SUMMARY
July 18, 2024

2024COA76

No. 23CA2005, *Quarky, LLC v. Gabrick* — Real Property — Common Interest Communities — Right of First Refusal

In this real property dispute among neighbors in a multi-unit condominium complex, a division of the court of appeals determines whether a current owner's offer to purchase a fellow owner's unit constitutes a third-party offer that triggers a right of first refusal held by the remaining owners under the complex's governing declaration. Based on the declaration's terms and decisions from other jurisdictions that have confronted the issue, the division concludes the answer is "no." The division holds that, absent specific language in the declaration or other instrument containing the right of first refusal, a condominium unit owner who offers to purchase a selling owner's unit is not a third party whose offer triggers a right of first refusal held by the remaining owners.

COLORADO COURT OF APPEALS **2024COA76**

Court of Appeals No. 23CA2005
Pitkin County District Court No. 22CV30096
Honorable Christopher G. Seldin, Judge

Quarky, LLC, a Texas limited liability company,

Plaintiff-Appellant,

v.

Norman M. Gabrick,

Defendant-Appellee,

and

Han Sarah Glickman,

Intervenor-Appellee.

JUDGMENT AFFIRMED

Division II
Opinion by JUDGE SULLIVAN
Fox and Grove, JJ., concur

Announced July 18, 2024

Husch Blackwell, LLP, Jamie Steiner, Richard A. Illmer, Denver, Colorado, for Plaintiff-Appellant

Peck.Feigenbaum, P.C., Daniel J. Sullivan, Basalt, Colorado, for Defendant-Appellee

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¶ 1 This real property dispute among neighbors in a multi-unit condominium complex requires us to resolve a narrow question — does a current owner's offer to purchase a fellow owner's unit constitute a third-party offer that triggers a right of first refusal (ROFR) held by the remaining owners under the complex's governing declaration? Based on the declaration's terms and decisions from other jurisdictions that have confronted this issue, we conclude the answer is "no." We therefore affirm the district court's grant of summary judgment in favor of intervenor, Han Sarah Glickman, and against plaintiff, Quarky, LLC.

I. Background

¶ 2 The Silver-Glo condominiums in Aspen are governed by a declaration recorded by the original declarants in 1970. The declaration contains a ROFR in favor of the current owners. The ROFR requires any selling owner who has received a bona fide offer from a "prospective purchaser, lessee, or tenant" to first offer to sell their unit on the same terms and conditions to the remaining Silver-Glo owners.

¶ 3 In 2022, Glickman, Quarky, and defendant, Norman M. Gabrick, each owned individual Silver-Glo condominium units.

Glickman entered into a contract with Gabrick to purchase Gabrick's unit for $1,075,000. Consistent with the declaration, the Title Company of the Rockies (the title company), overseeing the purchase and acting as the closing agent, sent notice of Glickman's offer to all Silver-Glo unit owners on October 4, 2022. Glickman and Quarky both received the notice, which advised the owners that they had twenty days, or until October 24, to exercise their ROFR in accordance with the declaration. The next day, Glickman paid the title company a down payment of $55,640 as required by her contract with Gabrick.

¶ 4 Even though she was the original offeror, Glickman decided to exercise her own ROFR as an existing Silver-Glo owner out of an abundance of caution. On October 7, Glickman filled out the blank ROFR form that accompanied the title company's notice and provided it to the title company. On October 10, still within the twenty days required by the title company's notice, Quarky similarly notified the title company that it was exercising its ROFR to purchase Gabrick's unit; Quarky tendered a matching $55,640 down payment to the title company two days later.

¶ 5 Both Glickman and Quarky then took additional actions to attempt to complete their purchases of Gabrick's unit. Quarky wired the title company the full purchase price for Gabrick's unit on October 19. Soon after, on November 1, Glickman executed and delivered closing documents to the title company and tendered payment in full.

¶ 6 Quarky filed this lawsuit and a notice of *lis pendens* against Gabrick while the title company's twenty-day notice period was still open, seeking specific performance and claiming that Gabrick was legally obligated to sell the property to it and not Glickman.[1] Glickman moved to intervene, which the district court allowed, and sought a declaratory judgment that she alone was entitled to purchase Gabrick's unit.

