STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

RICHARD S. TASCH,

Plaintiff,

v

File No. 01-21625-CK
HON. PHILIP E. RODGERS, JR.

MICHAEL NIEDZIELSKI,

Defendant.
/

Mark A. Hullman (P15254)
Attorney for Plaintiff

Paul T. Jarboe (P34343)
Attorney for Defendant

DECISION AND ORDER REGARDING CROSS MOTIONS FOR SUMMARY DISPOSITION

Procedural History

This is a breach of contract action. The Plaintiff Richard S. Tasch ("Tasch") is seeking money damages in the amount of $131,241.00 for lost profits because of the Defendant Michael Niedzielski's failure to complete the purchase of certain real estate. The case was scheduled for final settlement conference on September 6, 2002. Counsel for the parties agreed that the case could not be settled, but could be resolved on cross motions for summary disposition. A briefing schedule was issued. Both parties filed motions for summary disposition and briefs and responded to the other's motion. On October 28, 2002, the Court heard the arguments of counsel and took the matter under advisement. The Court now issues this written decision and order.

Factual Background

In 1959, the Plaintiff's parents, Richard E. Tasch and his wife, purchased a portion of a parcel of real estate on Neahtawanta Point that was owned by John and Anna C. Rae (the "Raes"). At the same time, these parties, who were to become neighbors, entered into a

Reciprocal Option Agreement giving each other the exclusive right, option and privilege of purchasing the interest of the other in said real estate if either of them at any time decided to sell. The agreement contains a provision whereby if one party decides to sell and receives a bona fide offer, the other party must be notified and has 60 days in which to exercise their option to purchase on the same terms. If the party so notified fails or refuses to exercise their option, the agreement becomes null and void and of no further effect. The agreement also contains a provision that "the privilege of purchase hereunder is personal to the parties hereto, is not assignable, and does not survive to the heirs, executors or legal representatives of either party or person."

In the summer of 1999, the heirs of John and Ann Rae (the "Heirs") accepted an offer to purchase the Raes' parcel for $600,000 from Barry and Diane Eckhold (the "Eckholds"). During the title search, the Reciprocal Option Agreement was discovered and the Heirs notified Tasch of the offer. Tasch immediately began looking for a purchaser for the property. The Defendant made an offer to purchase the property for $750,000, of which $600,000 would be paid to the Heirs and $150,000 would to be paid to Tasch.

In October, 1999, Tasch and the Defendant entered into a Buy-Sell Agreement Tasch was to deliver a warranty deed conveying marketable title upon payment of the full purchase price in cash. The Defendant tendered $1,000 earnest money which was retained by the broker. A policy of title insurance in the amount of the purchase price was to be furnished by Tasch "prior to closing." If the title insurance commitment disclosed that the title was unmarketable, Tasch had to cure the defect within 30 days to the Defendant's satisfaction or the Defendant could waive the defect or terminate the agreement "by written notice." The sale was to close on or before October 22, 1999.

Tasch and the Defendant also signed an Agency Disclosure Agreement which indicated that the broker, Ron Willmes of Twin Bay Title, was neither the agent of the seller nor the buyer and was only serving in the capacity of "transaction coordinator."

On October 21, 1999, the parties received notice that a lis pendens was being filed against the property by the Eckholds who were suing the Heirs for specific performance of their purchase agreement. It is undisputed that the Defendant had the necessary funds and was prepared to close on October 22, 1999, but because of the lis pendens the title was not marketable. Upon the advice of his attorney, the Defendant refused to close. The transaction

coordinator returned the earnest money deposit and copies of the Purchase Agreement. Thereafter, Tasch paid the Eckholds $9600 to settle their lawsuit against the Heirs. The lis pendens was ultimately discharged on March 16, 2000.

In May or June of 2000, Tasch advised the Defendant to renew negotiations directly with the Heirs. Negotiations did take place, but the parties never entered into another purchase agreement and the negotiations eventually broke down when a flood plain set back was disclosed along with other environmental issues.

In September of 2000, after the negotiations between the Defendant and the Heirs broke down, Tasch executed a Release of Reciprocal Option Agreement which was recorded on October 11, 2000. The Heirs subsequently sold the property to a third party for $775,000. This action was filed in 2001. Richard E. Tasch passed away in 2002, but assigned his interest in this litigation to his son, Richard S. Tasch, the Plaintiff.

Issues

1. Whether the Buy-Sell Agreement between Tasch and the Defendant is enforceable; and
2. Whether the Reciprocal Option Agreement was in force and effect in 1999.

Law and Analysis

I.

Whether the Buy-Sell Agreement between Tasch and the Defendant is enforceable.

Each side is claiming that the other side defaulted under the Buy-Sell Agreement. Tasch claims that the Defendant defaulted by failing to deposit the funds in escrow as promised so that he could close on the purchase of the property with the Heirs. The Defendant claims that Tasch defaulted because he could not deliver marketable title due to the lis pendens and, he further claims, that he was excused from performing because of the environmental issues.

