by Macomb County Circuit Court
11/15/2018

STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

RPF, LLC

Plaintiff,

vs. Case No. 2017-3263-CB

COLE STREET INVESTMENTS, LLC and
DIOCESE OF NEWTON FOR THE MELKITES
IN THE UNITED STATES OF AMERICA,

Defendants.
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OPINION AND ORDER

This matter is before the Court in connection with Plaintiff RPF, LLC's ("Plaintiff") and Defendant Cole Street Investments, LLC's cross motions for summary disposition.

I. Factual and Procedural History

This matter consists of a dispute over whether Plaintiff or Defendant Cole Street Investments ("Defendant CSI") is entitled to purchase certain real property from Defendant Newton. Defendant Newton originally owned three parcels of property at or near the address of 8525 Cole, Warren, MI. The parcels are referred to by the parties as Parcels A, B and C.

In 2000, Defendant Newton sold Parcel A to Defendant CSI. Parcel C is the location of a church owned and operated by Defendant Newton. Parcel B is the property at issue in this matter. Plaintiff and Defendant CSI both claim the right to purchase Parcel B from Defendant Newton. Specifically, Defendant CSI claims that it has a right to purchase Parcel B by operation of a right of first refusal ("ROFR") that Defendant Newton conveyed to it on June 5, 2002, which was required by ¶19 of an

Offer to Purchase Land executed in 2000 ("2000 Agreement"). (*See* Plaintiff's Exhibit A.) Plaintiff claims that it is entitled to purchase the property by operation of a 2016 agreement it reached with Defendant Newton ("Plaintiff/Defendant Newton PA").

On September 1, 2017, Plaintiff filed its complaint in this matter ("Complaint"). Count I asserts a claim for quiet title of Parcel B against both Defendants. Count II seeks a declaratory judgment against Defendants declaring Defendant CSI's right of first refusal null, void and unenforceable, and declaring that Plaintiff is entitled to purchase Parcel B. Count III consists of a breach of contract claim against Defendant Newton. Count IV is a claim for fraudulent misrepresentation claim against Defendant Newton. Count V is a claim for Innocent Misrepresentation against Defendant Newton. Count VI is a claim for Silent fraud against Defendant Newton. Finally, Count VII is a claim for unjust enrichment against Defendant Newton.

On July 2, 2018, Plaintiff filed its instant motion for partial summary disposition pursuant to MCR 2.116(C)(10). On July 2, 2018, Defendant CSI filed its motion for partial summary disposition of Count I pursuant to MCR 2.116(C)(8) and (10). On August 6, 2018, Defendant CSI filed its response. On the same date, Plaintiff filed its response to Defendant CSI's motion. On August 9, 2018, Plaintiff filed its reply brief in support of its motion. The Court has since held a hearing in connection with the motion and taken the matter under advisement.

II. Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion

under MCR 2.116(C) (10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.* at 121.

III. Law and Analysis

First, Defendant CSI argues that Plaintiff cannot sustain its claims in this case because its remedy for any defects in title is set forth in ¶8 of the Plaintiff/Defendant Newton PA. Paragraph 8 of the Plaintiff/Defendant Newton PA provides:

> 8. Objections to Condition of Title: If, within ten (10) days of receipt by [Plaintiff] of a copy of the Title Commitment, objection to title is made, based upon a written opinion of [Plaintiff's] attorney that the title is not in the condition required for performance hereunder, [Defendant Newton] shall have 30 days from the date he is notified in writing of the particular defects claims, either (1) to remedy the title defects, or (2) to obtain title insurance as required above, or (3) to refund Deposit in full termination of this-Agreement if unable to remedy the title or obtain title insurance. If the Seller remedies the title defects or shall obtain such title policy within the time specified, [Plaintiff] agrees to complete the sale within 10 days of written notification thereof. If the Seller is unable to remedy the defects or obtain title insurance within the time specified the Deposit shall be refunded forthwith in full termination of this Agreement. (*See* Plaintiff's Exhibit E.)

While ¶8 arguably provides Plaintiff's remedy against Defendant Newton in the event that one or more objections are made to title, Defendant CSI has failed to point to

any authority that would cause ¶8 to bar Plaintiff from taking independent action to clear title to Parcel B. Consequently, Defendant CSI's position is not properly supported and is without merit.

