

FILED

SEP 21 1978

480

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WRIGHT TREE SERVICE, INC.,

Appellant,

v.

LARRY RHINER, LESLIE RHINER, a/k/a
LESLIE A. RHINER, EDWARD J. RHINER,
RAYMOND W. RHINER, MELBA L. RHINER,
ROY A. RHINER, and IOLA RHINER, and
all the unknown claimants of any right, title
or interest in and to the following-described
real estate, to-wit: Lots 11, 12, 13 and 14
Block 5, Valley Junction, an Official Plat,
now included land forming a part of the
City of West Des Moines, Iowa; and all who
are or may be the heirs, spouses, assigns,
grantees, legatees, devisees, and beneficiaries
of each and all of the above-named defendants,

Appellees.

Filed September 21, 1978

557
2-61073

Appeal from Polk District Court - Thomas S. Bown, Judge.

Plaintiff appeals from an adverse ruling in an action for specific performance of a "right of first refusal" contract to purchase real estate. Affirmed.

Jonathan C. Wilson and Steven L. Nelson, of Thoma, Schoenthal, Davis, Hockenberry & Wine, Des Moines, for appellant.

David H. Goldman and John R. Phillips, of Rogers, Phillips & Swanger, Des Moines, for appellee Melba Rhiner.

Dan Stamatelos and Joyce M. Nixon, of Stamatelos & Smith, West Des Moines, for appellees Larry, Leslie, Edward, Raymond, Roy and Iola Rhiner.

Heard by Donielson, Acting C.J., Snell and Carter, JJ. Oxberger, J., takes no part.

PER CURIAM

Plaintiff-lessee appeals from the decree of the trial court denying its alternative claims for specific performance or money damages for alleged failure of defendants-lessors to honor contractual rights of first refusal for purchase of certain real estate. The matter being tried in equity below we review the case de novo and affirm the trial court's decree.

The claim presented is based upon a contractual provision contained in an agreement of lease between plaintiff and defendants-lessors which provides that plaintiff, as lessee,

[S]hall have the first refusal to purchase the above-described real estate of which the demised premises is a part, at the same price, same terms and conditions as lessor may offer to sell the same to any other person, firm or corporation, and if lessor shall receive a bona fide offer acceptable to lessor, lessor shall notify lessee in writing of the same and of the terms and conditions thereof, together with a copy of said offer, and if lessee shall not agree in writing to purchase the same in accordance with said offer within thirty (30) days from the date of submission of said offer to lessee, then lessee shall have no further right to purchase said property or any portion thereof and lessor shall be free to sell and convey the same to any other person, firm or corporation.

The defendants Larry Rhiner, Edward Rhiner and Leslie Rhiner, as the spouse of Larry Rhiner, are successors in interest to the rights and obligations of the original lessor under the lease. The other defendants are persons and their spouses who purchased the subject real estate from the holders of the lessors' interest for \$20,700, during the term of the lease. It is undisputed that plaintiff was not notified of this transaction and given an opportunity to match the third-party offer prior to consummation of the sale. The issues which we consider on appeal are (1) whether plaintiff is entitled to specific performance of its right of first refusal to purchase the subject real estate; (2) whether, if so, plaintiff's right to such relief is barred by doctrines of estoppel or laches; and (3) whether the sale to third parties involved a different quantity of real estate than that to which plaintiff's rights attach so as to fall within the principles established in *Myers v. Lovetinsky*, 189 N.W.2d 571 (Iowa 1971).

I. Right of specific performance. The contractual right of purchase which is the subject of the present action relates to real estate. This circumstance is sufficient under the law of this state to satisfy requirements of uniqueness necessary to support a

decree of specific performance. See *Moser v. Inorp Sales Corp.*, 256 N.W.2d 900, 907 (Iowa 1977); *Doe v. Collins*, 235 Iowa 22, 24, 15 N.W.2d 833, 885 (1944). This rule applies generally to options to purchase land contained in a lease. See, e.g., *Abdallah v. Abdallah*, 359 F.2d 170, 173 (3d Cir. 1956) and extensive citations therein; Annot. 17 A.L.R.3d 976 at 978. Such right is enforceable against purchasers for value from the lessor if the lessee is in possession. *Abdallah v. Abdallah*, *supra* at 174. The latter rule is based upon principles of inquiry notice and the right is even stronger where, as in the instant case, the lease provision has been recorded under local recording laws.

