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 FARGO BANK, N.A.,

Appellees.

APPELLANT'S REPLY BRIEF TO THE BRIEF OF APPELLEES JAMES C. RIEKSE AND WELLS FARGO BANK, N.A.

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TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

Appellant, the Fairfax County Redevelopment and Housing Authority ("Housing Authority"), by counsel, asserts for the reasons set forth below and in its Opening Brief, that the arguments of Appellees James C. Riekse ("Riekse") and Wells Fargo Bank, N.A. ("Wells Fargo") (collectively, "Riekse") in their Brief of Appellees are without merit and the Fairfax County Circuit Court ("Circuit Court") erred in granting their Motion to Strike.

ARGUMENT

I. THE HOUSING AUTHORITY PROPERLY RECORDED NOTICE OF ITS RIGHTS TO THE PROPERTY AND IS ENTITLED TO THE RELIEF REQUESTED IN ITS COMPLAINT.

Riekse suggests on brief that he is the victim of a mistake in this case and that specific performance should not be awarded as it was in *Landa v. Century 21 Simmons & Co.*, 237 Va. 374, 377 S.E.2d 416 (1989), and as requested by the Housing Authority because Riekse would be prejudiced if the property located at 8656 Hickory Ridge Court, Springfield, Virginia ("subject property"), were transferred back to the Housing Authority.

However, Riekse should have discovered through a proper title search the Housing Authority's right of first refusal that is set forth in the Housing Authority's deed to Peter A. Tovar and Christine A. Tovar ("the Tovars"), which was recorded in the land records of Fairfax County on September 22, 1989 ("Original Deed") (App. at 194).[1] *See Porter v. Wilson,* 244 Va. 366, 369, 421 S.E.2d 440, 442 (1992) (holding that "[e]very prudent man about to purchase land searches the land records to see whether the property has been previously conveyed or encumbered"). The Original Deed was recorded prior to Riekse's purchase of the subject property from Rajesh Kapani and Rajinder P. Kapani ("the Kapanis") on June 2, 2003 (App. at 237), and it had language on its first page stating that the deed restrictions were covenants running with the land that bound successors-in-title, such as Riekse. (App. at 194.) *See McDonald v. Rothgeb,* 112 Va. 749, 753, 72 S.E. 692, 693 (1911) (holding that accepting a party's claims that it relied on assumptions about title without regard to what was actually recorded "would be to set a premium on

[1] References to the Appendix herein are cited as "(App. at _____)."

negligence and nullify our registry statutes"). Therefore, Riekse's argument that he must be returned to the *status quo ante* by the Housing Authority is nonsensical because Riekse had constructive notice of the Housing Authority's right of first refusal. If Riekse is actually entitled to recover any losses in this case, he has already acknowledged that his remedy lies elsewhere by the cross-claim that he filed against the Kapanis.

In addition, Riekse attempts to distinguish *Bond v. Crawford*, 193 Va. 437, 69 S.E.2d 470 (1952), a case in which specific performance was granted to obtain title to a property, by arguing that Riekse only received constructive notice in this case rather than actual notice of the Housing Authority rights. However, even if one assumes, *arguendo*, that Riekse only had constructive notice, such notice is clearly sufficient for enforcement of a restrictive covenant. *See River Heights Associates Ltd. P'ship v. Batten*, 267 Va. 262, 272, 591 S.E.2d 683, 689 (2004) (holding that constructive notice by recording a deed in the land records is sufficient for enforcement of a restrictive covenant).

Riekse also argues that the remedy of specific performance

was not pled by the Housing Authority. This is false. In paragraphs 12-22 of the Complaint, the Housing Authority set forth the terms of its right of first refusal in the Original Deed and then requested specific performance by asking the Circuit Court to "[o]rder the Kapanis to convey the subject property to the Housing Authority for $102,488 [the Repurchase Sales Price calculated under the Original Deed] within 5 days after the Court enters a Final Order in favor of the Housing Authority in this case." (App. at 4-9.)

To provide complete relief in this case, the transfer of the property from the Kapanis to Riekse may be set aside by declaring it *void ab initio* so that the Kapanis can be required to specifically perform the requirements of the Housing Authority's right of first refusal in the Original Deed. (App. at 194.) Other than referencing *Turk v. Clark*, 193 Va. 744, 71 S.E.2d 172 (1952), in their brief, Riekse did not address the multitude of cases cited in the Housing Authority's Opening Brief that hold that conveyances or transfers of property can be set aside by declaring them void, voidable, null and void, or *void ab initio*.

