

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: ESTATE OF LEONARD CIESLAK,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
	:	
	:	
APPEAL OF: MICHAEL CIESLAK,	:	
	:	
Appellant	:	No. 1119 WDA 2012

Appeal from the Order entered on July 11, 2012
in the Court of Common Pleas of Allegheny County,
Orphans' Court Division, No. 0066 of 2011

BEFORE: BENDER, ALLEN and MUSMANNNO, JJ.

MEMORANDUM BY MUSMANNNO, J.:

Filed: April 26, 2013

Michael Cieslak ("Cieslak") appeals from the Order concluding that he did not properly exercise his right of first refusal as to tracts of land belonging to the Estate of Leonard Cieslak ("the Estate"), and permitting the Estate to convey the property to a third party. We affirm.

The Orphans' Court has set forth the relevant underlying facts:¹

Leonard Cieslak ("Decedent") died on December 14, 2000[,] leaving a will dated March 4, 1998[,] and a codicil dated November 2000. Paragraph 3.05 of [] [Decedent's] will dated March 4, 1998[,] provided that [] Cieslak, who is the son of Decedent, "shall be given the right of first refusal to buy ... two parcels known as the Mazzaro tract, lot block #108 E 210 and having 22 acres more or less, and the tract called the Glozzer tract ... having about 20 acres, lot and block #108 j 340 ... at the

¹ We note that the Estate and Cieslak have been involved in protracted legal proceedings that are not relevant to these proceedings. Indeed, at one point, in 2009, this Court quashed an appeal by Cieslak pertaining to a settlement agreement regarding the administration of the Estate. ***See In re Estate of Cieslak***, 981 A.2d 328 (Pa. Super. 2009) (unpublished memorandum).

price established by any bona fide buyer at that time.”^[2] These two parcels will hereafter be referred to collectively as “Estate Property.”

On or about July 27, 2001, the Estate Property was valued at \$22,000.00 for the Mazzaro tract, or about \$1,000.00 an acre and \$25,000.00 for the Glozzer tract or about \$1,250.00 an acre.

On or about February 29, 2012[, the Estate] entered into an Agreement of Sale with Frank Bryan, Inc., in relevant part, for the sale of the Estate property at a price of \$2,000 an acre, which is hereafter referred to as “Agreement.”

By email dated March 1, 2012[,] and by certified mail dated March 2, 2012, [the Estate] forwarded the Agreement to counsel for [] Cieslak requesting that he advise [the Estate] whether [] Cieslak planned to exercise his right of first refusal in accordance with the will as reference above.

When [] Cieslak’s counsel did not respond to this request, on March 13, 2012, [the Estate] filed a Petition for Citation to Show Cause Why [] Cieslak’s Right of First Refusal [Should] Not be Deemed Expired and Why the Estate Property Should Not be Sold to Frank Bryan, Inc. At a conference on April 20, 2012, [] Cieslak was directed to formally exercise his right of first refusal and provide evidence of his ability to purchase the property at the agreed upon price of \$2,000 an acre. On April 27, 2012, counsel for [] Cieslak filed a Motion for hearing Date for Sale of Real Estate requesting [the Orphans’] Court to allow [] Cieslak to purchase the Estate Property at \$32,250.00, the price he offered to pay in January 2008.^[3] In addition, [] Cieslak alternatively requested that he be able to “credit bid” both his 1/5 interest of the purchase price as well as his brother’s, Frank Cieslak’s, 1/5 interest of the purchase price.

Orphans’ Court Opinion, 9/11/12, at 1-2 (footnotes added).

² There was no provision in the will as to how long Cieslak had to exercise his right of first refusal.

³ We note that the Orphans’ Court entered an Order on January 24, 2008, indicating that this offer to buy the Estate Property was rejected.

On July 11, 2012, the Orphans' Court entered an Order allowing the Estate to proceed with the sale of the Estate Property to Frank Bryan, Inc. The trial court found that Cieslak had not properly exercised his right of first refusal. Cieslak filed a timely Notice of appeal. The Orphans' Court ordered Cieslak to file a Pennsylvania Rule of Appellate Procedure 1925(b) concise statement, which Cieslak timely filed.

