IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO.092486

FAIRFAX COUNTY REDEVELOPMENT AND HOUSING AUTHORITY,

Appellant,

v.

JAMES C. RIEKSE, RAJESH KAPANI, RAJINDER P. KAPANI, AND WELLS FARAGO BANK, N.A.,

Appellees

BRIEF OF APPELLEES

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STATEMENT OF FACTS

In addition to the facts set forth by the Appellant in its Statement of Facts, the Appellees, Rajesh Kapani and Rajinder P. Kapani, state that on September 21, 1989, when the Fairfax County Redevelopment and Housing Authority deeded the property located at 8656 Hickory Ridge Court, Springfield, Virginia, to Peter A Tovar and Christine A. Tovar, (App. pp. 194-197), it granted the Tovars a Second Deed of Trust in the amount of $14,240.00, (App. pp. 203-205), which second deed of trust was subordinate to the first deed of trust in the amount of $58,500.00 obtained by the Tovars. (App. pp. 198-202).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY RULED THAT THE ONLY REMEDY AVAILABLE TO THE HOUSING AUTHORITY IN THIS CASE IS AN ACTION IN EJECTMENT, GRANTED THE APPELLEES' MOTION TO STRIKE, AND DISMISSED THIS CASE.

Ejectment is a common-law action that is now codified by statute in §8.01-131 through §8.01-165

of the Code of Virginia, 1950, as amended. Citing *Brown v. Haley*, 233 Va. 210,216, 355 S.E.2d 563, 567 (1987), this Court said in *Sheffield v. Department of Highways and Transportation*, 240 Va. 332, 397 S.E.2d 802 (1990), that "[i]n order to determine whether ejectment is an appropriate remedy under the . . . circumstances, the nature of the action should be reviewed. Ejectment is an action to determine the title and right of possession to real property." In *Brown*, this Court cited *Providence v. United Va./Seaboard Nat., 219 Va. 735, 744, 251 S.E.2d 474, 479 (1979), and Benoit v. Baxter, 196 Va. 360, 365, 83 S.E.2d 442, 445 (1954)*, for its assertion that ejectment is an action at law to determine title and right of possession of real property. There this Court said:

> "[Ejectment] may be maintained by one who has an interest in and a right to recover possession of the premises, or a share, interest, or portion thereof." *Code § 8.01-137.* A verdict for the plaintiff must specify the share or interest of the plaintiff, whether in the whole or a part of the premises claimed, and the estate of

> the plaintiff, whether in fee, for life, or for a term of years. *Code §§ 8.01-152,* -153. The action is concerned only with the ownership rights of the plaintiff, and the proof necessary to support the action consists of the documents which vest title in the owner and any other evidence related to the issue of title."

Clearly, the proper action to have been filed by the Appellant, Fairfax County Redevelopment and Housing Authority, ("Housing Authority"), was an action for ejectment.

II. THE CIRCUIT COURT CORRECTLY RULED THAT IT COULD NOT DECLARE THAT THE CONVEYANCE OF THE SUBJECT PROPERTY FROM THE KAPANIS TO THE RIEKSE WAS *VOID AB INITIO.*

The language contained in the Housing Authority's deed to Tovar provided, *inter alia,* that "[i]n the event that Grantee shall die . . . or in the event the Grantee shall determine to sell this Property at any time within thirty (30) years from the date of this Deed, then and in either event, [the Housing Authority], its successors or assigns, shall have the option to repurchase the Property." Kapani views this deed provision as a

condition subsequent for which the conditions requiring repurchase were extinguished with the subsequent Tovar foreclosure.

In support thereof, Kapani submits that the first condition subsequent, the death of the Grantee Tovar, was not evidenced and did not, therefore, trigger the Housing Authority's right of first refusal. Secondly, Kapani submits that the second condition subsequent, Tovar's determination to sell this property, was not evidenced and did not, therefore, trigger the Housing Authority's right of first refusal.

Language in the Housing Authority's deed to Tovar referred to a "First Deed of Trust Note." (App. p. 195). Simultaneously with the execution of the Housing Authority's deed to Tovar, the Housing Authority took a second deed of trust on the property in the amount of $14,240.00, (App. pp. 203-205), subordinate to a first deed of trust on the property in the amount of $58,500.00. (App. pp.