Applying this Court's decisions in each of those cases, including *Turk*, would have the same effect in the present case by negating the transfer of the subject property from the Kapanis to Riekse. Therefore, the Housing Authority is seeking to have the Kapanis transfer declared *void ab initio*, which is what this Court did regarding the unauthorized subordinations in *First Funding Corp. v. Birge*, 220 Va. 326, 257 S.E.2d 861 (1979), and *Business Bank v. Beavers*, 247 Va. 413, 442 S.E.2d 644 (1994), and is equivalent to what this Court did in *Bond* by declaring a transfer of property "null and void."

In addition, Riekse does not mention *Commonwealth Transportation Commissioner v. Windsor Industries, Inc.,* 272 Va. 64, 630 S.E.2d 514 (2006), in their brief. In *Windsor*, this Court clearly holds that a party does not have to file an action in ejectment to enforce a condition subsequent. In fact, in *Windsor*, as in the present case, the plaintiff filed a declaratory judgment action and this Court held that the chancellor had jurisdiction to "administer complete relief" by ordering the property to be transferred back to the plaintiff who had the right to repurchase

the property. Therefore, for the reasons stated above, the Circuit Court erred when it granted the Appellees' Motion to Strike on the basis that the Housing Authority was not entitled to the relief requested in the Complaint.

II. CROSS-ERROR NO. 1 IS WITHOUT MERIT BECAUSE THE CIRCUIT COURT PROPERLY CONSTRUED THE RESTRICTIVE COVENANT AND CONDITION SUBSEQUENT REGARDING THE FREE ALIENABILITY OF PROPERTY IN OVERRULING THE APPELLEES' DEMURRER.

In their brief, Riekse asserts that *Trailsend Land Co. v. Virginia Holding Co.*, 228 Va. 319, 321 S.E.2d 667 (1984), which holds that restraints of alienation are not favored, bars the enforcement of the Housing Authority's right of first refusal. However, in *Trailsend*, this Court also recognized that restrictions on the ownership of property *are* enforceable if the precise conditions contained in the deed are met. *Id.* at 324-25, 321 S.E.2d at 669-70. In the present case, the Housing Authority's right of first refusal was clearly set forth in Riekse's chain of title in the Original Deed to the Tovars. (App. at 194.) The Original Deed explicitly provides that the Tovars or their successors (i.e., the Kapanis and Riekse) must provide the Housing Authority with

the opportunity to purchase the property when they "determine to sell" the subject property. (App. at 195.) Later, the Kapanis, the successors-in-interest to the Tovars, clearly determined to sell the subject property by selling it to Riekse without first offering it to the Housing Authority in violation of the express terms of the Original Deed. (App. at 237, 279.) Therefore, under the analysis of this Court in *Trailsend*, the precise conditions of the Original Deed were violated, and the Housing Authority's right of first refusal should be enforced.

Riekse further asserts that *Chesapeake and Ohio Railway Co. v. Willis*, 200 Va. 299, 304, 105 S.E. 833, 837 (1958), bars the enforcement of the Housing Authority's rights in this case. However, in *Willis*, this Court refused to require the defendant to construct and maintain fences in 1958 that were never built as required by 1855 and 1857 agreements because the plaintiff railroad did not act on its rights within a reasonable period of time. *Id.* at 306, 105 S.E.2d at 839. In the present case, the right of first refusal in the Original Deed is limited to 30 years (App. 195), and all of the relevant events in this case plainly

occurred within this time frame. In addition, the Housing Authority, by a letter dated June 12, 2006, to Riekse, asserted its rights to the subject property (App. at 261) when it learned of the Kapanis' June 2, 2003, breach, and filed the Complaint in this case on September 21, 2007, within all applicable limitations periods. *Willis* is thus inapposite because, unlike the plaintiff in *Willis*, in this case the Housing Authority acted within a reasonable period of time and sued the Kapanis, the parties who breached the right of first refusal, to have the subject property returned.

Riekse also argues that the phrase "determine to sell" and how it applies to successors in the Original Deed is ambiguous. However, this Court recently held in *Beeren & Barry Inv., LLC v. AHC, Inc.*, 277 Va. 32, 671 S.E.2d 147 (2009), that the option to repurchase in that case, which included the analogous term "elects to sell," was unambiguous. Therefore, the phrase "determine to sell," which is clearly applicable to the Tovars' successors pursuant to page 1 of the Original Deed, is likewise unambiguous in the present case. (App. at 194.)

