William & Mary Law Review

Volume 9 (1967-1968)
Issue 2

Article 18

December 1967

Contracts - Landlord and Tenant - Applicability of Right of First Refusal to Judicial Sale - Cities Service Oil Co. v. Estes, 208 Va. 44 (1967)

Jon W. Bruce

Contracts—Landlord and Tenant—Applicability of Right of First Refusal to Judicial Sale. In October, 1954, O. H. Mull and his wife leased for a term of 15 years certain property in Chase City, Virginia, to Cities Service Oil Company for use as a gasoline service station. Section 13 of the lease granted Cities Service the option to purchase the property at any time during the term of the lease for $45,000 and also gave the oil company a right of first refusal.[1] In January, 1962, O. H. Mull died intestate survived by his wife and six children. These heirs joined in a bill asking for a decree authorizing a sale of the real estate Mull owned at his death including that property under lease to Cities Service. The chancellor concurred in a chancery commissioner's recommendation that the Cities Service property be sold subject to any leases existing against it. A public sale was held and the highest and last bid on the property under lease to Cities Service was made by C. E. Estes in the amount of $31,100. Cities Service filed a petition in the Circuit Court of Mecklenburg County, Virginia, praying that the sale to Estes not be confirmed, claiming that it had a right of first refusal in the property and thirty days in which to exercise that right.[2] Within that period the oil company notified all parties in interest that it would purchase the property for $31,100. However, the chancellor ruled that the right of first refusal embodied in paragraph two of section 13 did not apply to a judicial sale. Cities Service appealed to the Supreme Court of Appeals of Virginia assigning this interpretation as error.[3]

The Supreme Court of Appeals reversed the lower court's decision and permitted the lessee to exercise its right of first refusal and to pur-

1. The second paragraph of section 13 contained the provision for the right of first refusal and read in part as follows:

> In the event that the Landlord at any time during the original or extended term hereof shall receive a bona fide offer satisfactory to it for the sale of the above described premises . . . the Landlord shall give the Tenant written notice of the terms and conditions of any said offer and the Tenant shall have the option and first refusal for thirty days after receipt of such notice within which to elect to purchase . . . on terms of said offer. If Tenant shall elect to purchase . . . the premises pursuant to the option and first refusal herein granted, it shall give written notice of such election to the Landlord within such thirty-day period, and upon such notice being given, the transaction shall be closed within sixty days subsequent to Tenant's notice of election. Upon such closing the Landlord shall deliver to Tenant . . . a full covenant warranty deed conveying a good and marketable title, free and clear of all liens and encumbrances . . . .

2. *Id.*

3. Cities Service Oil Company v. Estes, 208 Va. 44 (1967).

chase the property from the special commissioners for $31,100.[4] The court based this opinion on the theory that since the right of first refusal was placed in the lease to protect the lessee, it must be construed with that intention in mind.

The issue of whether a right of first refusal can be exercised at a judicial sale is one of first impression in Virginia and has been reviewed in few other jurisdictions. There are only four cases which deal directly with this problem.

The cases of *In re Rigby's Estate*[5] and *Draper v. Gochman*[6] stand for the proposition that the right of first refusal is not exercisable at a judicial sale. In the case of *Rigby's Estate*, the administrator for the estate of Mason Rigby sought instructions as to the rights of bidders on the deceased's real property being offered at public sale. When Rigby died his interest in his real property was subject to a lease which contained a provision giving the lessees the right of first refusal "on such terms as first party (Rigby) shall then demand for the purchase price." Pursuant to a court order the administrator put the deceased's land up for public sale. The lessees claimed that they were entitled to purchase the land at the price offered by the highest bidder. The Supreme Court of Wyoming found that the lessees could not exercise this right at judicial sale, since "there could be no offer that would create the right of first refusal until the price had been fixed in the manner prescribed."[7]

In *Draper* the Supreme Court of Texas held that the "desires to sell" term within the clause of the lease giving the tenant the right of first refusal covered only voluntary acts of the landlord. The right did not

4. Other issues decided by the lower court are not contested on appeal. The appellee does not question that the Mull heirs are bound by the subject lease. VA. CODE ANN. §§ 8-682, 8-701 (1950). There is also no contention that the chancellor was incorrect in his differentiation between the option to purchase in paragraph one of section 13 and the right of first refusal in the second paragraph of that section.

> A right of first refusal is distinguished from an absolute option in that the former does not entitle the lessee to compel an unwilling owner to sell. Instead it requires the owner when and if he decides to sell, to offer the property first to the person entitled to the right of first refusal.

Id. at 47; *accord*, Barling v. Horn, 296 S.W.2d 94 (Mo., 1956). See generally, 32 AM. JUR. *Landlord & Tenant* § 299 (1941); 91 C.J.S. *Vendor & Purchaser* § 19.1 Cum. Supp. (1967).