¶ 7 After Quarky and Glickman filed cross-motions for summary judgment, the district court issued a detailed written order entering summary judgment for Glickman. The court first noted that the

[1] For his part, Gabrick informed Quarky before litigation commenced that he wouldn't sell the unit to Quarky because Glickman was the first to validly exercise her ROFR. Gabrick switched positions during the lawsuit, however, and urged the court to rule in Quarky's favor. On appeal, Gabrick takes no position and "disclaims any interest" in the outcome.

declaration doesn't specify who prevails when multiple owners attempt to exercise their ROFR to purchase a seller's unit. Nor does the declaration explain, the court added, "how to handle situations where a current owner is both [the] initial purchaser and first-position purchaser under the ROFR." The court ultimately sided with Glickman because she was the first to exercise her ROFR. The court explained that Quarky's position would "penalize Silver-Glo owners who invest the time and energy to negotiate an initial purchase, and reward owners who make no such investment."

¶ 8 Quarky now appeals. Quarky contends the district court erred by granting summary judgment for Glickman because (1) a ROFR is only exercisable by a person who isn't already a party to the contract subject to the ROFR; and (2) it strictly complied with the declaration's ROFR requirements while Glickman didn't, thus entitling it to purchase Gabrick's unit.

II. Right of First Refusal

¶ 9 We first address a dispositive threshold issue raised by Glickman — whether her offer to purchase Gabrick's unit constituted a third-party offer that triggered Quarky's ROFR. Because we conclude that it didn't qualify as one, we agree with the

district court that Glickman was entitled to summary judgment, albeit for a different reason. *See Neher v. Neher*, 2015 COA 103, ¶ 33 (stating an appellate court "can affirm a trial court's ruling for any reason supported by the record").

A. Standard of Review

¶ 10 We review a district court's decision to grant or deny summary judgment de novo. *Griswold v. Nat'l Fed'n of Indep. Bus.*, 2019 CO 79, ¶ 22; *Filatov v. Turnage*, 2019 COA 120, ¶ 9. Summary judgment is appropriate only where no genuine issues of material fact are disputed, and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Filatov*, ¶ 9.

¶ 11 Similarly, we interpret the terms of a condominium declaration de novo. *Francis v. Aspen Mountain Condo. Ass'n*, 2017 COA 19, ¶ 9. We apply principles of contract interpretation, seeking to ascertain and give effect to the intentions of the party or parties who created the instrument. *802 E. Cooper, LLC v. Z-GKids, LLC*, 2023 COA 48, ¶¶ 20-21. We ascertain the parties' intent primarily from the language of the instrument itself, giving terms their plain and ordinary meanings. *Id.*; *Francis*, ¶ 9. We construe the instrument as a whole and seek to harmonize and give effect to all

provisions so that none are rendered meaningless. *Pulte Home Corp. v. Countryside Cmty. Ass'n*, 2016 CO 64, ¶ 23. We don't allow hypertechnical readings of a contract to defeat the parties' intentions, *Ad Two, Inc. v. City & Cnty. of Denver*, 9 P.3d 373, 377 (Colo. 2000), nor do we interpret a contract to yield an absurd result, *EnCana Oil & Gas (USA), Inc. v. Miller*, 2017 COA 112, ¶ 28.

B. Applicable Law

¶ 12 "The purpose of a condominium declaration providing for a preemptive option for unit owners is to give the unit owners an opportunity to purchase which is equal to that of third parties." *Id.* (citing *Sports Premiums, Inc. v. Kaemmer*, 42 Colo. App. 172, 176, 595 P.2d 696, 699 (1979)). When a property is burdened with a ROFR, the "general rule" is that the property owner is contractually obligated to offer the property to the ROFR holder on the same terms and conditions as those contained in the third-party offer made to the owner. *Parry v. Walker*, 657 P.2d 1000, 1002 (Colo. App. 1982) (quoting *Nw. Television Club, Inc. v. Gross Seattle, Inc.*, 612 P.2d 422, 425 (Wash. Ct. App. 1980)). We strictly construe a ROFR, *Kaiser v. Bowlen*, 200 P.3d 1098, 1103 (Colo.

App. 2008), and strict compliance with its terms is required for its exercise, *Sports Premiums*, 42 Colo. App. at 176, 595 P.2d at 699.