Count I of the Complaint purports to state a claim for quiet title. Quiet title actions are governed by MCL 600.2932(1), which provides:

> (1) Interest of plaintiff. Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

In this matter, Plaintiff claims to have an interest in Parcel B by operation of the Plaintiff/Defendant Newton PA, which was executed on November 15, 2016. The execution of a purchase agreement transfers an interest in property. *Lake Forest Partners 2, Inc. v Department of Treasury*, 271 Mich App 244, 249-250; 720 NW2d 770 (2006), rev'd in part on other grounds 480 Mich 1046 (2008). Accordingly, Plaintiff holds an interest in land. Moreover, by asserting that it holds an exercisable ROFR, Defendant CSI claims to have an interest inconsistent with Plaintiff's interest. As a result, Plaintiff has standing to pursue its quiet title claim.

Turning to the merits of Plaintiff's claims themselves, Plaintiff argues that Defendant CSI's right of first refusal ("ROFR") is invalid. The ROFR stems from Defendant CSI's purchase of Parcel A in 2000, although the ROFR was not formally conveyed until 2002. In 2004 Defendant CSI sold Parcel A to a third party. While the ROFR does not have a defined term/expiration date, Plaintiff argues that the ROFR either expired when Defendant CSI sold Parcel A or 10 years after it acquired the RORF, which would have been in 2012.

In Michigan "first refusal agreements, like option agreements, must be for a definite period of time. The absence of specific time limits will not render the agreement void. Rather, the courts will construe the agreement to be for a reasonable period of time." *Brauer v Hobbs*, 151 Mich App 769; 391 NW2d 482 (1986). When a contract does not specify a deadline for performance, the law implies a reasonable time, which is determined by looking at the nature of the contract and the particular circumstances. *Cleary v Henderson Bros, Inc.*, 30 Mich App 38, 41; 185 NW2d 919 (1971). However, the determining what is a reasonable time must be accomplished without reference to parol evidence. *Johnson v Landa*, 10 Mich App 152, 156-157; 159 NW2d 165 (1968). However, evidence as to what is involved in the kind of transaction before the Court is admissible for the purpose of bringing to light whether a reasonable time had elapsed. *Id.* at 157. When the question of reasonable time depends on the construction of a contract in writing or upon undisputed facts outside of the contract, it becomes a matter of law. *Reinforced Concrete Co v Boyes*, 180 Mich 609, 616; 147 NW 577 (1914).

Defendant CSI argues that *Brauer* stands for the proposition that, unless otherwise provided, "a reasonable time" is as a matter of law the time that party holding the right of first refusal remains alive. In *Brauer*, the Court of Appeals held that the trial court erred in holding that a right of first refusal was void because it did not list a duration. *Id.* at 778-779. Rather, the Court of Appeals held that the trial court should have determined what a reasonable duration would be under the circumstances. *Id.* However, the Court of Appeals reasoned that remanding the matter to the trial court for such a determination was unnecessary because the party granted the right of first refusal had died. *Id.* Specifically, the Court, in adopting the reasoning set forth in

Waterstradt v Snyder, 37 Mich App 400, 402-403; 194 NW2d 389 (1971), held that the right of first refusal terminated at the grantee's death because it required her personal volitional act to exercise it and that doing so was no longer possible after her death. *Brauer*, 151 Mich App at 779. Further, the *Brauer* Court cited to *Old Mission Peninsula School Dist v French*, 362 Mich 546, 551; 107 NW2d 758 (1961) where the Michigan Supreme Court held that there is a strong tendency to limit an option to the lives of the parties absent clear evidence of contrary intent.

As a preliminary matter, *Brauer*, nor the cases it cites, stand for the position that the lifetime of parties is the default rule when determining the duration of a right of first refusal that does not provide an end date. Rather, *Brauer* indicates that a right of first refusal not including an expiration date remains valid for a reasonable time, taking into account the circumstances, or the death of the grantee (absent evidence of a contrary intent), whichever is shorter. In this matter, it is undisputed that Defendant CSI and Defendant Newton are both still in existence. Accordingly, the issue before the Court remains what is a reasonable time for the right of first refusal to remain valid taking into account the facts and circumstances present in this case.