III. CROSS-ERROR NO. 2 IS WITHOUT MERIT BECAUSE THE FORECLOSURE SALE DID NOT EXTINGUISH THE HOUSING AUTHORITY'S RIGHT OF FIRST REFUSAL, AND THE RIGHT WAS NOT PERSONAL TO THE ORIGINAL GRANTEE.

Riekse relies extensively on *Beeren* in asserting its second assignment of error. However, the holding in *Beeren* that the option to repurchase does not run with the land is distinguishable from this case because the Original Deed expressly provides that:

> [t]his conveyance is also made subject to the following covenants which are covenants running with the land, the burden of which covenants are assumed by Grantee as evidenced by Grantees [sic] signatures hereon and by any subsequent successor in title as provided herein.

(App. at 194.) Consequently, unlike the deed in *Beeren*, the language of the Original Deed following the foregoing quoted paragraph sets forth the right of first refusal that is not personal to the Grantees under the Original Deed (the Tovars). *See Sloan v. Johnson*, 254 Va. 271, 273, 491 S.E.2d 725, 726 (1997) (holding that terms in a deed stating the "following" restrictions would continue in effect were covenants running with the land). Therefore, it is clear that the Kapanis, as successors-in-title to

the Tovars, were bound by the Housing Authority's right of first refusal when they sold the subject property to Riekse.

As to the effect of the foreclosure on the Housing Authority's right of first refusal, this Court held in *Beeren* that a foreclosure was not contemplated when the trustees transferred the property to the next buyer. However, unlike in *Beeren*, in the present case, where the covenants and restrictions clearly were meant to run with the land and bind successors, the covenants were still of record and enforceable regarding later transfers. Neither the Kapanis, Riekse, nor Wells Fargo can claim an interest in the property greater than their grantor's interest. *See Virginia Elec. and Power Co. v. Buchwalter*, 228 Va. 684, 688, 325 S.E.2d 95, 97 (1985); *see also Chavis v. Gibbs*, 198 Va. 379, 387, 94 S.E.2d 195, 200 (1956) (holding that a purchaser obtains only such title as his seller has the right to convey); *Wright v. Davis*, 145 Va. 370, 380, 133 S.E. 659, 662 (1926) (holding that a trustee cannot sell more than the grantor owns). This case is clearly distinguishable from the foreclosure in *Beeren* where the intent to have the deed of trust provision apply to owners after foreclosure

was not shown. In this case, the Original Deed, which was recorded prior to the Tovars' Deed of Trust that was foreclosed upon (App. at 206), explicitly states that the Housing Authority's repurchase option runs with the land and binds successors-in-title. Thus, the Housing Authority's right of first refusal survives the foreclosure resulting from that Deed of Trust.

IV. CROSS-ERRORS NO. 3 AND 5 ARE WITHOUT MERIT BECAUSE THE HOUSING AUTHORITY'S RIGHT OF FIRST REFUSAL IS AN ENFORCEABLE COVENANT THAT TOUCHES AND CONCERNS THE LAND.

Riekse argues that the Housing Authority's right of first refusal is not a covenant that runs with the land because it does not "touch and concern the land." However, few things could impact the use or enjoyment of property more than a restriction that limits the ability of an owner to sell it. *See Farmers Bank of Clinch Valley v. Kinser*, 169 Va. 69, 72, 192 S.E. 745, 746 (1937) (observing that complete dominion, control, and the right of disposition comprise perfect ownership of property). Here, the Housing Authority retains an interest in the subject property because, as set forth in the Circuit Court's January 15, 2009, Letter Opinion (App. at 138), the Housing Authority, pursuant to

its authority under Va. Code Ann. § 36-2 (Supp. 2009), held the right to repurchase the subject property at a predetermined price to ensure that the subject property is used for affordable housing.

