IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MELVIN C. KELLER,	:	
	:	
Plaintiff,	:	
	:	**Case No. 311004-V**
v.	:	
	:	
RANDOLPH BUILDINGS LIMITED PARTNERSHIP,	:	
	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

This commercial real estate dispute was tried to the court on December 17, 2009. The evidence was presented by means of Stipulations of Fact. At the conclusion of the trial, the court advised that a written opinion would be filed.

The court has carefully considered all of the evidence adduced at trial and has considered the arguments of counsel, including those set forth in their post-trial briefs. "The trier of fact may believe or disbelieve, accredit or disregard, any evidence introduced." *Great Coastal Express, Inc. v. Schruefer*, 34 Md. App. 706, 725 (1977). "The trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence." *Ryan v. Thurston*, 276 Md. 390, 392 (1975).

The court's findings of fact and conclusions of law are set forth below.[1] Maryland Rule 2-522(a); *see generally Kirchner v. Caughey*, 326 Md. 567, 572–73 (1992).

[1] The court's factual findings are based upon the parties' Stipulations of Fact and the documents appended thereto, the procedure to which the parties' agreed. Neither party presented live testimony.

I. Facts and Procedural History

On March 27, 2009, the plaintiff, Melvin C. Keller ("Keller"), filed a one-count complaint to quiet title to real property that he owns, located at 11500 Schuylkill Road in Rockville, Maryland ("Keller's Property"). (DE # 1). The property is used as a commercial office and warehouse space. Keller filed an amended complaint, also to quiet title, on August 7, 2009. (DE # 11).

The defendant is Randolph Buildings Limited Partnership ("Randolph Buildings"). Randolph owns real property located at 4921 Wyaconda Road in Rockville, Maryland ("Randolph Building' Property), which is adjacent to Keller's Property. Randolph Buildings answered the amended complaint on August 25, 2009. (DE # 12).

In 1990, Keller approached Allen Kronstadt, Randolph Buildings' sole general partner, and requested an easement to install, maintain, and use a ramp on Randolph Buildings' property, as well as to use an existing driveway on Randolph Buildings' property. Keller wanted the easement in order to add a 7,000 square foot addition to his property, including a second floor. Keller wanted a ramp to the second floor to allow for truck and pedestrian access to that new floor. The Montgomery County Code requires any second floor addition to have two exits. The easement Keller requested provided the required second exit.

Kronstadt was willing to grant Keller the requested easement on condition that Randolph Buildings was accorded a right of first refusal to purchase Keller's property and an easement allowing Randolph Buildings to place signage on Keller's Property. According to Kronstadt, the right of first refusal and the signage easement was to be

binding on Keller's successors and assigns, and neither would terminate upon Keller's sale of the property.

According to Keller, he intended the right of first refusal to be binding on himself, as well as on members of his immediate family if he transferred the property to an immediate family member. Keller had no recollection of any discussion with Kronstadt regarding whether the right of first refusal would be binding on his heirs, successors, and assigns.

On July 10, 1991, Randolph Buildings and Keller entered into an Agreement entitled "Easement Agreement and First Right of Refusal for Purchase of Grantee's Property." This Agreement was recorded twice in the land records of Montgomery County: once at Liber 9861 Folio 749, and then again at Liber 9921 Folio 542. This ensured that notice of the Agreement was on record in connection with both parcels of real estate.

The Agreement provides that it is made between Randolph Buildings, as Grantor, and Keller, as Grantee. The preamble recites the parties' ownership of certain realty and their mutual desire to grant certain easements and the purposes of those easements.

In Paragraph One, the Grantor grants an easement to the Grantee to install the ramp, and in Paragraph Two, the Grantor grants an easement to the Grantee to have the nonexclusive use of an existing driveway. Paragraph Three provides that the Grantee shall maintain the ramp at his own expense.

In Paragraph Four, the Grantee covenants "for himself, his heirs, successors and assigns" to indemnify the Grantor for any loss or damage arising out of the Grantee's use of the ramp.

Paragraph Five provides: "That the GRANTEE hereby grants unto GRANTOR a 'right of first refusal' as to any bona fide offer to purchase the aforementioned GRANTEE'S PARCEL and/or prior to any transfer by GRANTEE of GRANTEE'S PARCEL (other than a transfer to immediate family members of GRANTEE who shall be bound by this Agreement)."

Paragraph Seven provides: "This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their respective heirs, successors and assigns."

