

NOT DESIGNATED FOR PUBLICATION

PAMELA SCHILLECI RAY	*	NO. 2008-CA-0683
RICCA, WIFE OF/AND		
RONALD J. RICCA	*	
VERSUS	*	COURT OF APPEAL
KATHRYN DUBARRY SMITH	*	FOURTH CIRCUIT
WIFE OF/AND WARREN H.		
SMITH AND THOMAS E.	*	STATE OF LOUISIANA
WILLIAMSON	*****	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-10024, DIVISION "N-8"
HONORABLE ETHEL SIMMS JULIEN, JUDGE

JAMES F. MCKAY III
JUDGE

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge James F. McKay III)

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AFFIRMED

In this action to enforce a right of first refusal, the defendants, Kathryn DuBarry Smith, Warren H. Smith and Thomas E. Williamson, appeal the district court's granting of summary judgment in favor of the plaintiffs, Pamela Schilleci Ray Ricca and Ronald J. Ricca. We affirm.

FACTS AND PROCEDURAL HISTORY

On September 15, 1997, Pamela Schilleci Ray Ricca and Ronald J. Ricca sold a piece of unimproved immovable property located in Orleans Parish to Kathryn DuBarry Smith and Warren H. Smith for the sum of \$50,000.00. The act of sale provided that the Riccas would reserve "the right of first refusal to the subject property."

On December 11, 1998, the Smiths, through an act of sale with mortgage, sold the property to their nephew, Thomas E. Williamson, for the sum of \$65,000.00. The Smiths reserved the right of use and habitation of the property for themselves and their son, Kim Smith, as long as any of them should live. The Riccas maintain that they did not learn of the sale of the property from the Smiths

to Mr. Williamson until 2004 when they discovered a copy of the act of sale in the mortgage record. However, there is evidence that the Riccas were aware that the property had been transferred from the Smiths to Mr. Williamson but were under the impression that it was not a sale and that their right of first refusal had never been triggered and was still in place. Once the Riccas learned that the transfer was in fact a sale, they attempted to exercise their right of first refusal but were not successful. Thereupon, the Riccas filed a petition for declaratory judgment and to enforce a right of first refusal. Both the Riccas and the Smiths filed motions for summary judgment. The trial court denied the Smiths' motion for summary judgment and granted the Riccas' motion for summary judgment. The trial court ruled that the transfer from the Smiths to Mr. Williamson was a sale and that the Riccas' right of first refusal was valid and enforceable. It is from this judgment that the Smiths and Mr. Williamson now appeal.

DISCUSSION

On appeal, the defendants raise the following assignments of error: 1) the trial court erred in holding that the "right of first refusal" was triggered by the transfer of the property from the Smiths to Mr. Williamson when the undisputed evidence is that the transfer from the Smiths to Mr. Williamson was a donation, not a sale; 2) the trial court erred in holding as a matter of law that the Smiths to Williamson transfer was a "sale" simply because it was nominally shown as such when, in fact, all of the evidence established that it was a donation; 3) the trial court erred in holding that parol evidence was not admissible to show that the

instrument transferring the property from the Smiths to Mr. Williamson was a donation rather than a sale; 4) the trial court erred in granting summary judgment in face of conflicting evidence as to there having been an oral agreement specifically to the effect that the transfer of the property from the Smiths to Mr. Williamson would not trigger the right of first refusal; and 5) the trial court erred in holding that the right of first refusal is binding although it has no terminal date whereas the law applicable at the time provided that any right of first refusal not limited to ten years or less is void.

In their first three assignments of error, the defendants essentially argue that the trial court erred by finding that the transfer from the Smiths to Mr. Williamson was a sale, not a donation and by holding that parole evidence was not admissible to show that the instrument was a donation and not a sale. According to Louisiana Civil Code Article 1835: “An authentic act constitutes full proof of the agreement it contains, as against the parties, their heirs, and successors by universal or particular title.” In the instant case, the December 1998 document which transferred the property from the Smiths to Mr. Williamson was designated as a “Sale with Mortgage” and the Smiths were designated as “vendors” and Mr. Williamson was designated as the “purchaser.” The document included a legal description of the subject property as well as a specific price of \$65,000.00 to be paid by Mr. Williamson. The act was also passed before a notary and two witnesses. There was no indication in the act that the transfer was a donation.

