

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COSTALAS FAMILY LIMITED	:	IN THE SUPERIOR COURT OF
PARTNERSHIP,	:	PENNSYLVANIA
	:	
Appellee	:	
	:	
v.	:	
	:	
J. MEREDITH RAPP AND CO-TRUSTEES	:	
JAMES H. HARDY, III, AND WILLIAM E.	:	
RAPP FOR THE TRUST UNDER THE	:	
WILL OF FREDERICK M. RAPP AND	:	
2590 WEST CHESTER PIKE REALTY, LP,	:	
	:	
Appellants	:	No. 9 EDA 2013

Appeal from the Order entered on November 30, 2012
in the Court of Common Pleas of Delaware County,
Civil Division, No. 12-00287

BEFORE: BENDER, P.J., DONOHUE and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 20, 2013**

J. Meredith Rapp and co-trustees James H. Hardy, III, and William E. Rapp, for the Trust under the Will of Frederick M. Rapp (collectively, "the Rapps"), and 2590 West Chester Pike Realty, LP ("West Chester") (all appellants collectively referred to as "the Rapp Defendants"), appeal from the trial court's Order entering summary judgment in favor of the Costalas Family Limited Partnership ("Costalas") and against the Rapp Defendants. We affirm.

The Rapps own, in fee simple, three commercial real estate parcels, totaling 2.282 acres, located on the southeast corner of West Chester Pike and Sproul Road, Marple Township, Pennsylvania. On December 30, 1997,

the Rapps and Amoco Oil Company ("Amoco") entered into Lease Agreement ("the Gas Station Lease") for a 46,000 square foot parcel ("the Gas Station Parcel") located at the intersection of West Chester Pike and Route 320 in Marple Township. One day later, on December 31, 1997, Country Squire Diner, Inc. ("Country Squire"), and the Rapps entered into a lease agreement ("the Diner Lease") for a contiguous 46,000 square foot parcel ("the Diner Parcel"). The Rapps admitted that the Gas Station Parcel and the Diner Parcel,

each with separate tax folio numbers, had been the subject of a Leasehold Subdivision[,] as reflected in a Preliminary/Final Land Development Plan/Site Plan ["the Plan"] prepared for [Amoco], and recorded in Delaware County on October 15, 1998.

Trial Court Opinion, 4/9/13, at 32 (quoting Defendants' Counter Motion for Summary Judgment at ¶ 13).

Both the Gas Station Lease and the Diner Lease included certain option rights as to their respective tenants. The Gas Station Lease provided the following option language:

Article 37—Options to Purchase or Lease.

In consideration of this Lease:

...

(b) Purchase Refusal Option. [The Rapps] will not sell or otherwise dispose of the Premises or any part thereof during the term of this Lease or any extension thereof unless [the Rapps] shall first have received a separate, acceptable, bona fide offer for the purchase of the Premises and shall have notified Amoco in writing of the names of the party or parties making the same and the price, terms and conditions, thereof, and shall have

attached thereto a complete executed copy or photocopy of said offer; and [Amoco] shall thereupon have the prior right (option) to purchase the Premises at the same price and on the same terms and conditions as are contained in said offer. Said right must be exercised by giving written notice to [the Rapps] at any time within thirty (30) days after [Amoco's] receipt of Landlord's notice of said offer. In the absence of [the Rapps'] subdividing the property, to the extent that any bona[fide] offer applies to all of the properties owned by [the Rapps] of which the Leased property is a part, the purchase refusal right set forth in this paragraph shall apply to the entirety of the parcel and not just the leased property.

Gas Station Lease, 12/30/97, Article 37(b). The Diner Lease, executed the next day, provided the following option:

(a) Purchase Refusal Option. [The Rapps] will not sell or otherwise dispose of the Premises, any larger parcel of real estate of which the Premises forms a part or any part thereof during the term of this Lease or any extension thereof unless [the Rapps] shall first have received a separate, acceptable, bona fide offer for the purchase of the Premises and shall have notified [Country Squire] in writing of the names of the party or parties making the same and the price, terms and conditions, thereof, and shall have attached thereto a complete executed copy or photocopy of said offer; and [Country Squire] shall thereupon have the right, under and subject to the prior right of [Amoco] to purchase the same premises pursuant to their lease rights respecting the appurtenant parcel, to purchase the Premises or the larger parcel of real estate of which the Premises forms a part (the exact property to be sold to be determined by the [the Rapps] in its sole discretion) at the same price and on the same terms and conditions as are contained in said offer provided that [Amoco] has first waived its rights to acquire the same. Said right must be exercised by giving written notice to [the Rapps] at any time within thirty (30) days after [Country Squire's] receipt of [the Rapps'] notice of said offer.

