

STATE OF MICHIGAN
COURT OF APPEALS

JEROME H. WILLSON and ELIZABETH A.
ANDRUS,

UNPUBLISHED
February 7, 2006

Plaintiffs/Counterdefendants-
Appellants,

v

JOANNE JULIA STRATTAN and ROBERT
STRATTAN,

No. 258667
Shiawassee Circuit Court
LC No. 01-007147-CH

Defendants/Cross-Defendants/Third-
Party Plaintiffs-Appellees,

and

FRANCES J. KIDD and BARLOW H. KIDD,

Defendants/Counterplaintiffs/Cross-
Plaintiffs-Appellees,

and

CHICAGO TITLE INSURANCE COMPANY,

Third-Party Defendant.

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Plaintiffs Jerome H. Willson and Elizabeth A. Andrus appeal as of right the trial court order denying their motion for summary disposition and granting summary disposition in favor of defendants Joanne Julia Strattan and Robert Strattan (“the Strattans”) and defendants Frances

J. Kidd and Barlow H. Kidd (“the Kidds”)¹ pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

We review de novo a trial court’s decision on a motion for summary disposition. *Rice v Auto Club Ins Ass’n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. *Id.* In reviewing a motion for summary disposition under MCR 2.116(C)(10), the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record in the light most favorable to the nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations in order to demonstrate a genuine issue of material fact for resolution at trial. *Id.* at 31. Summary disposition is properly granted if no factual dispute exists, thereby entitling the moving party to judgment as a matter of law. *Id.*

Additionally, we review de novo the proper interpretation of a contract. *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004). In interpreting a contract, our obligation is to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). We examine the language in the contract and give the words their plain and ordinary meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). “[A]n unambiguous contractual provision is reflective of the parties’ intent as a matter of law,” and “[i]f the language of the contract is unambiguous, we construe and enforce the contract as written.” *Quality Products, supra* at 375.

In 1981, plaintiffs purchased property from Ralph Lovejoy, and were granted an “option to purchase” an adjoining parcel of land for the fixed price of \$850 an acre. The agreement provided that Lovejoy was required to first offer the property to plaintiffs before any sale or transfer of the property could occur. However, the agreement also provided that Lovejoy could transfer the property to his daughter, defendant Joanne Strattan, without first offering it to plaintiffs but that she would be bound to offer the property to plaintiffs in the same manner as Lovejoy would have been required to do. The agreement also provided that its terms and conditions were binding on the heirs and assigns of both parties. The agreement was recorded with the local register of deeds.

Joanne Strattan obtained title to the optioned property following Lovejoy’s death and, apparently unaware of the option agreement, later sold the property to defendants Frances and Barlow Kidd. In 2001, plaintiffs brought suit against Joanne Strattan, her husband Robert Strattan, and the Kidds, requesting the trial court to order defendants to release all claims to the optioned property and allow them to exercise their option to purchase it. Plaintiffs moved for summary disposition under MCR 2.116(C)(10), arguing that the option to purchase ran with the land and that they were entitled to exercise the option against a subsequent purchaser so long as the purchaser was not a bona fide purchaser for value, unaware of the existence of the option. Plaintiffs argued that the Kidds had constructive notice of the option, because it was recorded.

¹ The Strattans and the Kidds are collectively referenced as “defendants.”

The trial court denied plaintiffs' motion for summary disposition, stating that in the absence of a specified period of time, a right of first refusal, like an option agreement, must be construed to be valid for a reasonable period of time. Despite the language in the option agreement that its terms and conditions were binding on the heirs and assigns of both parties, the trial court determined that 20 years was an unreasonable period of time and constituted an unreasonable restraint on alienation. The trial court held that the parties were not bound by the option agreement and granted summary disposition in favor of defendants. We reverse.