C. Additional Background

¶ 13 The Silver-Glo declaration, in section 27, contains a ROFR in favor of the existing unit owners. Section 27 states:

> *Right of First Refusal by Owners*. In the event any owner of a condominium unit other than the Declarants shall wish to sell, lease, or rent a condominium unit and shall have received a bona fide offer therefore from a prospective purchaser, lessee or tenant, the remaining unit owners shall be given written notice thereof together with an executed or machine copy of such offer. Such notice and a copy thereof shall be delivered to the Board of Managers who shall notify each of the owners of such notice and offer. One or more of the Unit owners, acting individually or through another owner or owners, shall have the right to purchase, lease or rent the subject condominium unit upon the same terms or conditions as set forth in the offer; provided that during the twenty (20) day period immediately following the notice, written notice of such election to purchase, lease or rent is given to the selling, leasing or renting owner and a matching down-payment or deposit is paid to an escrow agent. Closing shall take place ten (10) days thereafter.

¶ 14 Section 1.2 of the declaration defines "owner" as "a person, firm, corporation, partnership, association or other legal entity, or

any combination thereof, who owns one or more condominium units."

D. Analysis

1. Declaration Terms

¶ 15 The declaration in section 27 states that the ROFR held by the Silver-Glo unit owners is triggered when a unit owner receives a "bona fide offer" from a "prospective purchaser, lessee or tenant." The declaration doesn't define "prospective purchaser," which appears only twice throughout, both times in section 27.

¶ 16 In contrast, the declaration specifically defines "owner" in the definitions section and uses the term repeatedly, including in section 27's ROFR provisions. Section 27 explains, for example, that once "any owner" receives a bona fide purchase offer, the "remaining unit owners" shall be given written notice of the offer. Those "[u]nit owners, acting individually or through another owner or owners," shall have the right to purchase the selling owner's unit on the same terms and conditions as set forth in the offer, provided that notice is given to the "selling, leasing or renting owner" within twenty days and the owner exercising their ROFR makes a matching down payment.

¶ 17 "Owner," however, is conspicuously absent from the enumerated list of offerors who can trigger the ROFR held by the remaining owners. Given the declaration drafters' prevalent use of "owner" elsewhere in the declaration, including in section 27, the drafters knew how to specify that an owner's offer to purchase another Silver-Glo owner's unit triggers the ROFR. But they didn't.[2] Mindful of the principle that the inclusion of certain items implies the exclusion of others, we conclude that the drafters' omission of the defined term "owner" from the list of offerors that can trigger the ROFR was purposeful.[3] *See DA Mountain Rentals, LLC v. Lodge at*

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[2] We note that the ROFR in section 27 is almost identical to the boilerplate language used in 2B Clark A. Nichols, *Nichols Cyclopedia of Legal Forms Annotated* § 44:36(25), Westlaw (database updated Nov. 2023), with one important difference. The boilerplate ROFR in *Nichols* states, "In the event any owner of a condominium unit other than the declarant shall wish to sell or lease the unit, and shall have received a bona fide offer from a prospective purchaser or tenant, *including an offer from another owner*, the selling or leasing owner shall give written notice to the remaining owners together with a copy of such offer and the terms." *Id.* (emphasis added). The Silver-Glo declaration drafters' omission of the emphasized language in section 27 is further evidence that they didn't intend an owner's offer to purchase another owner's unit to trigger the ROFR.

[3] We recognize, as Quarky argues, that the declaration contains two sections that specifically exempt certain transfers from the ROFR in section 27, and neither mentions a sale from one current owner to another. But because section 27's ROFR isn't triggered by a

Lionshead Phase III Condo. Ass'n, 2016 COA 141, ¶ 25 (applying the rule of *expressio unius est exclusio alterius* to the interpretation of a condominium declaration); *cf. State Farm Mut. Auto. Ins. Co. v. Stein*, 940 P.2d 384, 388 (Colo. 1997) (using bold typeface for a defined term in one section of an insurance policy but omitting the bold typeface for the same word in another section indicated the parties' intent to ascribe different meanings).