On appeal, Cieslak raises the following questions for our review:

1. Was [Cieslak's] offer to purchase the property in January 2008 a bona fide offer as prescribed by the terms of the will?
2. Did [Cieslak] properly exercise his right of first refusal to purchase Estate Property granted to him in the will[?]
3. Did the lower court err in finding that [Cieslak's] request for the court to rule on his outstanding 2008 offer to purchase the Estate Property was an attempt at negotiations rather than an acceptance of the offer on which [*sic*]?
4. Did the lower court commit an error in finding that [Cieslak's] request to take his interest in kind and be given a credit against the purchase price [was] without merit since [Cieslak's] right of first refusal had been deemed expired?

Brief for Appellant at 4.

When reviewing an Order entered by the Orphans' Court,

this Court must determine whether the record is free from legal error and the court's factual findings are supported by the evidence. Because the Orphans' Court sits as the fact-finder, it determines the credibility of the witnesses and, on review, we will not reverse its credibility determinations absent an abuse of that discretion. However, we are not constrained to give the same deference to any resulting legal conclusions. Where the rules of law on which the court relied are palpably wrong or clearly inapplicable, we will reverse the [Orphans' Court Order].

Estate of Fridenberg, 982 A.2d 68, 72-73 (Pa. Super. 2009) (citation omitted).

We will address Cieslak's right of first refusal claims together for ease of disposition. Cieslak contends that he had the right of first refusal to purchase the Estate Property. Brief for Appellant at 13-14. Cieslak argues that he unequivocally exercised his right of first refusal in separate letters to the Orphans' Court and to the administrator of the Estate in April 2012. ***Id.*** at 15-17, 19. Cieslak asserts that he did not change any terms of the agreement other than petitioning the Orphans' Court "to receive an in kind distribution for his and his brother[, Frank Cieslak's,] interests." ***Id.*** at 16; ***see also id.*** at 19-22 (wherein Cieslak argues that he sought to apply the proceeds that he and his brother would have received as residuary beneficiaries of the Estate to the purchase price for the Estate Property). Cieslak claims that he did not defer to his 2008 offer in these letters and

that he repeatedly exercised his right of first refusal. *Id.* at 17-18.⁴

Generally, the right of first refusal is a right of preemption, allowing the holder of the right first chance to purchase the property before the owner sells the property to a third party.

A right of first refusal constitutes a promise to offer the *res* of the right to the promisee for such consideration as the promisor determines to accept on the basis of an offer from a third party before accepting the offer of the third party. A right of first refusal does not require the promisor to offer the *res* at all. The right of first refusal merely requires that before the promisor accepts an offer of a third party, the promisor must offer the *res* to the promisee of the right for the consideration the promisor is willing to accept from the third party.

If a third party makes an offer, the owner of the land is privileged not to accept it or refer the offer to the promisee; but the owner is duty bound not to accept a third-party offer without first giving the promisee an opportunity to match the offer.

Delaware River Preservation Co., Inc. v. Miskin, 923 A.2d 1177, 1181 (Pa. Super. 2007) (citations, brackets, and emphasis omitted). Further, “[t]he terms of the owner’s offer to the promisee [must be] identical to

⁴ Cieslak also argues that the November 2000 codicil modified the language of the will so as to provide him with the right to use and enjoy the Estate Property for an unlimited time period. Brief for Appellant at 13-15. However, Cieslak waived this argument by failing to raise it before the Orphans’ Court. *See* Pa.R.A.P. 302(a); ***Sovich v. Estate of Sovich***, 55 A.3d 1161, 1165 (Pa. Super. 2012). Moreover, Cieslak failed to raise the argument in his Rule 1925(b) Concise Statement. *See Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 803 (Pa. Super. 2007) (stating that “any issue not raised in an appellant’s Rule 1925(b) statement will be deemed waived for purposes of appellate review.”). Furthermore, Cieslak claims that the agreement to sell to Frank Bryan, Inc., was improper because it aggregated the Estate Property with non-estate property, thereby increasing the price. Brief for Appellant at 18. Cieslak additionally argues that it was in the Estate’s best interest to sell him the Estate Property because his share and his brother’s share would not be subject to “transfer taxes.” *Id.* at 21. Cieslak waived these claims by failing to raise them in his Rule 1925(b) Concise Statement. *See Hess*, 925 A.2d at 803.

