

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA  
COURT OF APPEAL, THIRD CIRCUIT**

**10-1129**

**BRYAN MCCANN FARMS, L.L.C.**

**VERSUS**

**ROY O. MARTIN LUMBER COMPANY, L.L.C.**

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**APPEAL FROM THE  
TWELFTH JUDICIAL DISTRICT COURT  
PARISH OF AVOUELLES, NO. 2008-1952  
HONORABLE MARK A. JEANSONNE, DISTRICT JUDGE**

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**PHYLLIS M. KEATY  
JUDGE**

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Court composed of Marc T. Amy, Shannon J. Gremillion, and Phyllis M. Keaty,  
Judges.

**Amy, J., concurs in the result.**

**REVERSED IN PART, AFFIRMED IN PART, AND RENDERED.**

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**KEATY, Judge.**

Defendant appeals a judgment in favor of Plaintiff stemming from a hearing on cross motions for summary judgment. The judgment granted Plaintiff’s motion for summary judgment and denied Defendant’s motion for summary judgment, proclaiming that a right of first refusal to purchase standing timber existed in favor of Plaintiff, that Plaintiff was entitled to specific performance by Defendant, and that Plaintiff had the right to purchase the subject timber at \$412 per acre. Defendant appeals, asserting that there are outstanding issues of material fact to be determined that render the granting of the motion for summary judgment in favor of Plaintiff improper.

**FACTS AND PROCEDURAL HISTORY**

Plaintiff, Bryan McCann Farm, L.L.C. (McCann), asserted that it had a right of first refusal to purchase standing timber (the subject timber) owned by Defendant, Roy O. Martin Lumber Company, L.L.C. (Martin), stemming from a 1995 “Act of Exchange & Grant of Hunting Lease” (Exchange).<sup>1</sup> In the Exchange, Martin reserved

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<sup>1</sup>The property at issue is described in the Exchange as:

Certain tracts or parcels of land containing 2,665.27 acres, more or less, situated in Avoyelles Parish, Louisiana, and described as follows:

**TOWNSHIP 3 NORTH, RANGE 6 EAST**

Section 8: North half and that portion of the South Half lying west of the center line of Palmetto Bayou  
Section 9: North Half

**TOWNSHIP 4 NORTH, RANGE 5 EAST**

Section 25: Entire Fractional Section  
Section 26: Entire Fractional Section  
Section 34: Entire Fractional Section  
Section 35: Entire Fractional Section  
Section 36: Entire Fractional Section

ownership of the timber located on the property transferred to McCann and provided McCann with a right of first refusal to purchase the timber “for the same price and on the same terms” as any offer by a third party triggering Martin’s desire to sell.

On February 22, 2008, Martin entered into a pre-sale agreement (purchase agreement) with Heartwood Forestland VI, L.P. (Forestland). In that agreement, Martin agreed to sell, among other things, its timber rights in nine different Louisiana parishes, provided there were no defects in title or encumbrances on the areas in question. In consideration, Forestland agreed to pay Martin the lump sum of seventy-five million dollars. One area included in the purchase agreement was the subject timber for which McCann had a right of first refusal.

Subsequent to entering into the purchase agreement, the right of first refusal to the subject timber was discovered, and on March 24, 2008, Forestland and Martin amended the purchase agreement (the amendment) to exclude the subject timber from the purchase agreement and, ultimately, the sale.

On March 13, 2008, McCann, through its representative, sent Martin a letter inquiring about Martin’s intent concerning the sale of the subject timber and the price that had been offered so that McCann could decide whether it wanted to exercise its right of first refusal. On March 25, 2008, Forestland sent a letter to Martin expressing its desire to purchase the subject timber in Avoyelles Parish for \$820,000. On March 26, 2008, Martin communicated to McCann that the price for the subject timber was \$820,000 and forwarded a copy of the Forestland offer to McCann on March 27, 2008.

McCann requested a copy of the offer to purchase on March 31, 2008, and on April 14, 2008, Forestland clarified its March 25 offer to specifically describe the property as:

456 acres including all that portion of Section 8 lying west of the center line of Palmetto Bayou, located in said Section 8, Township 3 North, Range 6 East, Avoyelles Parish, Louisiana. Being a portion of that same property conveyed to McCann Farms Inc. by *Act of Exchange & Grant of Hunting Lease*, dated November 6, 1995.

McCann continued to seek a copy of the original purchase agreement and one was emailed to him in late April, 2008. After reviewing the original purchase agreement, McCann asserted that the purchase price of the subject timber was \$412 per acre and that it would like to exercise its right of first refusal. Martin responded, stating that McCann was wrong about the purchase price and that it would not sell the subject timber for \$412 per acre.