The following facts and circumstances are undisputed. The 2000 Agreement, which memorialized the sale of Parcel A from Defendant Newton to Defendant CSI, also required Defendant Newton to grant Defendant CSI the ROFR. (*See* Plaintiff's Exhibit A, at p. 1.) The ROFR was not exercisable by Defendant CSI until such time as Defendant Newton wished to sell Parcel B to someone that would utilize it for a purpose other than operating a charter school. (Id. at p. 3) The ROFR was ultimately conveyed to Defendant CSI on June 5, 2002 (See Plaintiff's Exhibit B.) In 2014, Defendant CSI sold

Parcel A to a third party, but did not transfer the ROFR. On November 15, 2016, after Parcel B had been listed for sale for over a year, Defendant Newton agreed to sell Parcel B to Plaintiff. (See Plaintiff's Exhibit E.) On August 3, 2017, Defendant CSI purported to exercise its rights under the ROFR. However, the parties disagree as to whether 15 years is an unreasonable time to keep the ROFR valid in light of what is standard in the real estate industry. With respect to this issue, Plaintiff has presented the testimony of two "experts", and Defendant CSI has presented the testimony of its own "expert".

Plaintiff's first expert is James Bieri. Mr. Bieri testified that he is an attorney who has been involved in real estate transactions for 40 years, and negotiates real estate transactions every day. (*See* Plaintiff's Exhibit J, at p.14.) Mr. Bieri testified that 10 years is the limit of what he believes is a reasonable duration for the ROFR to remain valid based on the transactions he has done. (Id. at 57.) Mr. Bieri also stated that his opinion that 10 years was the outer limit of reasonable is based on the fact that he sees that duration utilized often and as the number of years people are generally comfortable with. (Id. at 97). Mr. Bieri also opined that the general purpose to including a right of first refusal in a purchase agreement is to protect what you are purchasing, and that it would be unreasonable to allow someone to exercise that right after they dispose of the property they purchased. (Id. at 104, 106.) Mr. Bieri also testified that he is asked by clients all of the time what is reasonable or unreasonable. (Id. at 95.) Mr. Bieri also conceded that he has seen durations longer than 10 years, but in those situations the parties agreed to that duration upfront. (Id. at 58.)

Plaintiff's second expert is Mark Krysinski. Mr. Krysinski testified that he is an attorney, has over 35 years of experience and has had numerous situations involving rights of first refusal in the context of purchase agreements. (*See* Plaintiff's Exhibit M, at 12.) Mr. Krysinski also stated that his opinion as to reasonableness was based on his experience. (Id. at 28.) Mr. Krysinski opined that based on his experience the limit of what is a reasonable to time to keep the ROFR valid in this case is when Defendant CSI sold Parcel A. (Id. at 15.) Mr. Krysinski also testified that while there are other reasons a right of first of refusal could be obtained, normally a right of first refusal would be obtained in this situation in order to protect the property being purchased. (Id. at 18, 71-72.) Mr. Krysinski also testified that rights of first refusal are rare in the context of purchase agreements because they make it harder to sell the property. (Id. at 28.) Over 40 years, Mr. Krysinski has seen less than one right of first refusal in a purchase agreement per year. (Id. at 29.) Further, Mr. Krysinski conceded that he had not completed his analysis as of the time of his deposition. (Id. at 38.) Further, Mr. Krysinski stated that he has drafted rights of first refusal for longer periods than 10 years, but explained that those transactions were residential, not commercial. (Id. at 46.) However, Mr. Krysinski acknowledged that the longer duration for the transaction he was referencing was due to the parties' relationship, not the residential nature of the transaction. (Id. at 47.) Mr. Krysinski also testified that 16 years is on the long side of customary. (Id. at 83.) Mr. Krysinski also conceded that a plausible explanation for obtaining the ROFR is that Defendant CSI ultimately wanted to develop Parcel B. (Plaintiff's Exhibit M, at 19.) Mr. Krysinski also acknowledged that he did not consider

that the ROFR could not be exercised until there was no longer a school on Parcel B. (Id. at 25.)

The last purported expert is Daniel Share. Mr. Share testified that his opinion was based on his experience as an attorney specializing in real estate law. (See Plaintiff's Exhibit N, at 23-24.) Mr. Share testified that he has attended 150 hours of continuing education classes related to real estate. (Id. at 29-30.) However, none of those were specific to rights of first refusal, but a few substantively discussed them. (Id. at 30.) Mr. Share also noted that he has been identified as a Michigan Super Lawyer with respect to real estate. (Id. at 31.) Mr. Share also stated that he practices in several areas of law. (Id. at 46.) However, he testified that 60% of his practice focuses on real estate. (Id. at 53.) Mr. Share also testified that rights of first refusal in purchase agreements are rare, between 1% to 5% of the time. (Id. at 88-89.) Mr. Share also conceded that he could not think of any transaction involving a purchase agreement where a right of first refusal lasted beyond 10 years. (Id. at 98.) However, Mr. Share also testified that he could see a situation where a developer would purchase a portion of a large piece of real property and obtain a right of first refusal on another part of the property so that it could also develop that land at a later date. (Id. at 99, 104.)