Riekse mischaracterizes the right of first refusal in the Original Deed by analogizing it to cases involving the protection of the business interests such as those in *Carneal v. Kendig,* 196 Va. 605, 85 S.E.2d 235 (1955), *Oliver v. Hewitt*, 191 Va. 163, 60 S.E.2d 1 (1950), and *Allison v. Greear*, 188 Va. 64, 49 S.E.2d 279 (1948). However, these cases are inapposite because the Housing Authority was not protecting private business interests with its recorded right of first refusal. Rather, it was imposing a restriction on the sale of the property, which clearly touched and concerned the land by reserving the subject property for use as affordable housing for qualified Fairfax County residents. *See In Re: 523 East Fifth St. Housing Pres. Dev. Fund Corp.,* 79 B.R. 568, 575 (1987) (holding that a covenant in a deed to keep residential housing units affordable touched and concerned the land); *Neal v. State-Planters Bank and Trust*, 166 Va. 158, 184

S.E.2d 203 (1936) (holding that a covenant requiring payments to retain ownership of property was enforceable).

In addition, contrary to Riekse's assertions, the *Beeren* case was decided on the element of intent and did not reach the touch and concern analysis. 277 Va. at 39, 671 S.E.2d at 151. Therefore, Riekse's reliance on *Beeren* for the proposition that the Original Deed does not touch and concern the land is misplaced because this Court in *Beeren* never addressed that issue. Nevertheless, the triggering event of a determination to sell the subject property, which operates to invoke the right of first refusal in the Original Deed, applies to the Tovars' successors and directly relates to the Housing Authority's purpose of preserving the subject property as affordable housing.

Riekse's claim that the Housing Authority's action is barred by a five-year statute of limitations based on an alleged breach by the Tovars is also baseless. The Tovars never sold the property to another party as contemplated under the Original Deed, and their execution of a deed of trust was not such a breach. The Original Deed, when read as a whole, shows that a

deed of trust was not covered by the phrase "determine to sell." The Original Deed states, among other things, that the Grantee or his successor, *prior to a sale to a new owner*, "shall disclose the name and address and gross annual family income of the prospective purchaser of the Property" to the Housing Authority. (App. at 195.) Undoubtedly, a sale as contemplated under these provisions of the Original Deed does not include the execution of a Deed of Trust for the owner to secure a loan. Further, as stated in the Circuit Court's January 15, 2009, Letter Opinion, no fee simple interest was transferred from the Tovars to their lenders, and such transaction "simply cannot be construed as a 'determination to sell the property.'" (App. at 141.)

Therefore, the Kapanis' sale of the subject property to Riekse without first offering it to the Housing Authority was the first breach of the Housing Authority's right in the Original Deed to repurchase the subject property. After being unable to resolve the issue with Riekse, the Housing Authority filed its Complaint after the Kapanis' breach and satisfied all applicable limitations periods.

V. CROSS-ERROR NO. 4 IS WITHOUT MERIT BECAUSE THE HOUSING AUTHORITY'S CLAIMS WERE TIMELY FILED.

Contrary to Riekse's fourth assignment of cross-error, the ten-year limitation period under Va. Code Ann. § 8.01-255.1 does not bar the enforcement of the Housing Authority's right of first refusal because the Complaint was filed four years after the Kapanis' breach as stated above.

CONCLUSION

For the reasons set forth above, the Housing Authority asserts that Riekse's arguments are without merit and respectfully requests that this Court reverse the Circuit Court, vacate its June 23, 2009, Order granting the Appellees' Motion to Strike, and remand this case to the Circuit Court to complete the trial in this case and, upon entry of an Order in favor of the Housing Authority, require the Appellees "to take all steps necessary" to convey the subject property back to the Housing Authority as this Court did in *Landa,* 237 Va. at 384, 377 S.E.2d at 422 (1989).

FAIRFAX COUNTY REDEVELOPMENT
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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

I hereby certify that on this 17th day of June 2010, (1) fifteen copies of the foregoing Appellant's Reply Brief to the Brief of Appellees James C. Riekse and Wells Fargo Bank, N.A., were sent by certified mail, first-class postage prepaid, return receipt requested, to Patricia L. Harrington, Clerk, Supreme Court of Virginia, 100 N. Ninth Street, 5th Floor, Richmond, Virginia 23219, (2) an electronic copy of the Reply Brief was sent to scvbriefs@courts.state.va.us, and (3) three copies of the Reply Brief were mailed, first-class postage prepaid, to both:

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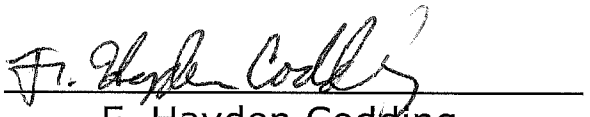

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