Diner Lease Agreement, 12/31/97, Article 39(a). On March 20, 2004, Amoco (now BP Products or "BP") assigned the Gas Station Lease to West Chester.

On October 7, 2011, the Rapps executed an agreement selling the Diner Parcel to Costalas for \$1.5 million ("the Costalas Agreement"). The Costalas Agreement included the following provision, which referred to the options provided in the Gas Station Lease and the Diner Lease:

3.5 Right of First Offer. Purchaser understands and agrees that the Property is subject to a right of first refusal to purchase in favor of [West Chester] pursuant to the terms of that certain Lease dated December, 1997 (the "Lease"). As set forth in the Lease, [West Chester] has a period of thirty (30) days after [the Rapps'] delivery of a notice to [West Chester] of the receipt of an offer to purchase the Property. Purchaser understands and agrees that [the Rapps are] required to deliver a fully executed copy of this Agreement to [West Chester] in connection with such notice, and consent to the same. It shall be a condition to [the Rapps'] obligation to proceed to Closing hereunder that [West Chester] fail to timely exercise its right of first refusal as contemplated by the Lease and described in this Agreement.

Costalas Agreement, 10/7/11, ¶ 3.5.¹

The Rapps tendered the required notice to West Chester on November

¹ Throughout Costalas Agreement, the Diner Parcel is referred to as the "Property." **See, e.g.**, Costalas Agreement, 10/7/11, ¶¶ 2 (describing the purchase price for the "Property"), 3.1(a)-(b) (describing the deliveries to be made by the seller as to the "Property"), 3.2 (describing due diligence to be facilitated as to the "Property"), 3.3(b) (requiring the seller to tender fee simple title to the "Property"), 3.4 (describing Amoco's right of first refusal as to the Property).

29, 2011.² On December 16, 2011, West Chester informed the Rapps that it intended to acquire both the Diner Parcel and the Gas Station Parcel. On December 19, 2011, the Rapps notified Costalas that they were terminating the Costalas Agreement, based upon West Chester's exercise of the option set forth in the Gas Station Lease.

Thereafter, Costalas filed the instant action against the Rapp Defendants demanding specific performance under the Costalas Agreement. Simultaneously, Costalas filed a *lis pendens* against the Diner Parcel. The Rapp Defendants filed an Emergency Motion to Strike *Lis Pendens*. On March 28, 2012, the trial court denied the Emergency Motion. Notwithstanding, on May 14, 2013, the Rapps conveyed the Diner Parcel and Gas Station Parcel to West Chester.

At the close of discovery, Costalas filed a Motion for Summary Judgment requesting that the conveyance of the Diner Parcel be set aside, and demanding specific performance of the Costalas Agreement. The Rapp Defendants filed a Counter Motion for Summary Judgment, arguing that West Chester properly exercised its option to purchase the Diner Parcel, in accordance with the Gas Station Lease. The Rapp Defendants asked the trial

² Counsel for the Rapps mistakenly sent notice of the Costalas Agreement to BP on October 7, 2011. Counsel for Amoco's successor, BP Products, notified West Chester of the Costalas Agreement on November 8, 2011. Counsel for West Chester asked the Rapps to provide formal notice of the Costalas Agreement. On that same date, the Rapps notified Costalas that West Chester intended to exercise its option to purchase the Diner Parcel, once it received notice of the Costalas Agreement.

court to approve the conveyance. After a hearing, the trial court entered summary judgment in favor of Costalas and against the Rapp Defendants. The trial court determined that because (a) a prior subdivision had occurred, and (b) the Costalas Agreement was limited to the purchase of the Diner Parcel, the Gas Station Lease did not grant West Chester a priority option to purchase the Diner Parcel. Trial Court Opinion, 4/9/13, at 30.

Upon the entry of summary judgment, the Rapp Defendants filed the instant timely appeal, followed by a court-ordered Pa.R.A.P. 1925(b) Concise Statement of Matters Complained of on Appeal.

