06/29/61 Milton Isen Et Al.

1961.CDC.0000117 (1961) | Cited 0 times | D.C. Circuit | June 29, 1961

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges.

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT. 1961.CDC.117

June 29, 1961.

Petition for Rehearing Denied Aug. 9, 1961.

DECISION OF THE COURT DELIVERED BY THE HONORABLE JUDGE BAZELON

BAZELON, Circuit Judge.

Alleging breach of contract, our appellants sued appellee for specific performance or damages. They appeal from an order of the District Court which granted summary judgment for appellee on the ground that the contract violated the rule against perpetuties.

Appellants owned contracts to purchase certain unimproved land in Fairfax County, Virginia, contingent on obtaining zoning for commercial purposes. Appellee, which operates a food market chain, desired that appellants build a store for its rental on a portion of the land. Accordingly the parties entered into an "Aggreement to Lease," dated October 27, 1959, which provided in pertinent part: That appellants, as landlords, "will diligently pursue" the pending petition for commercial zoning and that appellee, as tenant, will "cooperate to the end that such zoing be obtained as soon as possible"; that upon obtaining such zoning, appellants will acquire the property under its contract to purchase; that within twenty days after such acquisition, the parties will execute a lease identical with the form of "Agreement of Lease" attached to the "Agreement to Lease." Although appellants thereafter obtained the zoning and acquired the property, appellee refused to execute the "Agreement of Lease."

Since the land here involved is located in Virginia, the law of that jurisdiction with respect to the rule against perpetuities applies. Virginia follows the common-law rule:

The "Agreement to Lease" creates an interest subject to the rule against perpetuities. 3 Simes & Smith, The Law of Future Interests § 1242 (1956). The question before us is whether zoning may occur beyond the period of perpetuities, since the vesting of the equitable interest created by the "Agreement to Lease" is contingent upon zoning. The rule does not require that this interest be

certain of vesting within the period of perpetuities; it need only be certain that the interest will vest if at all during that period. See Shirley v. Van Every, 1933, 159 Va. 762, 167 S.E. 345.

Appellee says that it is not certain that its interest would vest within the period of perpetuities since the "Agreement to Lease" did not specifically prescribe the time within which zoning must be obtained. We think, however, that the agreement required that zoning for commercial purposes, if obtained at all, must be obtained within a reasonable time and that such time, in the circumstances of this case, is certainly within the period of perpetuities. This reasonable time prescription plainly appears from the provisions of the agreement wherein appellants undertook to "diligently pursue" the already pending zoning application[1] and appellee undertook to cooperate in obtaining zoning "as soon as possible." Where an instrument provides that an interest subject to the rule must vest, if at all, within a reasonable time and the reasonable time will under the circumstances necessarily be within the period of the rule, the contingent interest does not fail under the rule. See 3 Simes & Smith, The Law of Future Interests § 1228 (1956), and cases cited therein.

Appellee also contends that, if the "Agreement of Lease" is read together with the "Agreement to Lease," the rule is violated because under the former the leasehold interest may not vest within twenty-one years. The "Agreement of Lease" provided, inter alia, that the term of the lease should not commence until fifteen days after completion of construction; such completion to occur no later than August 1, 1961, except that this date may be extended to the extent of delays for causes beyond appellants' control. Appellee contends that since such delays could conceivably postpone completion, and consequently the commencement of the term of the lease beyond the period of the rule, the "Agreement of Lease" and therefore the "Agreement to Lease" are unenforceable.

Appellee relies upon Haggerty v. City of Oakland, 1958, 161 Cal.App.2d 407, 326 P.2d 957, 66 A.L.R.2d 718, in which it was held that an interest created by lease did not vest until the commencement of the lease's term which was contingent upon the completion of construction of a building for the lessee by the lessor. Under Virginia law, however, an interest in property is vested when there exists a present right to possession at either a present or future time. See Allison v. Allison's Ex'rs, 1903, 101 Va. 537, 44 S.E. 904, 63 L.R.A. 920. Thus, if upon execution of the "Agreement of Lease" appellee had a present right to possession at a future time, its interest was vested and not subject to the rule. [2] That appellee had such an interest is apparent from the provision of the agreement that the "Landlord does hereby lease and demise unto the Tenant . . . [the property] together with the building to be constructed . . .." (Emphasis supplied.) This is language of present rather than future effect. Since the leasehold interest was to vest upon the execution of the "Agreement of Lease," rather than upon commencement of the term of the lease, the rule against perpetuities is not applicable.

Reversed.

2. See Annotation, 66 A.L.R.2d 733, 735-739.