

NO. COA14-728

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2015

TARIQ M. KHWAJA,  
Plaintiff,

v.

Davidson County  
No. 12 CVS 2539

MOHAMMED S. KHAN and wife, HASEEB  
AKHTAR, MOHAMMED PERVEZ IQBAL and  
wife, IRSHAD BEGUM,  
Defendants.

Appeal by Defendants from an order entered 25 April 2014 by Judge W. David Lee and orders entered 29 October 2013 by Judge Theodore S. Royster in Davidson County Superior Court. Heard in the Court of Appeals 19 November 2014.

*Sharpless & Stavola, P.A., by Eugene E. Lester, III, for Defendant-appellants.*

*Morgan Herring Morgan Green & Rosenblutt, L.L.P., by John Haworth and James F. Morgan for Plaintiff-appellee.*

DILLON, Judge.

Defendants seek review of orders granting summary judgment and costs, including attorneys' fees, in favor of Plaintiff and of the denial of their Rule 60(b) motion for relief from these orders. For the following reasons, we reverse and remand the

orders granting summary judgment and costs, and we vacate the order denying the Rule 60(b) motion as moot.

### I. Synopsis

Plaintiff, who is a tenant of a commercial building, brought this action against his landlord and others to enforce a provision in his lease granting him a preemptive right, otherwise known as a right of first refusal, to purchase the building, claiming that this preemptive right vested when the landlord agreed on terms to sell the building to a third party.

Based on this Court's holding in *New Bar Partnership v. Martin*, \_\_\_ N.C. App. \_\_\_, 729 S.E.2d 675 (2012), we hold that the provision in the lease granting the tenant the preemptive right is subject to and violates the common law rule against perpetuities and is, therefore, void. Specifically, the period during which Plaintiff's preemptive right could have vested under the lease provision was not tied to any life in being and, otherwise, extended beyond 21 years. Accordingly, we conclude that Defendants - and not Plaintiff - are entitled to judgment on Plaintiff's claims as a matter of law.

### II. Background

Plaintiff (hereinafter referred to as "the Tenant") commenced this action to enforce his preemptive right under the

Lease and for other relief. Defendants answered, praying that the Tenant's claims be dismissed with prejudice. The parties filed cross motions for summary judgment, and the evidence presented at the hearing on those motions tended to show as follows:

In 2009, Defendants Mohammed S. Khan and his wife Haseeb Akhtar (the "Landlord") entered into a written agreement (the "Lease") to lease a commercial building in Davidson County to the Tenant, Plaintiff Tariq M. Khwaja. The Lease provided for an initial term of 15 years and granted the Tenant an option to renew for an additional term of "5 to 10 years." The Lease further provided that if at any time "during [the] period of [the Lease]" the Landlord agreed on terms with a third party to sell the property, the Landlord was required to first allow the Tenant the opportunity to purchase the property under said terms. The Lease was not initially recorded in the Davidson County Registry.

In late 2011, the Landlord approached the Tenant to see whether he had any interest in purchasing the property; however, the Tenant responded that he did not have the desire or the money to do so.

Shortly thereafter, the Landlord negotiated with Defendants Mohammed Pervez Akhtar and his wife Irshad Begum (the "Third-Party Buyers") to sell them the property. On 13 April 2012, the Landlord sold the property to the Third-Party Buyers, delivering them a deed; however, this deed was erroneously recorded in Guilford County rather than in Davidson County.

On 24 April 2012, the Tenant recorded the Lease in Davidson County. As of this date, there was nothing recorded *in Davidson County* indicating that the Landlord had sold the property to the Third-Party Buyers.

In June of 2012, the Third-Party Buyers sold the property back to the Landlord, financing the entire sales price pursuant to a ten-year promissory note and securing it with a deed of trust (the "Deed of Trust") on the property. The deed and the Deed of Trust were recorded in Davidson County.

In July of 2012, the Tenant - having become aware that the property was again owned by the Landlord - sent a letter demanding that the Landlord sell him the property for \$100,000.00.<sup>1</sup> However, the Landlord refused to sell him the

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<sup>1</sup> The revenue stamps from each transaction between the Landlord and the Third Party Buyers reflect a sale price of \$100,000.00. We note that Defendants contend that the actual amount of consideration was greater than \$100,000.00.

property. The Tenant continued making rent payments under the Lease, but has made them under protest.