II. Estoppel. The trial court ultimately found that plaintiff was estopped to assert the instant claim for specific performance. This finding was based upon the fact that within a period of a few months prior to selling the subject premises to the other defendants the defendants-lessors asked plaintiff if it wished to purchase it. Plaintiff indicated that it did not. It is disputed whether on this occasion price was discussed. Plaintiff claimed the lessors asked \$30,000 for the property; the lessors claim no price was discussed and that plaintiff indicated lack of interest at any price.

Whichever version of this transaction is accepted we conclude that there is an insufficient basis upon which to find plaintiff is estopped to assert its rights. When considered in the context of its continuing right to notice of an opportunity to match any third-party offer, plaintiff's action indicated only that it did not want to purchase the property at that time. This decision was made at a time when plaintiff was under no duty to make an election and had no reason to suspect that taking this position would prejudice its rights in the future if it were forced to elect as a result of a bona fide third-party offer to the lessors.

In response to a similar problem the New York Court of Appeals stated in *Cortese v. Connors*, 1 N.Y.2d 265, 135 N.E.2d 28, 29 (1956):

In this informal setting it was not for the landlord or her broker to construe the oral conversation as effectuating a cancellation of the covenant in the long-term written lease, nor may it be deemed tantamount to a waiver or an estoppel, since the condition precedent essential to a discharge of the landlord's obligation was not present, that is, rejection by the tenants of an offer that the landlord was willing to accept — pending which the landlord was in no position to sell to others. Furthermore, it is well settled that the landlord was in no position to call upon the tenants to exercise their option or lose it prior to receipt of a bona fide offer from a third person at a price she was willing to accept.

See also, 2 Friedman on Leases § 15.6 at 639 (1974); Annot. 76 A.L.R. 3d 1139. We hold that plaintiff is not estopped to pursue its claim for specific performance.

III. *Laches*. The doctrine of laches should be applied only where it would be inequitable to permit recovery or it is clearly demanded in the interest of justice. Moser v. Thorp Sales Corp., 256 N.W.2d 900, 908 (Iowa 1977). Defendants seek to predicate their claim of laches on the fact that plaintiff received notice of the transfer of title in April of 1974 and this action was not commenced until November of 1976. We find that defendants' claim of laches fails to satisfy the elements required by Moser v. Thorp Sales Corp., *supra*. Specifically there is no showing by defendants that if the action had been commenced at an earlier date they would have suffered any less detriment. We therefore decline to hold that plaintiff was compelled to commence its action prior to the running of the statute of limitations. See Moser v. Thorp Sales Corp., *supra* at 908.

IV. Lastly, we consider defendants' claim that the sale from the lessors to certain of the defendants for \$20,700 involved a larger quantity of real estate than that which was the subject of plaintiff's contractual rights. If such is the case, defendants contend that specific performance must be denied plaintiff by reason of the holding in Myers v. Lovetinsky, 189 N.W.2d 571 (Iowa 1971). This issue was presented but not decided in the trial court.

Initially, this contention presents a difficult problem of interpreting the language of the lease. The lease provides that plaintiff's right of first refusal applies to "the above-described real estate of which the demised premises is a part." (Emphasis added.) The real estate description which preceeds this language in the lease is that of the leased premises and is as follows:

Lots 11, 12, 13, and 14 Block 5, Valley Junction, an Official Plat, now included in and forming a part of the City of West Des Moines, Iowa. Except an area 75' x 75' SW corner.

Defendants urge that since this is the only description in the lease it follows that this is the only property to which the right of first refusal attaches. The property sold by the lessors to certain of the defendants included all of lots 11, 12, 13 and 14 of the above described property, including the 75' x 75' corner which was excluded from the leased premises. Plaintiff counters by urging that the interpretation proposed by defendant fails to take into account the clear import of the words "of which the

demised premises is a part." That language, plaintiff contends, indicates that the right of first refusal applies to more than the real estate which was the subject of the lease.

While the language upon which plaintiff relies does create some ambiguity, we conclude that defendants' contention is sound. There is only one description of the property to which the right of first refusal might attach. That description embraces only the leased premises. Because (a) the sale from the lessors to the other defendants involved a quantity of land greater than that to which plaintiff's rights attached; and (b) the leased premises were not separately priced; the right of first refusal remained inoperative. See *Myers v. Lovetinsky*, *supra*, at 575. Plaintiff's claims for both equitable relief and money damages were properly denied by the trial court, albeit for the wrong reasons. A decision which is proper on any valid ground may be affirmed on appeal. *Buchhop v. General Growth Properties*, 235 N.W.2d 301 (Iowa 1975); *Swartz v. Bly*, 183 N.W.2d 733 (Iowa 1971).

AFFIRMED.