This authentic act clearly states that the transaction between the Smiths and Mr. Williamson was a sale with mortgage.

The Louisiana Supreme Court has held that parol evidence in conflict with the terms of a written instrument was inadmissible to show that a conveyance for cash consideration between plaintiffs was in fact intended as a donation. Loranger v. Citizens' Nat. Bank of Hammond, 111 So. 418 (La. 1927). Other courts have also found that “our law indicates that parol evidence should not be admitted to show, contrary to the statements of an authentic act of sale, that the true intent of the act was to donate rather than to sell the property.” Webb v. Scott, 346 So.2d 765, 768-769 (La. App. 1 Cir. 1977)¹; *See also* Girard v. Donlon, 127 So.2d 761 (La.App. 3 Cir. 1961). Based on the law and evidence, we find no error in the trial court’s finding that the transaction was a sale and not a donation nor do we find any error in the trial court’s prohibition of the use of parole evidence to establish otherwise.

In their fourth assignment of error, the defendants argue that the trial court erred in granting summary judgment in face of conflicting evidence as to there having been oral agreement specifically to the effect that the transfer of the property from the Smiths to Mr. Williamson would not trigger the right of first refusal. The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of actions. Two Feathers Enterprises v. First National Bank of Commerce, 98-0465 (La.App. 4 Cir. 10/14/98), 720 So.2d 398,

¹ This case also stated that had the parties “intended that the transaction was, in fact, a donation, they should have executed a valid act of donation.” Id. At 769.

400. This procedure is now favored and shall be construed to accomplish those ends. La. C.C.P. art. 966 A(2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966.

As stated above, the type of parole evidence relied upon by the defendants is not admissible in order to show that an authentic act is anything other than what it purports to be. Based on the clear language of the December 1998 act, it was a sale which triggered the Riccas' right of first refusal. Accordingly, we agree with the trial court that the plaintiffs were entitled to summary judgment.

In their final assignment of error, the defendants argue the trial court erred in holding that the right of first refusal is binding although it has no terminal date whereas the law applicable at the time provided that any right of first refusal not limited to ten years or less is void. The defendants' argument is based on Comment b to Article 2628 which states that a right of first refusal for an unlimited term is null.

The trial court found that the right of first refusal was "valid and enforceable" and that it did "not violate LSA-CC article 2628 because it was not granted for a term of over ten years" and the "plaintiffs exercised their right of first refusal well within the ten year limit." The trial court also found that Comment b to Civil Code article 2628 misstated the law.

Civil Code Article 2625, entitled “Right of First Refusal,” reads: “A party may agree that he will not sell a certain thing without first offering it to a certain person. The right given to the latter in such a case is a right of first refusal that may be enforced by specific performance.” When the Ricca – Smith Act of Sale, which contained the right of first refusal, was executed in 1997, Civil Code Article 2628 read in pertinent part: “An option or right of first refusal that concerns an immovable thing may not be granted for a term longer than ten years.” “[P]rior jurisprudence found *options* without a definite term to be null and void, not rights of first refusal.” Gorum v. Optimist Club of Glenmora, 99-1963, p. 6 (La.App. 3 Cir. 8/30/00), 771 So.2d 690, 694. We also note that statements contained in the official comments are not part of the statute and are not binding on the courts. See Terrebonne Parish School Bd. v. Castex Energy, Inc., 2004-0969, p. 11 (La. 1/19/05), 893 So.2d 789, 797; See also Ramirez v. Fair Grounds Corp., 575 So.2d 811, 813 (La. 1991). Regarding the enforceability of a right of first refusal, the only prohibition is against a term longer than ten years and as the trial court correctly points out, that prohibition is not violated in the instant case and the right was exercised well within ten years from the time that it was granted. Accordingly, based on the law and facts of this case, we find no error in the trial court’s judgment on this assignment of error.

CONCLUSION

For the above and foregoing reasons, we affirm the trial court's granting of the plaintiffs' motion for summary judgment and its denial of the defendants' motion for summary judgment.

AFFIRMED