We initially conclude that it is immaterial whether the "option to purchase" in this case is characterized as an option or a right of first refusal. "An option is basically an agreement by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time." *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977). A right of first refusal, on the other hand, is a conditional option to purchase dependent upon the landowner's desire to sell. *Brauer v Hobbs*, 151 Mich App 769, 775-776; 391 NW2d 482 (1986); *Ackerman Electrical Supply Co v Koukious*, 16 Mich App 527, 530; 168 NW2d 433 (1969). In *Brauer*, *supra* at 777, this Court stated that both option agreements and rights of first refusal must contain a definite time for performance. Such agreements are not void, however, merely because they lack a specific time for performance. *Id.* at 778. Rather, in the absence of a specified time period, courts will construe agreements "to be for a reasonable period of time," and thus, such agreements are valid only for a reasonable period of time. *Id.* at 777-778. Therefore, it makes no difference whether the agreement at issue in this case is characterized as an option or a right of first refusal. Because the option to purchase lacked a specific time for performance, the trial court was required to determine whether it was exercised within a reasonable time.

In *Brauer*, *supra* at 772, Glenna and Leonard Wilson, husband and wife, sold a parcel of land to the plaintiff in 1976. The parties also stipulated that the plaintiff would have the option to purchase a second parcel. *Id.* at 772-773. The option was for an indefinite time and the Wilsons retained the power to call the option at any time. *Id.* at 773. In 1981, after Leonard Wilson's death, Glenna Wilson revoked the option agreement. *Id.* The plaintiff sought specific performance of the option agreement, and Glenna Wilson counterclaimed to quiet title. *Id.* The trial court entered a verdict of no cause of action regarding the plaintiff's claim and granted Glenna Wilson's request to quiet title. *Id.* The trial court found that the agreement was not an option contract and was void because it was for an indefinite period of time. *Id.* During the pendency of the appeal, Glenna Wilson died and the personal representative of her estate was substituted as the defendant. *Id.* at 773 n 1.

On appeal, this Court agreed with the trial court that the agreement was not an option contract but rather a right of first refusal, valid only for a reasonable period of time. *Id.* at 775-776, 778. This Court stated that it would ordinarily remand for a determination of what period of time was reasonable under the circumstances, but that the right of first refusal terminated on Glenna Wilson's death. *Id.* at 778-779. This Court explained that absent clear evidence of contrary intent, option agreements are generally limited to the lives of the parties because such agreements require a personal volitional act on the part of the grantor. *Id.* at 779. This Court held that if the plaintiff intended the right of first refusal to bind the Wilsons' heirs, he should have included a provision to that effect in the agreement. *Brauer*, *supra* at 779. Because no

clear evidence of contrary intent existed, this Court affirmed the trial court's denial of the plaintiff's request for specific performance and grant of the defendant's request to quiet title. *Id.*

Here, the option to purchase evidences a clear intent to bind the heirs of Ralph Lovejoy and Joanne Strattan. It specifically states that in the event that Lovejoy transfers the property to Joanne Strattan, she "shall also be bound to offer said property to Optionee in the same manner as Optionor would [sic] have been required to do." The option agreement further provides that all terms and conditions of the option "are binding on the heirs and assigns of both parties" and that "this covenant is intended and does run with the property until such time as Optionee specifically releases said covenant in writing." Accordingly, this case is distinguishable from *Brauer* in that here, Lovejoy and plaintiffs specifically indicated in the agreement their clear intent that the option run with the land and bind all of their heirs.

Although the trial court acknowledged that the option to purchase purported to bind the heirs of the contracting parties, the court nevertheless determined that 20 years was "too long a time period [sic] for a court of law to regard it as a reasonable time." The trial court erred by disregarding the unambiguous language binding Lovejoy's and plaintiffs' heirs. Given the clear intent to bind the heirs of the contracting parties, the 20-year time period was not an unreasonable amount of time in which to exercise the option or right of first refusal.