¶ 18 Our interpretation of the Silver-Glo declaration is also consistent with the rule that we strictly construe ROFR provisions. *See Filatov*, ¶ 11. A ROFR necessarily restricts the free transfer of property, requiring that we limit its application to its specific terms. *See Kaiser*, 200 P.3d at 1103-04; *see also Est. of Riggs v. Midwest Steel & Iron Works Co.*, 36 Colo. App. 302, 305, 540 P.2d 361, 363 (1975) (observing the ROFR on stock transfers did "not restrict testamentary dispositions specifically"). Thus, absent specific language stating that a Silver-Glo unit owner's offer to purchase a

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current owner's purchase offer, the declaration drafters had no need to specifically exempt such sales from the ROFR. *Cf. Dupre v. Allstate Ins. Co.*, 62 P.3d 1024, 1029 (Colo. App. 2002) (exclusion in an insurance contract "is unnecessary" if the excluded event wouldn't "otherwise fall within the coverage provisions").

fellow owner's unit triggers the ROFR, we decline to interpret "prospective purchaser" in section 27 so expansively as to include "owners" among those offerors who can trigger the ROFR.

¶ 19 Accordingly, interpreting the Silver-Glo declaration as a whole, we conclude that section 27's ROFR isn't triggered when a Silver-Glo unit owner offers to purchase a fellow owner's unit.

2. Case Law

¶ 20 Colorado case law and decisions from courts in other jurisdictions support our interpretation of the declaration. As Quarky acknowledges, a ROFR is generally triggered only when an offer to purchase is made by a *third party*. *See, e.g.*, *Filatov*, ¶ 11 ("Generally, the preemptive option creates a contractual obligation for the property owner to offer the subject property to the holder of a right of first refusal on the same terms and conditions as the third-party offer made to the owner."); *Peters v. Smuggler-Durant Mining Corp.*, 910 P.2d 34, 38 (Colo. App. 1995) ("The right of first refusal ripens into an option upon the happening of a contingency: the decision of the obligated party to accept a third-party's offer for the property."), *aff'd*, 930 P.2d 575 (Colo. 1997).

¶ 21 Quarky asserts that the "third party" mentioned in these cases refers to anyone who extends a bona fide offer to purchase the seller's unit, including a fellow owner who is already subject to the condominium declaration. We don't think that's quite right. Although no Colorado decision appears to have directly answered the question, courts in other jurisdictions have held that a ROFR generally is not triggered unless the offer to purchase is made by a third-party "stranger" to the instrument containing the ROFR.

¶ 22 In the leading case, *Prince v. Elm Investment Co.*, 649 P.2d 820, 821-23 (Utah 1982), the Utah Supreme Court surveyed decisions from several states to determine whether a lessor's transfer of leased property to a partnership in which it held an interest constituted a "sale" that triggered a ROFR in favor of the lessee. As relevant here, the court held that, "for purposes of a right of first refusal, a 'sale' occurs upon the [property's] transfer . . . to a stranger" to the instrument containing the ROFR — there, a lease agreement. *Id.* at 823. Because the lessor's partner in the newly formed partnership was a "stranger" to the lease agreement containing the ROFR, and because the other

applicable requirements were satisfied, the court determined the lessee was entitled to exercise its ROFR. *See id.*

¶ 23 Following *Prince*, the weight of authority in other jurisdictions similarly holds that a ROFR generally is triggered only when a "stranger" to the instrument containing the ROFR extends an offer to purchase. *See, e.g.*, *Belliveau v. O'Coin*, 557 A.2d 75, 78-79 (R.I. 1989); *Pellandini v. Valadao*, 7 Cal. Rptr. 3d 413, 415-18 (Ct. App. 2003); *Lehn's Ct. Mgmt. LLC v. My Mouna Inc.*, 837 A.2d 504, 511 (Pa. Super. Ct. 2003); *Bill Signs Trucking, LLC v. Signs Fam. Ltd. P'ship*, 69 Cal. Rptr. 3d 589, 598-99 (Ct. App. 2007); *Roeland v. Trucano*, 214 P.3d 343, 352 (Alaska 2009); *Rucker Props., L.L.C. v. Friday*, 204 P.3d 671, 675-76 (Kan. Ct. App. 2009); *In re Estate of Siedler*, 2019 IL App (5th) 180574, ¶ 27; *cf. Williams v. Kennedy*, 211 A.3d 1108, 1112 (D.C. 2019) ("[A]uthority from other jurisdictions appears to uniformly hold that a transaction between two individual co-owners is not a third-party transaction triggering rights such as a right of first refusal.").