While the communication between McCann and Martin was ongoing, Forestland and Martin entered into an escrow agreement on April 8, 2008, as several plats of timber rights were encumbered and excluded from the sale necessitating the reduction of the purchase price. For the 456 acres to which McCann had a right of first refusal, \$820,000 was placed in escrow and those timber rights were withheld from the sale. On the same day, Forestland and Martin entered into a sale of the remainder of the property contained in the purchase agreement.

On April 16, 2008, McCann filed suit for an injunction prohibiting Martin from selling the subject timber, and on April 29, 2008, McCann filed a notice of lis pendens, asserting its right of first refusal in the subject timber. A supplemental and amending petition was filed by McCann on May 19, 2008, alleging that the subject timber was sold on April 8, 2008, despite its right of first refusal, and naming Forestland as a co-defendant.

In this supplemental petition, McCann prayed for judgment ordering “specific performance and declaring the sale to McCann of the timber and timber rights subject

to the right of first refusal to have occurred when McCann notified Martin of its exercise of the right of first refusal,” that Forestland and Martin sign over the timber and timber rights to McCann upon McCann’s paying \$412 per acre, and that it be awarded attorney fees and costs. On May 20, 2008, McCann and Martin filed a stipulated judgment, agreeing that Martin would not sell the subject timber without first offering it to McCann for the same terms and price as offered by a third party.

On February 20, 2009, Martin and Forestland filed a clarification to the March 2008 amendment. In this clarification, they reiterated that the subject timber had not been sold.

Three motions for summary judgment were subsequently filed: the first on June 15, 2009, by McCann; the second on July 6, 2009, by Forestland;<sup>2</sup> and the third on February 17, 2010, by Martin. McCann’s motion for summary judgment alleged that it had a right of first refusal in the subject timber, that Martin intended to sell the subject timber to Forestland for \$412 per acre,<sup>3</sup> and that McCann was entitled to purchase the timber for that amount from Martin. Martin’s motion for summary judgment alleged that it had not sold the subject timber to Forestland, that because the subject timber was not sold, \$820,000 was excluded from the final purchase price, that McCann was invited to purchase the subject timber for \$820,000, and that a clarification of the amendment had been filed to reiterate that the subject timber was not part of the April 8, 2008 sale.

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<sup>2</sup>Forestland’s motion for summary judgment essentially stated that it did not own and had no ownership interest in the subject timber. McCann dismissed Forestland from this litigation on October 21, 2009.

<sup>3</sup>McCann arrives at this figure by using an amount derived from the original purchase agreement.

On March 5, 2010, a hearing on the cross motions for summary judgment was conducted and on July 10, 2010, the trial court signed a judgment granting McCann's motion for summary judgment, denying Martin's motion for summary judgment, and giving McCann the right to purchase "for the same price and on the same terms and conditions as offered by [Forestland]" the timber described in the original purchase agreement. The judgment further stated that the purchase price for the timber was \$412 per acre and that Martin was cast with all costs. Martin appeals, asserting that the trial court erred in granting McCann's motion for summary judgment and in denying Martin's motion for summary judgment.

## **DISCUSSION**

### ***Summary Judgment***

Summary judgment is a procedural tool "designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969." La.Code Civ.P. art. 966(A)(2). If the motion for summary judgment and supporting affidavits show that there is no genuine issue of material fact, the mover is entitled to a judgment as a matter of law. La.Code Civ.P. art. 966(B).

"[A]n issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. Summary judgment is the means for disposing of such meretricious disputes." *Evans v. Auto. Cas. Ins. Co.*, 94-129, p. 3 (La.App. 3 Cir. 10/5/94), 643 So.2d 389, 391, *writ denied*, 94-2732 (La. 1/6/95), 648 So.2d 930, quoting *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751. A "material fact" is one whose "existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery." *Smith*,

639 So.2d at 751. The mover bears the burden of proving that summary judgment is appropriate. *La. Pigment Co., L.P. v. Scott Constr. Co., Inc.*, 06-1026 (La.App. 3 Cir. 12/20/06), 945 So.2d 980.

We “review summary judgments *de novo* and use the same criteria as the trial court in determining whether summary judgment is appropriate.” *La. Pigment Co.*, 945 So.2d at 983.

## ISSUES

If McCann has a right of first refusal in the subject timber, that right allows it to purchase the timber at the price offered by a third party that triggered Martin’s desire to sell. Thus, the issues before us are: whether McCann had a right of first refusal in the subject timber, whether Martin intended to sell the subject timber, and the price offered that triggered Martin’s desire to sell.

Additionally, since the trial court granted specific performance as part of the summary judgment, we will review whether McCann was entitled to specific performance.