At the time the Agreement was executed, Kronstadt believed that the right of first refusal Keller granted to Randolph Buildings was perpetual and would be binding not only upon Keller personally, but also upon his successors and assigns. Kronstadt, on behalf of Randolph Buildings, would not have agreed to a perpetual easement to Keller for both the ramp and the driveway if the right of first refusal terminated upon Keller's sale of Keller's Property to a third party.

Keller, on the other hand, believed that the right of first refusal he granted to Randolph Buildings would be binding only on himself and immediate family members to whom he transferred the Keller property, but not upon third party buyers.

In 1991, Keller installed a ramp on Randolph Buildings' Property, and his property has benefitted from this ramp and driveway access since that time. Randolph Buildings has been unable to use the signage easement granted to it by Keller because of a Montgomery County zoning ordinance. Since the execution of the Agreement, Keller has obtained three loans on his property, notwithstanding the recordation of the right of first refusal.

Keller filed suit on March 27, 2009, seeking a declaration that the right of first refusal is binding only upon Keller personally, and that it would not encumber the property after a sale. Keller had received a third-party offer for the Property in August 2008. This offer was in the form of a letter of intent and did not expressly require the release of Randolph Buildings' right of first refusal. The offer was relayed to Randolph Buildings which, in November 2008, declined to purchase the Property. Keller requested, but Randolph Buildings declined to sign, a termination agreement stating expressly that the right of first refusal would not survive the closing of a third-party sale. The prospective purchaser that submitted the August 2008 offer did not purchase Keller's Property.

Keller filed an amended complaint on August 5, 2009. The amended complaint references a second offer on Keller's Property, made on July 7, 2009. The second offer was relayed to Randolph Buildings, which declined to exercise the right of first refusal on July 16, 2009. This prospective purchaser was able to obtain financing, but the bank requested that Randolph Buildings sign a Subordination Agreement, subordinating the right of first refusal to the bank in the event of a foreclosure. This transaction did not close. Keller's Property is currently listed for sale and is being shown to prospective purchasers, but there are no offers, letters of intent, or contracts currently pending on the Keller Property.

Keller seeks the following relief: (1) a declaratory judgment that the cross-easement granted by Randolph Buildings run with the land and are binding on Keller, Randolph Buildings, and all of their successors, heirs and assigns; (2) a declaratory judgment that the right of first refusal granted by Keller is binding only on Keller

personally; and (3) a declaratory judgment requiring Randolph Buildings exercise or decline to exercise its right of fist refusal within ten days of presentment. Keller also seeks attorneys' fees, even though there is no fee-shifting clause in the Agreement

Randolph Buildings contends that the case is not ripe for adjudication, because there is no current offer for Keller's Property. It also objects to the request that the court insert into the Agreement a ten day response provision, a term which is absent from the contract. Its principal contention, however, is that the right of first refusal is perpetual, and not simply personal to Keller. Randolph Buildings sees Keller as attempting to strip it of the essence of the bargained for exchange, the right of first refusal, which Keller granted in return for the easements which now burden Randolph Building' Property. In the event that the right of first refusal is held to violate the Rule Against Perpetuities, Randolph Buildings asks the court to find the entire Agreement invalid or unenforceable due to lack of consideration or a failure of performance.

II. Principles of Contract Interpretation

Maryland adheres to the objective rule of contract interpretation, giving effect to the terms of the parties' agreement. *See, e.g., Myers v. Kayhoe*, 391 Md. 188, 198 (2006); *Tomran, Inc. v. Passano*, 391 Md. 1, 13 (2006); *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985). "A court will presume that the parties meant what they said in an unambiguous contract, without regard to what the parties to the contract personally thought it meant or intended it to mean." *Maslow v. Vanguri*, 168 Md. App. 298, 318 (2006).

Whether a contract is ambiguous is a question of law. "A written contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than

one meaning." *Prison Health Services, Inc. v. Baltimore County*, 172 Md. App. 1, 9 (2006). "When contract language is ambiguous, its meaning becomes a question of fact and extrinsic evidence may be considered to determine the intent of the parties." *Id*. In other words, "[i]f a trial court finds that a contract is ambiguous, it may receive parol evidence to clarify the meaning." *Phoenix Services v. Johns Hopkins Hosp.*, 167 Md. App. 327, 393 (2006). Likewise, the converse is true. If a contract is "complete and unambiguous, parol evidence is inadmissible as a matter of substantive law to vary, alter or contradict it in the absence of fraud, accident or mutual mistake." *McLain v. Pernell*, 255 Md. 569, 572 (1969), *quoted with approval in Bernstein v. Kapneck*, 290 Md. 452, 460 (1981). "Without the presence of one of these excusing factors 'one having the capacity to understand a written document who reads it, or, without reading it or having read it to him, signs it, is bound by his signature.'" *Higgins v. Barnes*, 310 Md. 532, 537 (1987), *quoting in part Rossi v. Douglas*, 203 Md. 190,199 (1953).

