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 RAJESH KAPANI AND RAJINDER P. KAPANI

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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, in its Opening Brief, and in its Reply Brief to the Brief of Appellees James C. Riekse and Wells Fargo Bank, N.A., that the arguments of Rajesh Kapani and Rajinder P. Kapani (collectively, "the Kapanis") in their Brief of Appellees are without merit and the Fairfax County Circuit Court ("Circuit Court") erred in granting the Appellees' Motion to Strike.

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT 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.

The Kapanis argue that the Housing Authority's only remedy in this case was an action in ejectment. That contention is contrary to this Court's recent holding in *Commonwealth Transportation Commissioner v. Windsor Industries, Inc.,* 272 Va. 64, 630 S.E.2d 514 (2006). In *Windsor*, this Court addressed issues similar to those in the present case. As with the Housing Authority's right of first

refusal, the plaintiff in *Windsor* retained the right to repurchase the property at issue at the original purchase price if the state decided not to use the property for highway purposes. *Id.* at 77, 630 S.E.2d at 514. The state later decided to sell the property through a public sale, which triggered Windsor's right to repurchase the property. *Id.* at 83, 630 S.E.2d at 523. Windsor filed a declaratory judgment action seeking to have the property transferred back to it after the state determined to sell the property. This Court held that, even though the remedy for a condition subsequent may be a legal remedy, a court of equity has jurisdiction in such a case to award "complete relief," which in that case was an order that the property be transferred back to Windsor by the state at the original purchase price. *Id.* at 85, 630 S.E.2d at 524.

Similarly, in the present case, the Housing Authority has the right to repurchase the property located at 8656 Hickory Ridge Court, Springfield, Virginia ("subject property"), for the original purchase price plus a Consumer Price Index ("CPI") adjustment if the owners of the property, like the state in *Windsor*, determine to sell it. These terms are explicitly set forth in the deed ("Original

Deed") from the Housing Authority to Peter A. Tovar and Christine A. Tovar ("the Tovars"), which was recorded among the land records of Fairfax County on September 22, 1989. (App. at 194.) With the mere exception of the CPI adjustment, the Housing Authority is seeking precisely the same relief from the Kapanis in this case as the plaintiff sought in *Windsor*. The Housing Authority filed its Complaint for Declaratory Judgment and Injunctive relief requesting that, under the terms of a restrictive covenant that runs with the land and a condition subsequent, the property be transferred back to it by the Kapanis. The Complaint was filed in the same manner that this Court in *Windsor* held was sufficient to provide "complete relief" by ordering such a transfer back to the prior owner. The Circuit Court thus plainly erred in finding that the only available means of obtaining the relief sought by the Housing Authority in its Complaint was through the filing of an ejectment action.

Further, this Court has also held on numerous occasions that a condition subsequent is enforceable in actions brought in equity. In *Sanford v. Sims,* 192 Va. 644, 649, 66 S.E.2d 495, 498 (1951), this Court held that, where equity has jurisdiction over a case, a

condition subsequent may be enforced regardless of whether it is a legal remedy. Likewise, in *Neal v. State-Planters Bank and Trust,* 166 Va. 158, 164, 184 S.E.2d 203, 205 (1936), this Court held that where a declaratory judgment action was filed to enforce a condition subsequent, the condition subsequent and a restrictive covenant that ran with the land in that case were a "covenant coupled with a condition subsequent." In that case, the defendant was obligated to pay certain sums to maintain ownership of the property and those obligations ran with the land. When the defendant breached those obligations, this Court held that the plaintiff had the right to elect his remedy, which included forfeiture for breach of the condition subsequent or specific performance or damages for breach of the restrictive covenant. Clearly, the Housing Authority in this case properly requested an appropriate remedy by requesting the return of the subject property when it filed this action to enforce the deed restrictions as both a condition subsequent and a restrictive covenant.

Morever, in *Landa v. Century 21 Simmons & Co.,* 237 Va. 374, 384, 377 S.E.2d 416, 422 (1989), this Court held that a right of first

refusal similar to the Housing Authority's right in this case could be enforced and the appropriate relief was the equitable remedy of specific performance. Undoubtedly, the Housing Authority sought specific performance in this case by requesting that the property be returned to it pursuant to the terms in the Original Deed. (App. at 4-9.) Therefore, since a right of first refusal has the same effect as a condition subsequent in this case in requiring that the property be transferred back to the Housing Authority, the Housing Authority's filing of an action seeking specific performance of the terms of its Original Deed in this case was an appropriate request for relief.

Based on the holdings of this Court, filing to enforce a right of first refusal or a condition subsequent through an action filed in equity does not disqualify a plaintiff from obtaining the relief of having a particular property transferred back to it. Further, as noted, the present case also involved the enforcement of a restrictive covenant. Clearly, a plaintiff who seeks to enforce a restrictive covenant is not limited to a legal remedy such as an action in ejectment. *See Sonoma Development, Inc. v. Miller*, 258 Va. 163, 169, 515 S.E.2d 577, 581 (1999) (holding that a restrictive

covenant may be enforced by specific performance). Therefore, the Circuit Court erred when it held that filing an action in ejectment was required for the Housing Authority to proceed on its restrictive covenant and condition subsequent counts.

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

The Housing Authority relies on its Opening Brief and its Reply Brief to the Brief of Appellees James C. Riekse and Wells Fargo Bank, N.A., and incorporates those herein by reference, to respond to the Kapanis' analysis of this Court's decision in *Beeren & Barry Investments, LLC, et al. v. AHC, Inc.,* 277 Va. 32, 671 S.E.2d 147 (2009) and to address the *void ab initio* issue.

In response to the Kapanis' assertion that the Housing Authority knew "full well that foreclosure was possible, or perhaps, even probable" after the Tovars' purchase of the subject property, there is absolutely nothing in the record to support such a claim. The Kapanis base this statement on the fact that the Housing Authority participated in financing $72,740 for the Tovars' purchase of the subject property and assert that the Tovars were "low

income." However, the program under which the Tovars purchased the property was the Moderate Income Direct Sales ("MIDS") Program. (App. at 281.) There is no evidence to indicate that the Tovars, particularly before their separation in 1997 (App. at 214), did not have sufficient income to obtain financing in 1989. Thus, the claim that they were a "probable" risk for foreclosure is unsupported by the record, speculative at best, and completely irrelevant to any issue in this case.

CONCLUSION

For the reasons set forth above, the Housing Authority asserts that the Kapanis' 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 AND HOUSING AUTHORITY

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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 Rajesh Kapani and Rajinder P. Kapani 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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