198-202). The Housing Authority sold the property to the Tovars for $74,640.00 knowing that these purchasers who were qualified by the Housing Authority as "low income," borrowed $72,740.00 in order to purchase the property. The Housing Authority sold the property to the Tovars knowing full well that foreclosure was possible, or perhaps, even probable. No provision in the Tovar deed or the second trust addressed the event of foreclosure: either to state the rights granted upon the happening of the conditions subsequent, or to state conditions subsequent that apply to the foreclosed property.

This Court's recent decision in *Beeren & Barry Investments, LLC, et al. v. AHC, Inc.*, 277 Va. 32, 671 S.E.2d 147 (2009), is both instructive and controlling in the instant case. Citing *Perel v. Brannan*, 267 Va. 691, 698, 594 S.E.2d 899, 903 (2004), and *Wilson v. Holyfield*, 227 Va. 184, 187-88, 313 S.E.2d. 398 (1984), this Court reiterated

that its review of a circuit court's interpretation of covenants, deeds, options, and other related documents is *de novo*. *Beeren & Barry Investments*, *Id.* at 37, 671 S.E.2d. at 150. The Court stated where such documents are unambiguous, they should be accorded their plain meaning. *Id.* at 37, 671 S.E.2d. at 150. Kapani takes the position that the "plain meaning" of the deed provision does not extend the "covenant" to include foreclosure and that the deed provision is personal and not a covenant running with the land.

In *Beeren & Barry Investments*, the Court was called upon to decide whether a provision creating a right of repurchase in a deed of trust was enforceable against a subsequent purchaser of the property following foreclosure on the property. In *Beeren v. Barry Investments*, *Id.* at 3, 671 S.E.2d. at 149, the language creating the right to repurchase paralleled that in the Housing

Authority's deed to Tovar. In pertinent part, the *Beeren & Barry Investment* language read:

> "In the event of Grantor's Death or in the event that Grantor elects to sell the property secured hereby at any time within thirty (30) years from the date of the Trust, AHC, Inc., it successors or assigns shall have the option to purchase the property at the Purchase Price as hereinafter defined . . . . "

Similarly, the language creating the right to repurchase in the Housing Authority's deed to Tovar read:

> "[i]n the event that Grantee shall die . . . or in the event the Grantee shall determine to sell this Property at any time within thirty (30) years from the date of this Deed, then and in either event, [the Housing Authority], its successors or assigns, shall have the option to repurchase the Property."

In its analysis of *Beeren & Barry Investment*, this Court looked to the elements necessary for a restrictive covenant to be such that it runs with the land. Citing *Sonoma Development, Inc. v. Miller*, 258 Va. 163, 167, 515 S.E.2d 577, 579 (1999), and *Sloan v. Johnson*, 254 Va. 271, 276, 491

S.E.2d. 725, 728 (1997), it found the elements to be: "(1) an intent evidenced by the original covenanting parties in the document that the burdens and benefits of the covenant will run with the land; (2) privity between the original parties to the covenant, commonly referred to as horizontal privity; (3) privity between the original parties to the covenant and their successors in interest, commonly described as vertical privity; and (4) the covenant much "touch and concern" the land."

In analyzing *Beeren & Barry Investments*, this Court noted that the provisions in the *Beeren & Barry Investment* deed made "no provision for the option to take effect in the event that a purchaser acquire[d] the property as a result of a foreclosure sale." *Beeren & Barry Investments*. 227 Va. at 38, 671 S.E.2d. at 151. There, this Court held that subsequent purchasers of the property were not bound by the covenant as the original parties did not intend that the option run with the

land as the option could only be exercised upon the happening of the death of the grantee or the grantee's election to sell the property to a prospective purchaser within 30 years of the agreement. *Beeren & Barry Investments*, *277 Va.* at 39, 671 S.E.2d. at 151. For that same reason, Kapani is not bound by the covenant contained in the Housing Authority's deed to Tovar.

CONCLUSION

For these reasons, the Appellees, Rajesh Kapani and Rajinder P. Kapani, respectfully request that this Court deny each of the Appellant's two assignments of error, and affirm the judgment of the Circuit Court of Fairfax County in its entirety.

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RAJINDER P. KAPANI

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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

I hereby certify that on this 4th day of June, 2010, fifteen copies of the foregoing Brief of Appellees and an electronic copy of such brief on a CD were mailed by certified mail, first-class postage prepaid, return receipt requested, to Patricia L. Harrington, Clerk, Supreme Court of Virginia, 100 North Ninth Street, 5th Floor, Richmond, Virginia 23219, and on the same day, three copies of the foregoing Brief of Appellees were mailed, first-class postage prepaid, to the following:

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