All provisions of a contract must be considered together, giving effect to every clause and phrase, and construed under the objective standard of what a reasonable person in the position of the parties would conclude the manifestations to mean. *Owens-Illinois v. Cook*, 386 Md. 468, 496–97 (2005); *Wells v. Chevy Chase Bank*, 363 Md. 232, 250–51 (2001). "[T]he intention of the parties must be garnered from the terms of the contract considered as a whole, and not from the clauses considered separately." *Kasten Constr. v. Rod Enterprises*, 268 Md. 318, 329 (1973). "In the construction of contracts, words are given their ordinary meaning." *Id*.

III. Rights of First Refusal and the Rule Against Perpetuities

Randolph Buildings first argues that the modern trend is not to apply the Rule Against Perpetuities to rights of first refusal. *See, e.g., Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Ass'n One, Inc*., 986 So.2d 1279, 1288 (Fla. 2008). The short answer to this contention is that the Court of Appeals held to the contrary in *Ferraro Constr. Co. v. Dennis Rourke Corp*., 311 Md. 560, 573–76 (1988). *Ferraro* remains the law in Maryland. *See David A. Bramble, Inc. v. Thomas*, 396 Md. 443, 452 n. 6 (2007). This court simply cannot disregard a holding of the Court of Appeals. The Court of Appeals in *Ferrero* said: "[E]ven a right of first refusal tied to a bona fide offer may constitute an unreasonable restraint on alienation if the right is of unlimited duration." 311 Md. at 574. As a consequence, the court must consider whether the right of first refusal granted in the Agreement applies only to Keller, thereby avoiding the Rule Against Perpetuities, or is perpetual and thus violates the Rule.[2]

Keller contends that that the result in this case is controlled by *Park Station Limited Partnership, LP v. Bosse*, 378 Md. 122 (2003). The principal issue before the Court of Appeals in that case was whether a transfer of real property was a sale or a gift. The Court of Appeals first held that the the transaction at issue was a gift and, as a consequence, the right of first refusal was not even triggered. *Id*. at 128–30. Although arguably unnecessary to the resolution of the case, the Court of Appeals nevertheless proceeded to consider an issue raised by the cross-appeal: whether the right of first refusal in the contract, as construed by the cross-appellant, violated the Rule Against

[2] As the Court of Appeals noted in *Ferraro*, the General Assembly may, if it so elects, except certain transactions from the common law Rule Against Perpetuities. 311 Md. at 575. Presumably, the General Assembly could enact a statute exempting rights of first refusal in commercial real estate contracts from the Rule.

Perpetuities. The Court held that it did not, based on the way the contract was drafted. It agreed with the circuit court that the parties intended for the right to be personal, and that the contract did not intend for it to be transferable or assignable. *Id*. at 137–38. In other words, because there was a measuring life, the right of first refusal would vest, if at all, within the time provided by the Rule.

Keller maintains that the contracts in Park Station and this case are virtually indistinguishable. There are some similarities between the contract in *Park Station* and the Agreement at issue in this case, but there are also significant differences. The facts of this case, moreover, bear little resemblance to the facts either in *Ferraro* or *Park Station*. However, the court need not decide whether the contract language differences, alone, require the same or a different result.

Section 1-103 of the Real Property Article provides:

> Unless otherwise *expressly* provided, any obligation imposed on or right granted to any person *automatically* is binding on or inures to the benefit of his assigns, successors, heirs, legatees, and personal representatives. However, this section is not to be construed to create or confer any rights of assignment where none would exist otherwise.

(Emphasis added). The parties in *Park Station* did not refer to, and the Court of Appeals did not address, the applicability, if any, of this statute to a right of first refusal. The decision in *Park Station* turned solely upon the Court's construction of the language of the specific contract before it. *Jurgensen v. The New Phoenix Atlantic Condo. Council*, 380 Md. 106, 118 n. 11 (2004). Fairly read, footnote 11 in *Jurgensen* leaves open the question of whether the result in *Park Station* would have been different had the Court of Appeals considered and applied Section 1-103 of the Real Property Article to the contract in that case.