Plaintiffs also argue that the trial court erred in concluding that the option to purchase constituted an unreasonable restraint on alienation. We agree. "Michigan follows the common-law rule against unreasonable restraints on alienation of property."² *LaFond v Rumler*, 226 Mich App 447, 451; 574 NW2d 40 (1997). A restraint on alienation is "an attempt by an otherwise effective conveyance or contract to cause a later conveyance (1) to be void, (2) to impose a contractual liability upon the conveyor for conveying in breach of the agreement not to convey, or (3) to terminate all or part of a conveyed property interest." *Stenke v Masland Dev Co, Inc*, 152 Mich App 562, 567; 394 NW2d 418 (1986). Michigan has adopted a flexible approach regarding restraints, and a restraint on alienation will not be enforced unless it is determined to be reasonable in a particular case. *Nichols v Ann Arbor Fed S & L Ass'n*, 73 Mich App 163, 168; 250 NW2d 804 (1977).

Plaintiffs contend that neither an option nor a right of first refusal constitutes a restraint on alienation. Indeed, Michigan cases support this position. See, e.g., *Lantis v Cook*, 342 Mich 347, 356-358; 69 NW2d 849 (1955); *Stenke, supra* at 569. Defendants argue that the trial court did not find that the option to purchase constituted an unreasonable restraint on alienation by its very nature, but that considering the predetermined price, the lack of a definite term, and the attempt to enforce the option after 20 years, the trial court determined that the circumstances rendered the option unenforceable. It appears from the trial court's oral ruling that it focused primarily on the fact that 20 years had elapsed before the attempted exercise of the option and that the option was for an indefinite period of time. As discussed previously, the trial court erred by disregarding the unambiguous language of the option to purchase and by determining that the

² By enacting 1949 PA 38, the Legislature repealed Michigan's statutory rule against restraints on alienation. *Moffit v Sederlund*, 145 Mich App 1, 12; 378 NW2d 491 (1985).

20-year time period was an unreasonable amount of time in which to exercise the option or right of first refusal. Accordingly, these factors do not constitute unreasonable restraints on alienation and are reasonable in the context of this case. *Nichols, supra* at 168.

Further, an option or right of first refusal does not constitute a restraint on alienation in Michigan where a predetermined price is set. *Lantis, supra* at 349, involved an option or right of first refusal which specified a predetermined sale price. The issue presented was whether this clause constituted a restraint on alienation. *Id.* at 350, 356. Our Supreme Court stated that a pre-emptive option, i.e., a “first-right-to-buy option” that arises merely when an optionor desires to sell, which contains a fixed price, is not void in Michigan. *Id.* at 356-357. The Court explained that while “[p]ractical alienability might, in some instances, be restrained by such a contract, [] its primary purpose is to enable a particular person to buy, not to prevent any one from selling; and doubtless the owner could alienate his property subject to the option if he wished.” *Id.* at 357, quoting 2 Simes, *Future Interests*, § 462, pp 304-305. The Court concluded that the option was not a direct restraint on alienation and that it was therefore valid.³ *Id.*

In accordance with *Lantis*, the option to purchase at issue here does not constitute a restraint on alienation merely because it specified a predetermined price. The clear intent of the contracting parties, Lovejoy and plaintiffs, was to enable plaintiffs to purchase the property if Lovejoy or Joanne Strattan desired to sell it, and the “purchase price” provision clearly specifies a price of \$850 an acre. The fact that the option to purchase contains a predetermined price does not render it a restraint on alienation. *Lantis, supra* at 357.

Plaintiffs further argue that they may exercise their option against the Kidds, the subsequent purchasers of the property, because the Kidds are not bona fide purchasers for value. We decline to review this unpreserved issue which the trial court did not expressly consider. *Bombalski v Auto Club Ins Ass’n*, 247 Mich App 536, 546; 637 NW2d 251 (2001). Rather, we reverse the trial court order granting summary disposition in favor of defendants on the basis that the option to purchase constituted an unreasonable restraint on alienation and was unenforceable because of the 20-year time period preceding the attempted exercise of the option, and remand for further proceedings.

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White

³ The Court went on to state that even if the option was not a pre-emptive option because it was conditioned on the optionors no longer wishing to use the property as a home, “[s]uch an option, exercisable upon the happening of a condition precedent, is not regarded as a direct restraint on alienation and is everywhere held valid even though it specifies a fixed price” *Lantis, supra* at 357-358.