Tasch relies upon the fact that he only exercised the option after being notified by the transaction coordinator that the Defendant was tendering the money for the purchase in escrow. The Defendant never tendered the money, however, because he was notified that the Eckholds had filed a lis pendens and were suing the Heirs for specific performance of their purchase agreement. Tasch does not deny that he failed to cure the defect in title within the 30 days called

for by the agreement, but he relies upon the fact that, under the agreement, the Defendant had to give him written notice that he was terminating the agreement because of Tasch's failure to cure.

The Buy-Sell Agreement actually provides that: (1) Tasch will furnish a title insurance commitment prior to closing; and (2) if the owner's title insurance commitment discloses title to be unmarketable, Tasch has 30 days to cure or the Defendant may waive the defect or may terminate the agreement by written notice, in which case, selling broker shall return deposit in full.

First, no title insurance commitment was provided prior to closing. Second, the parties were all aware of the lis pendens prior to the closing. Thus, Defendant was justified in refusing to deposit $600,000 in escrow and close on the transaction when Tasch could not deliver marketable title. Since, the title defect was not disclosed through a title insurance commitment provided by Tasch, the provision of the Buy-Sell Agreement requiring the Defendant to notify Tasch in writing if he was going to waive the defect or terminate the agreement when he did not cure within 30 days was not triggered.

It is undisputed that the defect was not cured until March of 2000.[1] After that Tasch admittedly told the Defendant to negotiate directly with the Heirs in order to arrive at acceptable terms and that he could buy Tasch's rights and interest under the Reciprocal Option Agreement for $150,000. At or about this same time, the broker returned the Defendant's $1,000 deposit. For all intents and purposes, the Buy-Sell Agreement between Tasch and the Defendant had been abandoned.

For this reason, the Defendant is entitled to judgment as a matter of law. MCR 2.116(C)(8) and (10).

II.

Whether the Reciprocal Option Agreement was in force and effect in 1999.

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[1] The Eckholds sued the Heirs for specific performance of their Purchase Agreement. Tasch paid $9,600 to settle that suit and get the lis pendens discharged.

Although the parties did not address and argue this issue, the Court believes that the Reciprocal Option Agreement terminated upon the death of the Raes and the Heirs were not obligated to provide notice to Tasch when they received the offer to purchase from the Eckholds.

The Reciprocal Option Agreement was executed in 1959. It was expressly "personal to the parties hereto, is not assignable, and does not survive to the heirs, executors or legal representatives of either party or person." Thus, when the Raes passed away, the Agreement terminated. The Heirs were not under any obligation to give Tasch notice of the Eckholds' offer to purchase. Tasch had no further rights under the Agreement.

In *Brauer v Hobbs*, 151 Mich App 769; 391 NW2d 482 (1986), a purchaser brought an action for breach of contract against a vendor, seeking specific performance of an agreement purported to be an option. The trial court entered a verdict of no cause of action and granted the purchaser's request to quiet title and the vendor appealed. The vendor died during the pendency of the appeal, and her personal representative was substituted as a party. The Court of Appeals held that: (1) the agreement was a first refusal agreement rather than an option; (2) specific performance was not an available remedy to a purchaser; and (3) the first refusal agreement terminated upon the death of the vendor.

> We hold that the right of first refusal agreement terminated upon her death for the reason stated in *Waterstradt v Snyder*, 37 Mich App 400, 402-403; 194 NW2d 389 (1971):
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> > [The agreement] terminated on the death of the [grantor] because it required her personal volitional act in her lifetime. We cite with approval, as did the Supreme Court in [*Old Mission Peninsula School Dist v French*, 362 Mich 546, 551; 107 NW2d 758 (1961)], the general rule:
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> > > 'There is a strong tendency to construe an option or pre-emption to be limited to the lives of the parties, unless there is clear evidence of a contrary intent.'
> >
> > In the instant case, there is no clear evidence of contrary intent. If plaintiff intended to bind the Wilsons' heirs, he should have so provided.

In the instant case, when the Heirs received a bona fide offer to purchase the Raes' property and the Reciprocal Option Agreement surfaced in the research of title, the Heirs gave Tasch notice of the offer, but Tasch had no enforceable right to such notice. Tasch nonetheless attempted to exercise his option and entered into a Buy-Sell Agreement with the Defendant. The

Reciprocal Option Agreement had terminated, however, upon the death of the Raes. Thus, the *Brauer* case further supports the Court's ruling that the Defendant is entitled to judgment.

Conclusion

The Buy-Sell Agreement between Tasch and the Defendant terminated when Tasch could not convey marketable title. In addition, the Reciprocal Option Agreement terminated upon the death of one of the parties thereto. *Brauer v Hobbs, supra.*

The Defendant's motion for summary disposition is granted. The Plaintiff's motion for summary disposition is denied. Within 14 days of the date hereof, counsel for the Defendant shall prepare and submit a judgment consistent with this decision and order. The Defendant is entitled to reasonable attorney's fees and costs, pursuant to paragraph 16 of the Buy-Sell Agreement. Within 14 days of the date hereof, counsel for the Defendant shall prepare and submit an itemized bill of costs.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: S/ 11/15/02