Costalas now presents the following claims for our review:

1. Did the [trial] court commit an error of law and abuse its discretion by finding that [West Chester] did not possess a priority right under Article 37(b) of [the Gas Station Lease] with [the Rapps] to purchase the Diner Parcel under [the Diner Lease]?

[2.] Did the [trial] court commit an error of law and abuse its discretion when it misinterpreted a certain provision in Article 37(b) of the Gas Station Lease to require that there be both (1) the absence of a subdivision of the entire Rapp Property; and (2) a bona fide offer by another to purchase the entire Rapp Property in order for [West Chester] to have a priority right to purchase the Diner Parcel?

[3.] Did the [trial] court commit an error of law and abuse its discretion [] by finding that under the [Diner] Lease, at Article 39(a), [West Chester] was not granted a priority right to purchase the Diner Parcel?

[4.] Did the [] trial court commit an error of law and abuse its discretion by finding that under the [Costalas Agreement] between Rapp and [Costalas,] for [Costalas] to purchase the diner Parcel, there was not a condition precedent therein at

subsection 3.5 which confirmed to [West Chester] a priority right of first refusal to purchase the Diner Parcel?

Brief for Appellants at 5 (issues renumbered) (emphasis in original).

The Pennsylvania Rules of Civil Procedure instruct that a trial court shall enter summary judgment when there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. Pa.R.C.P. 1035.2(1); **Weaver v. Lancaster Newspapers, Inc.**, 926 A.2d 899, 902 (Pa. 2008). If there are any material facts in dispute, or if the facts can support conflicting inferences, the case is not free from doubt, and therefore, summary judgment is inappropriate. **Weaver**, 926 A.2d at 902; **Fine v. Checcio**, 870 A.2d 850, 857 (Pa. 2005).

This is because a motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In other words, if there is relevant evidence that a jury could reasonably credit that would allow the non-moving party to prevail, then judgment as a matter of law would be inappropriate. In considering the merits of a motion for summary judgment, a trial court views the record in the light most favorable to the non-moving party ... and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party....

Weaver, 926 A.2d at 902.

This case involves the interpretation of three agreements: the Gas Station Lease, the Diner Lease, and the Costalas Agreement. When interpreting the language of a contract, this Court's goal is to ascertain the intent of the parties and give it effect. **TruServ Corp. v. Morgan's Tool &**

Supply Co., 39 A.3d 253, 260 (Pa. 2013). “When the words of a contract are clear and unambiguous, the intent of the parties must be ascertained from the language employed in the contract, which shall be given its commonly accepted and plain meaning.” **Id.**

The first two claims by the Rapp Defendants challenge the trial court’s interpretation of options described in the Gas Station Lease. The Rapp Defendants claim that Article 37(b) of the Gas Station Lease afforded Amoco (West Chester’s predecessor) three distinct options. Brief for Appellants at 15-16. First, the Rapp Defendants argue, West Chester (formerly Amoco) holds an option to purchase the Gas Station Parcel “if a bona fide offer was made by someone else.” **Id.** at 15. Second, if the entire Property is subdivided, West Chester holds an option to purchase “whatever parcel within the Rapp Property that [the Rapps] might contemplate selling other than the Gas Station Parcel.” **Id.** at 15-16. Finally, if the Property is not subdivided and the Rapps receive a bona fide offer, West Chester holds an option to match the offer, “which would include the purchase of the Diner Parcel and a third parcel identified as Tax Parcel 25-00-0009-00.” **Id.** at 16.

In claiming trial court error, the Rapp Defendants acknowledge that the Rapps subdivided the property as of October 15, 1998. **Id.** at 19. Because the Property is subdivided, and the Rapps received a bona fide offer from Costalas, the Rapp Defendants argue that “a priority right to purchase

the Diner Parcel was extended to [West Chester] under the Amoco Lease.” ***Id.*** at 19.

The Rapp Defendants further argue that the trial court improperly imposed a two-prong test not supported by the language of Article 37(b) of the Gas Station Lease. ***Id.*** at 31. In interpreting the last sentence of Article 37(b), the Rapp Defendants assert, the trial court improperly converted the comma following the first portion of the last sentence to an “and”, thereby creating two conditions that must be met in order for West Chester to exercise its option. ***Id.***

In its Opinion, the trial court properly determined that a subdivision of the Property had taken place, based upon the Rapp Defendants’ admission against interest. Trial Court Opinion, 4/9/13, at 19, 28-29. Notwithstanding, the trial court concluded that the First Purchase Option conferred by Article 37(b) of the Gas Station Lease “was never triggered inasmuch as there had been an admitted subdivision of the property by the Rapp Defendants and an offer to buy *only the Diner Parcel* and not a bid to purchase the entire premises by [Costalas].” Trial Court Opinion, 4/9/13, at 29 (emphasis added). Upon review, we agree with the trial court’s interpretation of Article 37(b) of the Gas Station Lease, and its conclusion that the First Purchase Option was not triggered by the Costalas Agreement.