¶ 24 We agree with the reasoning of these courts. Were it otherwise, a declaration containing a ROFR in favor of existing owners would have the bizarre effect of elevating some owners'

interests over others. As the district court noted, under Quarky's interpretation, a unit owner could lie in wait until another owner who invests the time and energy necessary to negotiate a purchase price makes an initial offer. After the initial offer, the owner lying in wait could exercise their ROFR and co-opt the other owner's offer as their own. Nothing in the declaration here suggests that the drafters intended such disparate treatment among owners who are otherwise on equal footing. As a result, absent more specific declaration language, we decline to adopt an interpretation that would result in unequal treatment among owners or deter them from investing time and resources into negotiating a purchase price with their neighbor. *See EnCana Oil & Gas (USA)*, ¶ 28 (a contract shouldn't be interpreted to yield an absurd result).

3. Quarky's Remaining Arguments

¶ 25 Quarky argues that triggering the remaining owners' ROFR anytime a fellow owner makes an offer on a neighbor's unit isn't absurd because it helps ensure that all owners receive the highest possible price when they sell. *See Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 99 N.E.3d 744, 757 (Mass. 2018) ("With a typical right of first refusal, a third party can still prevail against the

holder by overbidding — that is, by offering a price so high that it cannot be matched.").

¶ 26 We recognize that one effect of a ROFR might be to boost the offer price received from a potential buyer. But nothing in the Silver-Glo declaration suggests that was the drafters' intent behind the ROFR in section 27. Instead, section 27 of the declaration shows that the drafters intended to provide existing owners with the opportunity to purchase a selling owner's unit on the "same terms and conditions" offered by a third-party stranger to the declaration, thus enabling existing owners to *purchase* a unit on favorable terms. Nothing in section 27 suggests the drafters' purpose was to allow an owner to *sell* their unit on favorable terms.

¶ 27 Accordingly, we hold that, absent specific language in the declaration or other instrument containing the ROFR, a condominium unit owner who offers to purchase a selling owner's unit isn't a third-party stranger whose offer triggers a ROFR held by the remaining owners.

4. Application

¶ 28 Applying our holding here, we conclude Glickman didn't trigger Quarky's ROFR when she offered to purchase Gabrick's

Silver-Glo unit. All agree that Glickman and Gabrick were both Silver-Glo unit owners who were subject to the declaration when Glickman extended her initial offer to purchase Gabrick's unit. As a result, Glickman wasn't a third-party stranger to the Silver-Glo declaration, and her offer didn't trigger Quarky's ROFR under section 27. The district court therefore properly entered summary judgment in Glickman's favor.

III. Appellate Attorney Fees and Costs

¶ 29 Glickman requests her costs under C.A.R. 39 and her attorney fees under C.A.R. 39.1. In support of her attorney fees request, Glickman relies on section 18 of the declaration. Section 18 states:

> Each owner shall comply strictly with the provisions of this Declaration . . . . Failure to comply with [the Declaration] shall be grounds for an action to recover sums due, for damages or injunctive relief or both, and for reimbursement of all attorney's fees incurred in connection therewith, which action shall be maintainable . . . in a proper case by an aggrieved owner.

¶ 30 Because we affirm the judgment, we grant Glickman's request for appellate costs. *See* C.A.R. 39(a)(2) ("[I]f a judgment is affirmed, costs are taxed against the appellant."); C.A.R. 39(c)(2) (party

seeking costs must file an itemized and verified bill of costs in the trial court within fourteen days of entry of the appellate mandate).

¶ 31 We deny, however, Glickman's request for appellate attorney fees. Section 18 of the declaration authorizes an award of attorney fees to the prevailing party in a suit for "damages or injunctive relief or both." But Glickman's complaint in intervention sought only declaratory relief. *Compare* C.R.C.P. 57 (declaratory judgments), *with* C.R.C.P. 65 (injunctions); *see also Atchison v. City of Englewood*, 180 Colo. 407, 412, 506 P.2d 140, 142 (1973) (The "remedy or purpose afforded by the declaratory judgment statute is that of declaration of right, status or other legal relation *in the absence of right or desire for coercive relief*." (quoting *Lane v. Page*, 126 Colo. 560, 563, 251 P.2d 1078, 1079 (1952))) (emphasis added). The fee-shifting provision in section 18 therefore doesn't apply.

IV. Disposition

¶ 32 The judgment is affirmed.

JUDGE FOX and JUDGE GROVE concur.