On 29 October 2013, the trial court entered orders granting summary judgment in favor of the Tenant, decreeing essentially that the Landlord sell the property to the Tenant for \$100,000.00 free and clear of the Deed of Trust in favor of the Third Party Buyers; and that the costs of the action, including \$10,000.00 for attorneys' fees, be taxed to the Landlord.

Through neglect, Defendants' attorney failed to notice an appeal from these 29 October 2013 orders in a timely manner. Defendants subsequently filed a Rule 60(b) motion at the trial court seeking relief from the 29 October 2013 orders; however, this motion was denied. Defendants timely appealed the order denying their Rule 60(b) motion, and a panel of this Court granted *certiorari* to review the 29 October 2013 orders.

### III. Analysis

This matter involves the interpretation and application of a lease provision granting a preemptive right, a right which our Supreme Court has defined as one which "requires that, before property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person." *Smith v. Mitchell*, 301 N.C. 58, 61, 269

S.E.2d 608, 610 (1980). The preemptive right in the present case is found in Paragraph 21 of the Lease, a paragraph which also grants the Tenant an option to extend the term of the Lease, which states as follows:

21. Option to Sell Property or renew lease:  
If Lessor decide to sell property during period of signed agreement, Lessee shall has first right to buy this property on competent estate market price offered by other buyers. Option provided that Lessee is not in default in the performance of this lease, Lessee shall have the option to renew the lease for an additional term of 5 to 10 years commencing at the expiration of the initial lease term.<sup>2</sup>

(Emphasis in original).

The parties' arguments in their briefs raise a number of interesting issues, among which are the following:

Whether there is an issue of fact that the Tenant, at least temporarily, waived his preemptive right based on his alleged statement to the Landlord that he had no desire nor the means to purchase the property.

The effect of the timing of the recordation of the Lease and of other documents in the Davidson County Registry has on the rights and liabilities of the parties.

Assuming the Tenant's preemptive right has vested, whether there is an issue of fact regarding the terms under which the right could be exercised.

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<sup>2</sup> The evidence tended to show that English was not the first language of the parties.

However, we do not reach any of these issues. Rather, based on our holding in *New Bar Partnership v. Martin*, \_\_\_ N.C. App. \_\_\_, 729 S.E.2d 675 (2012), we are compelled to conclude that the Lease provision granting the Tenant a preemptive right violates the common law rule against perpetuities and is, therefore, void and unenforceable.

The common law rule against perpetuities has been defined by our Supreme Court as follows:

No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. ***If there is a possibility*** such future interest may not vest within the time prescribed, the gift or grant is void.

*Rich v. Carolina Construction*, 355 N.C. 190, 193, 558 S.E.2d 77, 79 (2002) (emphasis added).

As a tenant's preemptive right is a contingent right which does not vest until his landlord agrees on terms to sell the property, this Court held in *New Bar* that such "a preemptive right or right of first refusal" as contained in a commercial lease is subject to the common law rule against perpetuities and not subject to the Uniform Statutory Rule Against Perpetuities, codified in N.C. Gen. Stat. § 41-15, *et seq.* *New Bar*, \_\_\_ N.C.

App. at \_\_\_, 729 S.E.2d at 684. The lease at issue in *New Bar* was for an initial term of five years, but provided for optional renewal terms extending for 35 years. The duration of the preemptive right contained in that lease was tied to the lease's duration. Accordingly, this Court held that since the time during which the preemptive right could vest extended beyond 21 years and was not otherwise tied to any life in being, the lease provision granting the preemptive right violated the common law rule against perpetuities and was, therefore, "void." *Id.* at \_\_\_, 729 S.E.2d at 685.

In the present case, Defendants argue in their brief that the language in the Lease providing "the time within which the [preemptive right] may be exercised" renders the provision "unenforceable." Specifically, the Lease provides this "time" to be "during period of signed agreement[,]" and is otherwise not tied to any life in being.<sup>3</sup> Though the Lease provides for an initial term of 15 years, it also provides the Tenant the option to extend the Lease for an additional term of "5 to 10 years," making it "possible" that the duration of the Lease - and the Tenant's preemptive right - to be 25 years. Accordingly, the

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<sup>3</sup> The Lease provides that its provisions are "binding upon and insures [sic] to the benefit of the heirs [and] successors in interest to the parties."



preemptive right provision violates the common law rule against perpetuities. That is, at the time the Lease was entered into in 2009, there was a "possibility" that the Tenant's preemptive right would not vest, if at all, within 21 years of any life in being at the time the Lease was executed. This "possibility" is illustrated in the following scenario:

In 2009, the Landlords and the Tenant execute the Lease.