As to his opinion as it relates to what would be a reasonable amount of time for the ROFR to remain valid, Mr. Share testified that it would be reasonable to allow Defendant CSI to exercise the ROFR in August 2017, approximately 15 years after the ROFR was conveyed. (Id. at 111.) His opinion was based on the fact that the ROFR was conveyed separately from the 2000 Agreement, and his conclusion that at the time of the 2000 Agreement and conveyed of the ROFR the land was being leased to

operate a school, and the lease could be extended, which supports the conclusion that leaving the ROFR open for a prolonged period of time was reasonable. (Id.)

As a preliminary matter, the Court is satisfied that all three proposed experts are qualified to offer expert opinions as to what is involved in transactions like the one at the center in this case and what is a reasonable duration for the ROFR to remain open. A trial court may permit testimony by a "witness qualified as an expert by knowledge, skill, experience, training, or education" if the court determines that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." MRE 702. An expert may offer an opinion at trial if his or her testimony "is based on sufficient facts or data" and "is the product of reliable principles and methods," and if the witness "has applied the principles and methods reliably to the facts of the case." MRE 702. The trial court must also ensure that the expert's testimony is relevant. *People v Bynum*, 496 Mich 610, 624; 852 NW2d 570 (2014). Even when an expert's testimony is relevant, it remains subject to the limits imposed by MRE 403. *Id.* at 635 n. 43.

In this matter, the Court must examine the facts and circumstances present in this case to determine what a reasonable time for the ROFR to remain open and exercisable. In order to make that determination, it is important to look to what is ordinary in similar transactions. See *Johnson*, 10 Mich App at 156-157. All three proposed experts in this case are attorneys whose practice consists mostly of real property law. Moreover, all three individuals have been practicing for decades, during which time they have acquired specialized knowledge with respect to what practices and terms are common in purchase agreements. This Court is satisfied that such

knowledge, which has been obtained through their extensive training and experience, will assist this Court is making the ultimate determination as to what is a reasonable time to keep the ROFR open. As a result, the Court is convinced that all three proposed experts are qualified to offer expert testimony in this case.

Turning to whether it is reasonable to allow Defendant CSI to exercise the ROFR approximately 15 years after it was executed, the Court has examined the facts of circumstances in this case, including the testimony offered by each expert witness. After that examination, this Court is convinced that the ROFR was properly exercised by Defendant CSI as 15 years was a reasonable time for the ROFR to remain valid. Defendant CSI is a real estate developer. While Plaintiff's experts opined that obtaining a right of first refusal on an adjacent piece of property when purchasing another piece of property is most often for the purpose of protecting the value of the property being purchased, Defendant CSI's expert and Mr. Krysinski testified that a right of first refusal could be obtained in this context because the developer/purchaser also wanted to purchase the second parcel to develop it. In this case, Defendant CSI retained the ROFR even after it sold Parcel A, which supports a finding that a right of first refusal has value to the party holding it even if that party does not own an adjacent parcel. This is particularly true for a real estate developer. While Defendants nevertheless maintain that 15 years is too long for the ROFR to remain valid when rights of first refusal rarely last more than 10 years, all three experts testified that they have seen rights of first refusal with durations longer than 10 years. While Plaintiff's experts testified that 10 years was the highest duration they would ordinarily see, Mr. Krysinski testified that 16 years is on the long side of customary, which implies that 15 years is not objectively

unreasonable per se. While what duration is ordinary is relevant, it is the Court's task to determine a "reasonable time" based on all the facts and circumstances, not the ordinary time. In this matter, Parcel B was being leased for the purpose of operating a school. Given that fact, it is easily foreseeable that the land would continue to be used for a school for a prolonged and undeterminable period of time. Under those circumstances, the Court does not find it unreasonable to keep the ROFR open for 15 years. Moreover, it appears undisputed that Defendant CSI purported to exercise its rights under ROFR shortly after learning that the conditions that needed to be met in order to exercise the ROFR had been met. For all of these reasons, the Court is convinced that 15 years was a reasonable time to keep the ROFR valid.

IV. Conclusion

For the reasons discussed above, Plaintiff's motion for partial summary disposition is DENIED. Further, Defendant's motion for summary disposition of Count I of the Complaint is GRANTED. Counts I and II, to the extent they are brought against Defendant CSI, are DISMISSED. This Opinion and Order neither resolves the last claim nor closes the case. *See* MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: NOV 15 2018

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge