[Cite as *Wargo v. Henderson*, 2009-Ohio-2443.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JACOB S. WARGO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 08-CO-21
	)	
RANDALL G. HENDERSON,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas of Columbiana County, Ohio Case No. 2005CV1061

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: May 20, 2009

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DONOFRIO, J.

{¶1} Defendant-appellant, Randall Henderson, appeals from a Columbiana County Common Pleas Court judgment granting plaintiff-appellee, Jacob Wargo, the right to purchase appellant's real estate based upon a Real Estate Purchase Option Agreement.

{¶2} On May 18, 2001, the parties entered into a loan agreement. Appellee was the lendor and appellant was the lendee for the loan of $45,000, plus interest. The parties executed a promissory note (Note), a mortgage deed for appellant's property to secure the loan (Mortgage), and a Real Estate Purchase Option Agreement (Option Agreement).

{¶3} Appellant defaulted on the Note. This fact is not in dispute. Appellee initiated the present action to foreclose his mortgage lien on appellant's property on October 27, 2005.

{¶4} Appellant transferred the property to Steven and Jocelyn Henderson, his son and daughter-in-law, in September 2006. They arranged for financing to pay off the Note through Farm Credit Services. A check was then issued to appellee to pay off the Note. However, appellee refused to negotiate the check. Appellee argued that the transfer from appellant to his son and daughter-in-law was in violation of the Option Agreement and triggered his right to purchase the property.

{¶5} The Option Agreement provides in pertinent part:

{¶6} "2. In consideration of a certain note and mortgage executed between the parties and the payment of $10.00 and other good and valuable consideration, the receipt of which is hereby acknowledged by Owner, the Owner hereby grants to the Purchaser the exclusive right and option to purchase the aforedescribed real estate, together with all improvements thereon and all easements and appurtenances for the benefit thereof, specifically according to the terms and conditions contained in this Purchase Option Agreement.

{¶7} "3. This option may be exercised by the Purchaser by giving written notice of the exercise of this Option to the Owner, or to the Agents/Executor/Administrator/Legal Representative of the Owner within 30 days from the date of occurrence of either of the following conditions: the death of the

Owner; notice, from the Owner, of the Owner's intent to sell said real estate during the Owner's lifetime.

{¶8} "4. In the event the Owner determines to sell said real estate during his lifetime, the Owner shall give written notice thereof to the Purchaser."

{¶9} Appellee next filed an amended complaint adding Steven and Jocelyn Henderson, the County Treasurer, and Farm Credit Services as defendants.

{¶10} Appellant and appellee later reached an agreement concerning the other parties. Per the agreement, Farm Credit Services cancelled and released the note and mortgage from Steven and Jocelyn Henderson. Farm Credit was then dismissed from the proceedings. The court subsequently found that Steven and Jocelyn Henderson transferred any interest in the subject property back to appellant. Therefore, because Steven and Jocelyn Henderson no longer claimed an interest in the property, the court dismissed them from the lawsuit. The court also noted that the Columbiana County Treasurer was a party to the lawsuit only as to a claim for real estate taxes.

{¶11} The trial court considered the parties' arguments and issued a judgment entry in favor of appellee. The court first summed up the parties' arguments:

{¶12} "In summary, Plaintiff argues that Henderson sold the property in violation of the Plaintiff's rights which triggered Plaintiff's right to exercise his option to purchase the real estate pursuant to the terms of the Option Agreement.

{¶13} "* * *

{¶14} "Defendant argues that the transfer of the property by Defendant Randall G. Henderson to Stephen G. Henderson and Jocelyn R. Henderson was not really a sale but a condition of a loan required by Farm Credit Services which was providing the financing to payoff the Plaintiff's Promissory Note and Mortgage. Defendant argues that his equity of redemption supersedes Plaintiff's contractual Option/First Right of Refusal."

{¶15} The trial court found that while there is an equity of redemption in favor of a mortgagor, it does not supersede the contractual right at issue in this case. The

court stated that it could not ignore appellant's sale of the property. Thus, the court found that appellee was permitted to exercise the option to purchase appellant's real estate.

{¶16} Appellant filed a timely notice of appeal on June 18, 2008. The trial court subsequently granted a conditional stay of its order pending this appeal

{¶17} The parties filed an agreed statement of facts in lieu of a transcript pursuant to App.R. 9(D), which was approved by the trial court.

{¶18} Appellant raises a single assignment of error, which states:

{¶19} "THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DETERMINING THAT PLAINTIFF-APPELLEE IS ENTITLED TO SPECIFIC PERFORMANCE OF THE REAL ESTATE OPTION TO PURCHASE AGREEMENT, THAT IMPERMISSIBLY INTERFERED WITH APPELLANT'S RIGHT TO THE EQUITY OF REDEMPTION."

{¶20} Appellant argues that the right to redeem is an incident of every mortgage. He contends that the right of redemption is an absolute right until confirmation of the sale. Appellant states that equity allows for redemption after a default, known as "equity of redemption."

{¶21} Appellant argues that a mortgagor cannot bind himself not to assert the right of equity of redemption at the time he enters into a mortgage. He asserts that the right of redemption is an inseparable part of the mortgage and cannot be restrained by any agreements.

{¶22} Appellant further argues that because the Note, Mortgage, and Option Agreement were all executed contemporaneously with each other, appellee cannot enforce the Option Agreement. He points out that he retained a redeemable estate, as the Option Agreement provides:

{¶23} "6. This Purchase Option Agreement shall terminate and become null and void upon the full payment and satisfaction of a certain Note and Mortgage Deed executed by the parties at the same time as and contemporaneously with this Agreement."

{¶24} Appellant argues that because the Option Agreement became a nullity upon full payment, the purpose of the Option Agreement was to interfere with his right to the equity of redemption. Appellant contends that appellee's intention in entering into the Option Agreement was to thwart attempts by appellant to redeem his real estate in the event of default. However, he argues that this is in contravention of long-established law. He asserts that finding the Option Agreement unenforceable and permitting him to redeem his property from the mortgage would put the parties in the position for which they bargained: appellee would receive his principal and interest and appellant would retain his real estate.

{¶25} In response, appellee argues that per the terms of the Option Agreement, appellant was required to give him written notice in the event that appellant planned to sell the real estate. Therefore, because appellant transferred the real estate, appellee contends the Option Agreement's terms were triggered and he should have been given the right to exercise his option to purchase the real estate. Appellee argues that appellant's decision not to pay on the Note and Mortgage was tantamount to a decision to sell the real estate either by voluntary disposition or by order of sale.

{¶26} Appellee asserts that appellant's arguments ignore the facts that (1) the parties entered into a legally binding Option Agreement and that (2) the real estate did not proceed to foreclosure, therefore, the issue of redemption, appellee argues is irrelevant. Appellee argues that if we were to accept appellant's argument, no option agreement or right of first refusal would ever be enforceable. Under appellant's reasoning, appellee argues, any property owner who has entered into an option agreement could void the agreement by permitting the property to go into foreclosure and then asserting a right of equitable redemption.

{¶27} Appellant is asserting a claim here for equitable relief. We review claims for equitable relief under the abuse of discretion standard of review. *McCarthy v. Lippitt*, 150 Ohio App.3d 367, 2002-Ohio-6435, at ¶22. Abuse of discretion connotes more than an error of law; it implies that the trial court's judgment was

arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶28} Neither party cites to any case law to support their position. Thus, to begin this analysis, some background law on mortgages, the equitable right of redemption, and option agreements is helpful.

{¶29} "In Ohio, a mortgagor's right to redeem is 'absolute and may be validly exercised at any time prior to the confirmation of sale.' *Women's Fed. Sav. Bank v. Pappadakes* (1988), 38 Ohio St.3d 143, 146, 527 N.E.2d 792, 795. This right is dual in nature, arising both from equity and statute. The mortgagor's 'equity of redemption' is typically cut off once a mortgagee seeks and is granted a decree of foreclosure. Generally, a common pleas court grants the mortgagor a three-day grace period to exercise the 'equity of redemption,' which consists of paying the debt, interest and court costs, to prevent the sale of the property. See Hausser & Van Aken, Ohio Real Estate Law and Practice (1993) 744, Section 53.01(D)." *Hausman v. Dayton* (1995), 73 Ohio St.3d 671, 676, 653 N.E.2d 1190

{¶30} A mortgagor's statutory right of redemption stems from R.C. 2329.33, which provides:

{¶31} "In sales of real estate on execution or order of sale, *at any time before the confirmation thereof,* the debtor may redeem it from sale by depositing * * * the amount of the judgment or decree upon which such lands were sold, with all costs * * *. The court of common pleas thereupon shall make an order setting aside such sale * * *." (Emphasis added.)

{¶32} Thus, the equitable right of redemption applies when the property is in foreclosure but the court has yet to issue a confirmation of sale.

{¶33} An option agreement, such as the one in the case bar, " 'has been defined as an agreement by which a person binds himself to perform a certain act, usually to transfer property, for a stipulated price within a designated time, leaving it to the discretion of the person to whom the option is given to accept upon the terms specified.' Annotation, Necessity for Payment or Tender of Purchase Money Within

Option Period in Order to Exercise Option, in Absence of Specific Time Requirement for Payment (1976), 71 A.L.R.3d 1201, 1208-09, Section 4. Thus, 'an option is an agreement to keep an offer open for a specified time; it limits the customary power of an offeror to revoke his offer prior to its acceptance.' *Ritchie v. Cordray* (1983), 10 Ohio App.3d 213, 215. The option agreement is separate and independent from the underlying agreement to sell, and the underlying agreement does not become binding until its terms are accepted. *Id.*" *In re Estate of de Saint-Rat*, 12th Dist. No. CA2007-02-052, 2008-Ohio-2109, at ¶10.

{¶34} The Option Agreement is a contract between appellant and appellee. "In construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties." *Aultman Hosp. Ass'n. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins.Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus.

{¶35} As set out above, the Option Agreement clearly provides that if appellant intends to sell the property, he is to give appellee notice of this intent. Appellee is to then have 30 days to exercise his option to purchase the property at the predetermined price. The Option Agreement is clear and unambiguous. When the parties entered into the Option Agreement, they intended that if appellant were to ever sell the property, appellee was to have the first option to buy it.

{¶36} Thus, this court must determine whether the trial court abused its discretion in concluding that appellant triggered the option when he conveyed the property to his son and daughter-in-law. The trial court acknowledged that there is an equity of redemption in favor of a mortgagor. However, it concluded that this equity of redemption does not supersede appellee's contractual right under the Option Agreement. The court reasoned:

{¶37} "Essentially, the Defendant asks this Court to ignore an actual sale of the property and to adopt a rule that can be stated as follows: 'Where as here, a sale

by a mortgagor of real estate subject to an option, turns out to be invalid because of the doctrine of lis pendens, the reconveyance of the property from the purported purchasers to the mortgagor fails to trigger the Option/First Right of Refusal of a mortgagee.' This Court declines to adopt such a convoluted rule."

{¶38} In determining whether the trial court abused its discretion, an examination of *Panagouleas Interiors, Inc. v. Silent Partner Group, Inc.*, 2d Dist. No. 18864, 2002-Ohio-1304, is helpful. In *Panagouleas*, the Second District, in analyzing an option agreement, cited to an old Ohio Supreme Court case as follows:

{¶39} "In *Shaw v. Walbridge* (1877), 33 Ohio St. 1, the Ohio Supreme Court held that:

{¶40} "[t]here is no rule of law which prevents a mortgagor from disposing of his equity of redemption to a mortgagee by private arrangement, but courts of equity will not permit a mortgagee to take advantage of his position so as to wrest from the mortgagor his equity, by an unconscionable bargain. The transaction will be jealously scrutinized, but if the agreement is a fair one, under all the circumstances of the case, it will be upheld.

{¶41} "*Id.* at paragraph 2 of the syllabus. In explaining this concept, the court stressed that:

{¶42} "[i]t is true that at the time the mortgage is made no agreement can be made to deprive the mortgagee of his right to redeem. * * *

{¶43} "But it is equally true that he may subsequently part with this right and the rule on the subject may be thus stated: Courts will scrutinize such a transaction, and will not allow the mortgagee to take any undue advantage; he will not be allowed to use his position as creditor to oppress, or to drive an unconscionable bargain. But where such a sale is a fair one, under all the circumstances, it will be upheld.

{¶44} "*Id.* at pp. 5-6 (citations omitted)." (Emphasis added.) Id.

{¶45} The Second District concluded that under *Shaw*, the parties could not enter into an agreement at the time of the mortgage that would deprive the mortgagor of his right to redeem. Id. In that case, the parties executed the note and mortgage

on the same day as an agreement to escrow a deed in lieu of foreclosure. The court found that without the deed in lieu of foreclosure, the mortgagee would not have provided the financing to the mortgagor. The court noted that all of the documents were signed as a part of the same transaction. It then pointed to general contract law that documents executed as part of the same transaction should be read together. Id. citing *Edward A. Kemmler Memorial Found. v. 691/733 East Dublin-Granville Road Co.* (1992), 62 Ohio St.3d 494, 499, 584 N.E.2d 695. It continued:

{¶46} "No matter how the transaction was structured, the fact is that SPG was loaning Corona the money for the down payment on the hotel. As a condition of the loan, SPG required Corona to forfeit his equity of redemption. However, this was not permissible under established law. Compare *Lewis Broadcasting Corp. [v. Phoenix Broadcasting Partners (1998),* 232 Ga.App. 94] 502 S.W.2d (sic.) [254] at 256 (option agreement executed as part of a loan transaction is not a "subsequent agreement" and is unenforceable as an invalid restraint on equity of redemption)." Id.

{¶47} One notable difference exists between the case at bar and *Panagouleas.* In the case at bar, the parties entered into an Option Agreement. Appellant did not execute a deed in lieu of foreclosure, as was the case in *Panagouleas.* Thus, in *Panagouleas*, if the mortgagor defaulted on the note, the mortgagee could take title to the property without instituting foreclosure proceedings. And, as stated above, the institution of foreclosure generally gives rise to the equity of redemption. Such could not occur in this case. In fact, appellee did institute foreclosure proceedings against appellant.

{¶48} But we can nonetheless glean valuable points of law from *Panagouleas.* Notably, a mortgagor can contract away his equity of redemption as long as it is not part of an unconscionable bargain. Additionally, the court examining the bargain must scrutinize the agreement and uphold it if, under all the circumstances, the agreement is fair. The court must examine the circumstances to determine whether the mortgagee used its position as a creditor to oppress the mortgagor or to force the mortgagor into an unfair bargain.

{¶49} This case presents a contractual issue. The parties executed the Note, Mortgage, and Option Agreement on May 18, 2001. The Option Agreement states that the consideration for the Option is "a certain note and mortgage executed between the parties and the payment of $10.00 and other good and valuable consideration." Thus, appellant received good consideration for the Option. The Option was both clear and fair. There is no indication whatsoever in the record that the Option was unconscionable or that appellee in any way oppressed appellant or pressured him into contracting away his equity of redemption.

{¶50} Moreover, appellant triggered the Option when he transferred the property to his son and daughter-in-law. Steven and Jocelyn Henderson purchased the subject property. This sale occurred without notice to appellee, as was required by the Option. Thus, appellant breached the terms of the contract. Appellee was never afforded the benefit of the Option, which he had bargained for.

{¶51} Consequently, we cannot conclude that the trial court abused its discretion in granting appellee the right to purchase appellant's property in accordance with the Option Agreement.

{¶52} Accordingly, appellant's sole assignment of error is without merit.

{¶53} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, P.J., concurs.
DeGenaro, J., concurs.