### ***Right of First Refusal***

The language granting the alleged right of first refusal giving rise to this litigation is contained in the 1995 Exchange between McCann and Martin. The Exchange specifically states, in pertinent part:

**2. Right of First Refusal:** If MARTIN desires to sell the timber reserved in paragraph 1 on the tracts received by MCCANN hereinbelow, to any third party other than a company related to ROY O. MARTIN LUMBER COMPANY, INC., MCCANN shall have the right of first refusal to purchase said timber (each only on the tract received by him in the Partition hereinbelow) for the same price and on the same terms and conditions as offered by a third party making such offer in good faith.



Throughout this litigation, McCann has asserted the existence of the right of first refusal in its favor. Martin initially, in its answer to McCann's petition, denied McCann's assertion that it had a right of first refusal in the subject timber. Subsequent documents, however, indicate that Martin agrees that the Exchange was clear in granting McCann a right of first refusal to the subject timber. In its statement of uncontested facts, Martin asserts that the Exchange granted McCann the right to purchase the subject timber "for the same price and on the same terms and conditions as offered by a third party making such offer in good faith." Additionally, at the hearing, counsel for Martin agreed that there was "no question about it" when the trial court stated "here we have the right of first refusal since 1995."

Accordingly, the record clearly supports a finding that there is no dispute regarding the existence of McCann's right of first refusal in the subject timber. Thus, the trial court was correct in granting summary judgment on this issue.

### ***Specific Performance***

Louisiana Civil Code Article 2625 defines a right of first refusal as a party's agreement not to "sell a certain thing without first offering it to a certain person. The right given to the latter in such a case is a right of first refusal that may be enforced by specific performance." The right of first refusal is a unilateral obligation; the grantor alone is obligated to act and the person holding the right of first refusal is not required to accept the offer, though failure to accept the offer permits the grantor to then sell the thing to a third party. *See* ALAIN LEVASSEUR & DAVID GRUNING, LOUISIANA LAW OF SALE AND LEASE: A PRÉCIS § 1.1.4 (Alain Levasseur, John Trahan, Andrea Carroll & Ronald Scalise, eds., Matthew Bender & Company, Inc., a member of the LexisNexis Group 2007).

“[T]he right of first refusal [imposes] on the grantor an obligation not to do i.e. not to sell to another before offering to sell to the grantee, rather than an obligation to do i.e. sell to the grantee first” and “is subject to two suspensive conditions”: a) the grantor’s intent to sell and b) the grantee’s agreement to purchase “on the same terms, or on those specified when the right was granted if the parties have so agreed.” LA. LAW OF SALE & LEASE, *supra*, at 15; *see also* La.Civ.Code art. 2625. The same terms of the offer made to another person (price, modalities of payment, etc.) must be made to the holder of the right of first refusal. LA. LAW OF SALE AND LEASE, *supra* .

In the instant case, the parties agreed that if Martin desired to sell the subject timber to any third party not related to Martin, McCann would have the right of first refusal to purchase the timber “for the same price and on the same terms and conditions as offered by a third party making such an offer in good faith.” By contract between them, Martin had thirty days to notify McCann after the offer was made, and McCann would then have thirty days after receipt to either accept or reject the offer in writing.

Neither party disputes the existence of the right of first refusal. The trial court’s finding that a right of first refusal existed was proper, as was its determination that McCann was entitled to specific performance. *See* La.Civ.Code art. 2625. The specific performance, however, is on the obligation not to do. *See* LA. LAW OF SALE AND LEASE, *supra*. Louisiana Civil Code Article 1986 states: “Upon an obligor’s failure . . . not to do an act, . . . the court shall grant specific performance plus damages for delay[.]” In the instant case, specific performance can only be ordered on Martin’s obligation not to do. Practically speaking, that means that Martin can only be prohibited from selling the timber to a third party without offering it to McCann first.

Martin precluded the subject timber from the purchase agreement by filing the amended contract to sell on March 24, 2008. Martin did not sell the timber on April 8, 2008, and it filed a clarification of the amendment on February 20, 2009, to further state that the subject timber had been excluded from the sale to Forestland. The record is clear that Forestland sent a letter to Martin offering to purchase the subject timber for \$820,000 on March 25, 2008; that Martin offered the subject timber to McCann for \$820,000 on March 27, 2008; that \$820,000 for the subject timber was excluded from the purchase price and was placed in escrow pending the resolution of the right of first refusal encumbrance; and that the subject timber was not included in the sale.

It is clear that Martin did not sell the subject timber to a third party at all, let alone without offering it to McCann first; thus, it has not yet breached its obligation concerning the right of first refusal. McCann is not entitled to any further relief from the courts under specific performance. The trial court's ruling concerning specific performance is reversed.