Maryland long has adhered to the principle that the laws that exist at the time of the making of a contract become part of the agreement as if they had been expressly incorporated into its terms. *Wright v. Commercial & Sav. Bank*, 297 Md. 148, 153 (1983); *Griffith v. Scheungrab*, 219 Md. 27, 33 (1959); *Hearn v. Hearn*, 177 Md. App. 525, 535 (2007). The plain meaning of Section 1-103 of the Real Property Article is that unless the contract *expressly* provides otherwise, the obligations and rights granted in the instrument affecting real property *automatically* bind assigns, successors, heirs, legatees and personal representatives. The purpose behind such a requirement in connection with contracts affecting land is manifest: to avoid the very type of controversy presented in this case due to inattentive drafting of real property contracts, potentially inconsistent contract clauses, and differing recollections of contractual intent.

Nowhere in the Agreement before the court did the parties *expressly* provide that the right of first refusal, granted in Paragraph Five, would not bind Keller's successors and assigns. Paragraph Seven of the Agreement states in plain English that the "Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their respective heirs, successors and assigns," suggesting the contrary. Hence, even if Keller is correct that the Agreement in this case, from the point of view of contract terms alone, is indistinguishable from that construed in *Park Station* (which it is not), the application of Section 1-103 of the Real Property Article changes the result because the statute automatically binds successors and assigns to the right granted in Paragraph 5. In sum, the court holds that the right of first refusal granted under the Agreement is perpetual, applies to Keller and his heirs, successors and assigns, and thus violates the Rule Against Perpetuities, as construed in *Ferraro*.

IV. The Remedy

Keller contends that the remedy in this case simply is to void Randolph Buildings' right of first refusal but keep for himself, and specifically enforce in equity, the easements over Randolph Buildings' land. Randolph Buildings sees it differently, contending that Keller (and his successors and assigns) should not be permitted to have perpetual easements over its land without the burden of the bargained for exchange of the perpetual right of first refusal.

Keller asks the court to simply strike the right of first refusal from the Agreement but to enforce what remains, as if this case simply involved a gift or a bequest that vested too remotely. Keller also posits that the court cannot rescind the Agreement simply because the parties made a mistake of law when drafting the Agreement. *See Janusz v. Gilliam*, 404 Md. 524, 535–37 (2008) ("[W]e hold that the mutual mistake of law made by the parties is not, as a matter of law, grounds for rescission.")

Randolph Buildings, on the other hand, argues that there has been a complete failure of consideration. It also contends equity may decline to enforce an agreement when there has been a mistake of fact, or no meeting of the minds. *See 4500 Suitland Road Corp. v. Ciccarello*, 269 Md. 444, 415–53 (1973); *see also Hupp v. Geo. R. Rembold Bldg. Co.*, 279 Md. 597, 600 (1977) (discussing when specific performance may be denied).

The concept of failure of consideration in this case actually means the failure of performance. *See* J. Perillo, *Calamari and Perillo on Contracts* § 11.21 (5th Ed. 2003). A contract was formed in the case *sub judice* when the parties exchanged promises in 1991. The problem here does not relate to the formation of the Agreement but to its

performance. Keller cannot perform its promise in Paragraph Five because of the Rule Against Perpetuities. It is only in this sense that there is a "failure of consideration."

The court finds in this case that there has been a complete failure of performance because the performance Randolph Buildings bargained for by Keller has not been, and cannot be, rendered. This complete failure of performance, in turn, relieves Randolph Buildings of its obligations under the Agreement. *See First Nat'l Bank v. Burich*, 367 N.W.2d 148, 153 (ND 1985); *Converse v. Zinke*, 635 P.2d 882, 887 (Colo. 1981); *Franklin v. Carpenter*, 244 N.W.2d 492, 495 (Minn. 1976); *Restatement (Second) of Contracts* §§ 237, 240 (1981).

The court finds that Randolph Buildings' easement over Keller's Property is worthless. The right of first refusal is worthless, as well. Apart from the recited consideration of $10.00, Randolph Buildings received nothing in exchange for perpetual easements over its land. Under the circumstances presented in this case, there is a total failure of performance by Keller, warranting a court in equity to relieve Randolph Buildings of its promises.[3]

Counsel shall prepare and submit to the court a form of Declaratory Judgment reflecting the findings and conclusions set out above within ten (10) days of the entry of this Order. Any relief not specifically granted to either party is denied. It is SO ORDERED this ____th day of January, 2010.

_____

Ronald B. Rubin, Judge

[3] In this case, there is a distinctly sufficient lack of mutuality of remedy such that this court will deny Keller's prayer for specific performance of the Agreement. *See Baker v. Dawson*, 216 Md. 478, 487 (1958); *Restatement (Second) of Contracts* § 363 (1981); *see also 8621 Limited Partnership v. LDG, Inc.*, 169 Md. App. 214, 239 (2006).