FILED
MAR 29 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF

DAVID B. McCURNIN,

Appellant,

v.

IOWA REALTY CO., INC.,

Appellee.

Filed March 29, 1978

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2-59565

Appeal from Polk District Court - Anthony M. Critelli, Judge.

Plaintiff appeals from declaratory judgment construing a written lease between the parties. Reversed.

Theodore T. Duffield, of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, of Des Moines, for appellant.

William C. Knapp, of Stewart, Wimer & Bump, P.C., of Des Moines, for appellee.

Heard by Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This appeal involves a dispute between the parties concerning the interpretation of a written lease. Following trial, the court below entered a declaratory judgment adopting defendant's proposed construction of that written instrument. The matter being in equity, our review is de novo. Rule 4, Rules of Appellate Procedure. Because we conclude that the language of the lease clearly supports the construction advocated by plaintiff we reverse the trial court's decree.

The written lease, which is the subject of dispute in the present action, was executed in 1954 between plaintiff, as lessor, and Western Tool and Stamping Co., an Iowa corporation, as lessee. Defendant succeeds to the original lessee's rights under the lease. The lease was for an initial term of 30 years, which has not yet expired. The dispute between the parties concerns future rights of purchase or renewal after the expiration of the initial term.

The parties are in agreement that the lease provides that not less than 18 months before expiration of the initial 30-year term, the lessor shall notify the lessee concerning whether the lessor intends to sell or to re-lease the premises at the expiration of the term. The parties also agree that if the lessor's election is to re-lease, the lessee is to have the privilege of first refusal to lease the premises for an additional period of 12 years, upon terms and conditions specified in the lease. Similarly, it is undisputed that, if the lessor elects to sell the property at the expiration of the initial term, the lessee is granted a privilege of first refusal on the sale for (a) the appraised value of the unimproved land, or (b) the highest price offered by a bona fide third party offeror, whichever sum is greater.[1] If the lessee fails to avail itself of the rights of first refusal available at the expiration of the initial term it is provided that all buildings and improvements placed on the real estate become the property of the lessor.

[1] We construe this language in the lease to mean the price offered by a bona fide third party offeror for the unimproved land.

The dispute between the parties concerns their respective rights in the event the foregoing alternatives result in an additional 12-year renewal of the lease by the lessee. In this event the lease provides:

> If the lessee elects to lease the said premises for the said twelve (12) year period, at the end of the said period the lessee shall have a right of first refusal to purchase or to lease the said premises. At the end of the said twelve (12) year extension, all improvements shall so become the property of the lessor.

The parties are in disagreement over the nature of the "right of first refusal to purchase or to lease" which is available to the lessee at the expiration of a 12-year renewal of the lease. Defendant contends that such right is conferred to it on the same basis as is provided at the expiration of the initial term of the lease: (1) to purchase for the appraised value of the unimproved land or for the price a bona fide third party offeror would pay for the unimproved land; or (2) to re-lease on the same terms and conditions, and for the same period of time (12 years).

Plaintiff contends that the second right of first refusal (applicable at the expiration of a 12-year renewal of the lease) requires defendant, in order to re-lease, to accept a lease on the same terms as offered by a bona fide third party offeror for the land and improvements. Similarly, with respect to a sale, plaintiff contends that the second right of first refusal requires defendant (if it desires the property) to pay a price offered by a bona fide third party offeror for the property and improvements.

We conclude that the trial court erred in adopting defendant's contention that the second right of first refusal accorded the lessee under the lease could be exercised on the same terms and conditions as the initial right of first refusal. The specified terms incident to the initial right of first refusal were stated in the lease immediately following the language which granted such right to the lessee. With respect to the second right of first refusal (both to buy and to lease) no terms are specified and significantly no effort is made to incorporate the former terms by reference. We must consider this circumstance in light of the fact that the term "right of first refusal" has a generally understood meaning consistent with the interpretation advanced by

plaintiff.[2] We therefore hold that plaintiff's proposed interpretation should prevail.[3] Under that interpretation only the first extension of the lease, if any, can properly be characterized as a "twelve (12) year extension." Accordingly, upon the expiration of an initial 12-year extension, all improvements shall become the property of the lessor.[4]

We reverse the decree of the trial court and remand the action for the entry of a declaratory judgment consistent with this opinion and establishing the rights of the parties in a manner consistent with the allegations set forth in paragraph 9 of plaintiff's petition, as amended.

REVERSED.

[2] With respect to both a sale or a lease, a "right of first refusal" is a condition that the owner of the property shall not sell or lease the property without first offering same to the holder of said right on the same terms offered in good faith by a third party offeror. Tamura v. DeIuliis, 203 Or. 619, 281 P.2d 469 (1955); Parker v. Murphy, 152 Va. 173, 146 S.E. 254 (1929). This is sometimes denominated as a "right of preemption." See, e.g., 6 American Law of Property (1952), § 26.64 at 506; Simes and Smith, Law of Future Interests (2d ed. 1956), § 1154 at 60; 1 Corbin on Contracts (1950), § 261 at 858; 4 Restatement, Law of Property (1944), § 393 at 2319; Annot. 34 A.L.R.2d 1158 (1954).

[3] We reach this result from our consideration of the language of the written instrument and without resort to parol evidence. See rule 14(f)(14), R.App.P. To the extent parol evidence was offered at the trial in aid of construction, it is entirely consistent with the result which we reach.

[4] Article VI of the lease contemplates that ownership of the improvements constructed by the lessee may be disposed of elsewhere in the lease. The language of article XVII clearly grants such ownership to the lessor at the end of the 12-year extension.