5. 62 Wyo. 401, 167 P.2d 964 (1946).

6. 400 S.W.2d 545 (Tex. 1966) *reversing* 389 S.W.2d 571 (Tex. Civ. App. 1965).

7. The court held that the Rigby heirs were the only parties which could set a price that would make the right of first refusal operational; but since the heirs had not been ascertained, the condition precedent to the right could not be fulfilled.

apply to a judicial sale upon foreclosure of a deed of trust, since the landlord did not express a willingness or desire to accept an offer from a third party.

The two cases the appellant Cities Service relies upon, *McCarter v. York County Loan Company*[8] and *Price v. Town of Ruston*,[9] espouse the opposite view. The Canadian court in *McCarter* held that a lessee's right of first refusal applied to a sale negotiated by a liquidator appointed to wind up the lessor company's affairs. In the *Price* case, the owner of a lot preparing to construct a two-story building thereon entered into an agreement with the local chapter of the Order of Elks by which the lodge was permitted to construct a third story on the building for use as its meeting hall. The contract contained a clause giving the owner the right of first refusal in the event the lodge "shall desire to sell" the third story. The lodge had borrowed money for construction and secured the loan by a mortgage on the third story. When the chapter defaulted on the loan, the mortgage was foreclosed and the property sold at public sale to the Town of Ruston as highest bidder. The owner's heirs tendered the amount of the highest bid, but it was refused. The Supreme Court of Louisiana held that the word "desire" should be construed liberally as conferring the right to purchase when about to sell and that the first right to purchase entitles the optionee to take property at the highest bid at a sheriff's sale. The court concluded that:

> Our opinion is that one of the main purposes of the option was to save Mrs. Price [the owner] and her heirs and assigns from the danger, in case of a forced sale, of having to bid an exorbitant price to prevent any one else, other than the Elk's lodge, from owning the third floor of the Price building, and from occupying the space free of rent.[10]

The Supreme Court of Appeals of Virginia agreed with the reasoning of the Louisiana court in *Price*. It rejected the argument that the exercise of the right of first refusal at a judicial sale would depress the bidding by saying that it does not logically follow that the holder of the right would exercise it at every opportunity, since in many instances he may elect not to buy because he deems the final bid to be too high. It also refused to accept Estes' contention that the requirement

8. 14 ONT. L.R. 420 (1907).
9. 171 La. 985, 132 So. 653 (1931).
10. *Id.* at 132 So. 656.

of paragraph two of section 13 that the lessor furnish a general warranty deed indicated that the parties excluded a judicial sale where only a special warranty deed would be executed.[11] The court stated, "Since a right of first refusal is inserted in a lease for the benefit of the lessee, we must interpret it with that purpose in mind." [12]

The position taken by the Supreme Court of Appeals appears to be the better of the two views on the subject, since it is not based solely on the technicalities of the specific lease as are the decisions in *Draper* and *Rigby's Estate.* Since none of the leases or facts in the cases considered above are precisely the same, the conflict of authority may not be as great as it first appears.[13] The decision of the Virginia high court giving the lessee the protection he has bargained for is a just one and should be adopted as the preferred view when other jurisdictions consider this question.

Jon W. Bruce

Torts—CONTRIBUTORY NEGLIGENCE—FAILURE TO ATTACH SEAT BELTS. On July 25, 1964, the plaintiff, Singleton, a guest in an automobile driven by defendant, Cierpisz was seriously injured when the defendant collided with another automobile on a country road in Maryland. Although seat belts were installed in the automobile at the time of the accident, neither party had them fastened. Plaintiff brought an action for damages based on defendant's negligence in operating the automobile. The trial court held for the plaintiff and the defendant appealed, noting as error the trial court's failure to submit to the jury the question of plaintiff's contributory negligence in not attaching her seat belt.

---

11. *Supra* note 1.

12. Cities Service Oil Company v. Estes, 208 Va. at 49; *accord,* First National Bank v. Roanoke Oil Company, 169 Va. 99, 192 S.E. 764 (1937).

13. The particular facts of the instant case might cause the Texas and Wyoming courts to reach a decision similar to that of the Supreme Court of Appeals of Virginia. The Texas court in *Draper* based its opinion on the fact that the lease permitted the right of first refusal to be used only wherever the landlord had a desire to sell. In the present case the right of first refusal clause was exercisable in the event the Landlord at any time during the term of the lease "received a bona fide offer satisfactory to it for the sale of the above described premises." The heirs of O.H. Mull were satisfied with the price the property brought at judicial and did not file a brief on appeal. The Texas court would be hard put to find that that clause of the lease was not fulfilled. Also, the fact that the heirs had accepted the price would destroy the foundation for the decision in *Rigby's Estate,* since it could be said that the heirs had set the price by asking for the sale and accepting the final bid.