those contained in the third party's offer." *Id.* (citation omitted). "In order to act on a right of first refusal, the promisee must unequivocally accept the terms of the third-party offer." *Id.* (citation, brackets, and quotation marks omitted).

Right of first refusal cases are reviewed under the standard principles of contract construction. An acceptance qualified by conditions not implied by law does not make a contract. If a reply does not unequivocally accept the terms of an offer, then no contract is formed. Such a question is generally one of law for the court to decide.

Id. at 1181-82 (citations and quotation marks omitted).

Cieslak's argument on appeal that he exercised his right of first refusal revolves around the letters he sent to the administrator of the Estate and the Orphans' Court in April 2012. In his April 26, 2012 letter to the Orphans' Court, Cieslak indicates that he was exercising his right of first refusal and additionally stated that he should be entitled to credit bid his and his brother's shares of the Estate Property, rather than obtaining financing for the share that they would receive on the distribution of the Estate's funds. **See** Letter, 4/26/12. Further, in his April 27, 2012 letter, Cieslak stated that he was exercising his right of first refusal, but that he had requested a hearing on his request to credit bid his and his brother's interest in the event that the 2008 offer was not a bona fide offer. **See** Letter, 4/27/12. In each of these letters, Cieslak indicates that he is exercising his right of first refusal. However, in his April 26, 2012 letter, Cieslak qualified his right of first refusal by adding additional terms related to the amount of his

payment. Indeed, Cieslak seeks to lower his payment by requesting that not only his own interest in the Estate Property be credited toward the purchase price but also the interest of his brother. It is unclear whether Cieslak's brother is also purchasing an interest in the property or whether he is selling his interest separately to Cieslak. *See, e.g.*, N.T., 6/1/12, at 11 (wherein Cieslak's counsel argues that Cieslak and "Frank [Cieslak] should not have to put up their money so that they can get their money back. They should be entitled to credit bid their interest."). In either event, Cieslak, who alone had the right of first refusal, has not unequivocally accepted the terms of the offer to purchase the Estate Property, in its entirety, by Frank Bryan, Inc. Further, in his April 27, 2012 letter, Cieslak qualified his right of first refusal by invoking the request to credit bid and his original 2008 offer.⁵ Thus, based upon this record, we conclude that the Orphans' Court did not err in concluding that Cieslak did not properly exercise his right of first refusal.

We note that Cieslak also raises claims that his request to take interest in kind should have been honored because the sale of the Estate Property

⁵ To the extent Cieslak argues that his 2008 offer of \$32,350 was a bona fide offer and that he should have been able to buy the Estate Property at this price, we conclude that this offer did not properly exercise his right of first refusal. *See* Orphans' Court Opinion, 9/11/12, at 5 (stating that Cieslak's attempt to defer to his 2008 offer was merely negotiations for the sale of the Estate Property and did not constitute a proper right of first refusal); *see also* **Steuart v. McChesney**, 444 A.2d 659, 663 (Pa. 1982) (stating that "[b]y conditioning exercise of the Right of First Refusal upon occurrence of the triggering event of there being obtained a bona fide offer, protection was afforded against a sham offer, made not in good faith, precipitating exercise of the preemptive right.").

was not necessary to pay the Estate's debts or to make distributions. Brief for Appellant at 19-21. However, the Orphans' Court did not make any determinations regarding the ability of the Estate to pay debts or make distributions. Indeed, the subject of the Order in question on appeal was whether Cieslak had properly exercised his right of first refusal. **See** Order, 7/11/12. Accordingly, we will not further address this claim.

Order affirmed.