Article 37(b) of the Gas Station Lease, provides, in relevant part, that the Rapps

will not sell or otherwise dispose of the Premises or any part thereof ... **unless [the Rapps] shall first have received a separate, acceptable bona fide offer for the purchase of the Premises** ... ; and [West Chester] shall thereupon have the prior right to purchase the Premises at the same price and on the same terms and conditions as are contained in said offer...

Gas Station Lease, 12/30/97, Article 37(b). Under the Gas Station Lease, the term "Leased Premises" is a defined term and applies only to the Gas Station Parcel. **See** Gas Station Lease, 12/30/1997, Article 1 (defining "Leased Premises" as including the 46,000 square feet comprising the Gas Station Parcel). The term "Premises", as used in Article 37(b), is not a defined term. However, in other sections of the Gas Station Lease, the term "Premises" is used solely in reference to the Gas Station Parcel.

For example, the Gas Station Lease requires an environmental audit of the "Premises" following or concurrent with the removal of storage tanks. Gas Station Lease, 12/30/97, Article 28(b). In the event that an audit discloses the existences of environmental conditions that exceed the applicable federal, state or local standards, and Amoco (now West Chester) is unable to remedy the conditions within 60 days, the Gas Station Lease provides that West Chester "may remain in exclusive possession of the Premises" as is reasonably necessary to investigate or remedy the conditions. **Id.** As West Chester never possessed the Diner Parcel, the term "Premises" could only refer to the Gas Station Parcel.

Similarly, in Article 30(4), the terms "Leased Premises" and "Premises" are used, interchangeably, in reference to the Gas Station Parcel. **Id.,**

Article 30(4). Article 32, entitled "Destruction of the Premises", likewise uses the terms "Leased Premises" and "Premises" interchangeably in referring to the Gas Station Parcel. **Id.**, Article 32. Because the Gas Station Lease invokes the term "Premises" only in reference to the Gas Station Parcel, we agree with the trial court's determination that the term "Premises", as used in Article 37(b), referred to the Gas Station Parcel.

Interpreting the term "Premises" as meaning "the Gas Station Parcel," the first portion of Article 37(b) provides as follows:

[The Rapps] will not sell or otherwise dispose of the [Gas Station Parcel] ... unless Landlord shall first have received a separate, acceptable, bona fide offer for the purchase of the [Gas Station Parcel] ... and [West Chester] shall thereupon have the prior right (option) to purchase the [Gas Station Parcel]"

Gas Station Lease, 12/30/97, Article 37(b). Because the Rapps had received no offer for the Gas Station Parcel, Article 37(b) conferred no option upon West Chester.

In its last sentence, Article 37(b) conferred upon West Chester the right to purchase all of the Rapps' properties only "[i]n the absence of [the Rapps] subdividing the property[.]" Gas Station Lease, 12/30/97, Article 37(b). Because there was a subdivision, West Chester's option to purchase all properties owned by the Rapps did not vest.

Therefore, as the trial court properly concluded, Article 37(b) afforded West Chester no option to purchase the Diner Parcel. **See** Trial Court Opinion, 4/9/13, at 29 (concluding that, because (a) the property is

subdivided and (b) Costalas did not offer to purchase the Gas Station Parcel, Article 37(b) of the Gas Station Lease conferred no option upon West Chester). On this basis, we conclude that the Rapp Defendants are not entitled to relief on their first two claims.