In 2010, the Landlords have a child, and the Tenant becomes a father.

In 2011, the Landlords and the Tenant die. Their respective wills name their newborn children as successors in the Lease.

In 2024, the Tenant's child exercises the right to extend the Lease for an additional term of ten years, to 2034.

In 2032, the Landlord's child decides to sell the property, *at which time* the preemptive right would finally vest.

Under this scenario, the vesting of the Tenant's preemptive right in 2032 - 22 years after the death of the original parties to the Lease - occurs more than 21 years after the death of any life that was in being at the time the Lease was executed in 2009. Accordingly, the provision in the Lease granting the preemptive right is in violation of the common law rule against perpetuities. It does not matter here that the Landlord ultimately agreed upon terms to sell the property within the 21-year period. Rather, the provision was in violation of the rule

against perpetuities from the outset since there was at that time the "possibility" that the right might not vest within the required time. See *Rich, supra*.

The common law rule against perpetuities is grounded in the sound public policy concern regarding unreasonable restraints upon alienation. *Starnes v. Hill*, 112 N.C. 1, 19, 16 S.E. 1011, 1016 (1893); see also *Sandlin v. Weaver*, 240 N.C. 703, 707, 83 S.E.2d 806, 809 (1954) (recognizing that an option to purchase which violates the rule is void as an unreasonable restraint upon alienation). As such, the provision in the Lease granting the Tenant a preemptive right in violation of the common law rule against perpetuities was void *ab initio* and is unenforceable in our courts. *Building Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968) (holding that a void contract "is no contract at all; it binds no one and is a mere nullity"); *Cansler v. Penland*, 125 N.C. 578, 581, 34 S.E. 683, 684 (1899) (stating that "when the court discovers that it is invoked to aid in enforcing an illegal transaction, the court *ex mero motu* will withdraw its hand").

#### IV. Conclusion

Based on the foregoing, we reverse the orders of the trial court entered 29 October 2013 granting Plaintiff summary

judgment and costs; we vacate the 25 April 2014 order denying Defendants' Rule 60(b) motion as moot; and we remand the matter to the trial court, directing it to enter an order granting Defendants' motion for summary judgment on Plaintiff's claims.

REVERSED AND REMANDED in part, VACATED, in part.

Judge DIETZ concurs.

Judge BRYANT concurs in the result only.

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Defendants.

BRYANT, Judge, concurring in result only.

I concur in the result reached by the majority in this opinion. I write separately to emphasize that my concurrence is based on the fact that the result reached in the majority opinion—holding the commercial lease in the instant case to be void—is controlled by *New Bar P'ship v. Martin*, \_\_\_ N.C. App. \_\_\_, 729 S.E.2d 675 (2012).

In *New Bar P'ship*, “we conclude[d] that the USRAP [Uniform Rule Against Perpetuities] did not replace the common law RAP as to preemptive rights arising from nondonative transfers such as that at issue here. As such, the USRAP is inapplicable to this appeal.” *Id.* at \_\_\_, 729 S.E.2d at 683. Due to its reliance on *New Bar P'ship*, the majority opinion concludes that the USRAP is inapplicable to the appeal in the instant case.

I also write separately to express my concern that we should proceed with caution in applying the common law RAP to non-donative transfers, commonly known as commercial leases. When our legislature specifically excluded these types of commercial transactions from the statutory RAP, it reflected an intent that the common law rule "is a wholly inappropriate instrument of social policy to use as a control over such arrangements." *Rich*, 355 N.C. at 194, 558 S.E.2d at 79-80 (citations omitted). Clearly, the legislature was making a distinction between donative transfers and commercial transactions. However, as noted in *New Bar P'ship*, "a preemptive right or a right of first refusal to be valid must not extend beyond the period of the common law RAP". *New Bar P'ship*, \_\_\_ N.C. App. at \_\_\_, 729 S.E.2d at 684 (citation omitted) (holding the right of first refusal violated the common law RAP and, thus, was void). Because the lease in the instant case contained a section that made the preemptive rights under the lease "binding upon and insures [sic] to the benefit of the heirs [and] successors in interest to the parties[,]" it went beyond the period of the common law RAP, and therefore, based on our case law, is void and unenforceable.

Because the instant case cannot be distinguished from *New Bar*, I concur in the result reached by the majority.