Next, the Rapp Defendants claim that the trial court erred in interpreting Article 39(a) of the Diner Lease as conferring no priority option upon West Chester. Brief for Appellants at 19. The Rapp Defendants assert that Article 39(a) of the Diner Lease provided the Diner Parcel tenant with the right to purchase the Diner Parcel, in the event of a bona fide offer made by another. *Id.* at 20. The Rapp Defendants argue that this option extended to West Chester “if it elected to exercise the option.” *Id.* The Rapp Defendants, comparing the language of the Diner Lease option with that of the Gas Station Lease option, argue that the use of the term “prior”, as set forth in Article 39(a) of the Diner Lease, denotes a priority granted to West Chester. Brief for Appellants at 21. In support, the Rapp Defendants posit that the term “premises”, when uncapitalized in the Diner Lease, refers to the Diner Parcel. *Id.* at 22. Therefore,

[w]hen Article 39(a) of the [Diner] Lease and refers to the term “premises”, it is referring to the Diner Parcel on which the Diner is situated. And when the priority purchase option granted under this provision to [West Chester] “to purchase the same premises”, the option extended to [West Chester] is referring to the Diner Parcel[.]

Id. (emphasis in original). Thus, Defendants contend, the Diner Lease granted West Chester a right of pre-emption, thereby allowing West Chester,

“as the holder of this right, to have the first opportunity to purchase the Diner Parcel before Rapp could sell it to Costalas or another bona fide purchaser.” ***Id.*** at 23. We disagree.

Article 39(a) of the Diner Lease granted to the Diner Parcel tenant, Country Squire, an option to purchase the Diner Parcel in the event that the Rapps receive a bona fide offer on that parcel. Diner Lease, 12/31/97, Article 39(a). However, in affording the Diner Parcel tenant that option, Article 39(a) stated the following, in relevant part:

... [the Diner Parcel tenant] shall thereupon have the right, under and subject to the prior right of [West Chester] to purchase the same premises **pursuant to their lease rights respecting the appurtenant parcel**, to purchase the Premises or the larger parcel of real estate of which the Premises form a part

Diner Lease, 12/31/97, Article 39(a) (emphasis added). By its plain language, Article 39(a) granted to West Chester a priority to purchase the Diner Parcel “pursuant to” its lease rights under the Gas Station Lease. As discussed *supra*, because (a) the Rapps subdivided the property, and (b) Costalas only offered to purchase the Diner Parcel, the Gas Station Lease conferred no rights upon West Chester. Because the Gas Station Lease conferred no rights upon West Chester, Article 39(a) of the Diner Lease conferred no priority upon West Chester. Accordingly, the Rapp Defendants’ claim lacks merit.

The Rapp Defendants next claim that the trial court improperly interpreted a condition precedent that was included in the Costalas

Agreement. Brief for Appellants at 24. The Rapp Defendants assert that section 3.5 of the Costalas Agreement extended to West Chester the right of first refusal to purchase the Diner Parcel. *Id.* at 24-25. Based upon this section, the Rapp Defendants argue, West Chester's right of first refusal constituted a condition precedent of the Costalas Agreement. *Id.* at 25. Upon review, the plain language of the Costalas Agreement does not support the Rapp Defendants' position.

Section 3.5 of the Costalas Agreement provides as follows:

3.5 Right of First Offer. Purchaser understands and agrees that the Property is subject to a right of first refusal to purchase in favor of [West Chester] pursuant to the terms of that certain Lease dated December, 1997 (the "Lease"). ... It shall be a condition to [the Rapps'] obligation to proceed to Closing hereunder that [West Chester] fail to timely exercise its right of first refusal **as contemplated by the Lease** and described in this Agreement.

Costalas Agreement, 10/7/11, § 3.5 (emphasis added).

Interpreting section 3.5, the trial court concluded that

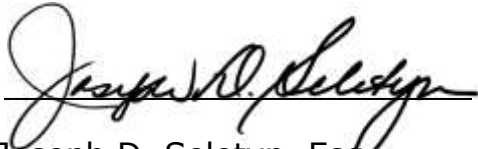
the "right of first refusal to purchase in favor of [West Chester]" phrasing is patently conditioned by language ... necessitating that the priority option must be exercised pursuant to the terms of the Lease that [West Chester] had signed when renting the Gas Station Property....

Trial Court Opinion, 4/9/13, at 37. We agree with the trial court's interpretation of section 3.5 of the Costalas Agreement. Under the circumstances presented, the Costalas Agreement did not confer a purchase option independent from that provided in the Gas Station Lease.

As discussed above, the Gas Station Lease conferred no option upon West Chester. Accordingly, Section 3.5 of the Costalas Agreement could confer no priority or option upon West Chester. Under these circumstances, we conclude that the Rapp Defendants are not entitled to relief on this claim.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/20/2013