***Martin's Intent to Sell the Subject Timber***

On appeal, Martin asserts that the trial court erroneously found that it had an intent to sell the subject timber. This assertion is supported by Martin's conclusion that "the Purchase Agreement did not trigger McCann's right of first refusal" and that "the issue of whether the Purchase Agreement included a desire by [Martin] to sell the Subject Timber is an issue of material fact and, therefore, the trial court's ruling granting of McCann's motion for summary judgment should be reversed." We disagree.

Martin entered into the purchase agreement with Forestland on February 22, 2008, whereby Forestland agreed to purchase various tracts of land, timber rights, a

sawmill, and equipment for a total cost of seventy-five million dollars. The purchase agreement included timber cutting rights on approximately 140,000 acres in nine parishes, including 456 acres of the subject timber. The purchase agreement, signed by a representative for Martin and a representative for Forestland, contained a provision that allowed Forestland to abstract the properties and to exclude encumbered property or timber from the sale. It also provided that Martin could cure any defects in title of these assets.

After entering into the purchase agreement, McCann's right of first refusal in the subject timber was discovered and an amendment to the purchase agreement was executed and filed on March 24, 2008. In the amendment, Martin and Forestland excluded all references to timberlands in Avoyelles Parish and agreed that a portion of the proposed purchase price representing the price of the subject timber and other properties potentially containing defects in title would be placed into escrow at the time of the sale. The subject timber was not included in the sale between Martin and Forestland on April 8, 2008, and \$820,000 for the subject timber was excluded from the purchase price and placed in escrow pending McCann's decision concerning its right of first refusal. The escrow agreement, signed by the president of Martin and the managing director of Forestland, effective April 8, 2008, specifically stated:

**E.** An unrelated third party maintains a right of first refusal on the timber located on the Avoyelles Property (the "Avoyelles ROFR"), and the parties desire to provide for Purchaser's acquisition of the timber on the Avoyelles Property if and when the holder of the Avoyelles ROFR declines to exercise said right.

Additionally, Martin communicated to McCann on March 26, 2008 that the purchase price of the subject timber was \$820,000, should McCann wish to engage its right of first refusal. Martin forwarded to McCann the offer it had received from

Forestland to purchase 456 acres of the subject timber for \$820,000 and a subsequent letter from Forestland to Martin containing an explanation of the property it offered to purchase. Martin notified McCann in writing on April 28, 2008, that \$412 was not the purchase price agreed upon by Forestland and Martin for the subject timber and that it would not sell the timber to McCann for that price.

The provisions of the escrow agreement stating that Forestland would purchase the subject timber should McCann not exercise its right of first refusal, coupled with Martin's communications with McCann about the purchase price, all of which are in the record, make it clear that Martin intended to sell the subject timber. The trial court did not err in granting summary judgment on this issue.

### ***Price***

The final issue on appeal is whether there are genuine issues of material fact with regard to the price agreed upon between Forestland and Martin. Price is an essential element to a contract to sell and without an agreement on price there cannot be a valid contract. *See Belin v. Dugdale*, 45,405 (La.App. 2 Cir. 6/30/10), 43 So.3d 272.

The agreed upon price between Forestland and Martin was seventy-five million dollars. McCann argues, and the trial court agreed, that the price agreed upon between Forestland and Martin for the subject timber was \$412 per acre, totaling \$187,872. Martin disagrees, contending that each plat of land has a different value depending on the amount and quality of the timber it contains. It further argues that even though the parties to the sale agreed to a lump-sum payment for a lump-sum thing, to determine the cost of only a portion of the lump-sum thing, one has to look at more than a pro-rata breakdown of the price; failure to do so would be in contravention of the law.

Louisiana law makes clear that “[t]he price must be fixed by the parties in a sum either certain or determinable through a method agreed by them.” La.Civ.Code art. 2464. In the purchase agreement, the parties, Forestwood and Martin, agreed on a lump sum payment of seventy-five million dollars. They specified certain amounts for the sawmill and equipment, leaving a sum of fifty-seven million dollars for the 140,000 acres of timber rights. They did not indicate how much each plat was worth, nor did they establish a method agreeable to both of them to determine the price of each acre or plat. Subsequent to entering into the purchase agreement, they filed an amendment that specified that a portion of the purchase price would be held in escrow for the subject timber until McCann chose to exercise or decline its right of first refusal. The amount placed in escrow for the subject timber was \$820,000.

Louisiana Civil Code Article 2464 provides that “the price must not be out of all proportion with the value of the thing sold. ”

“A price which bears no proportion to the actual value of the thing sold, is not a real price; . . . for, as the price is only the estimation of the parties in regard to the value of the thing, a sum, which bears no proportion to that value, cannot pass for a serious estimation, nor consequently for a real price . . .”

LA. LAW OF SALE & LEASE, *supra*, at 31, citing R. J. Pothier, TRAITÉ DU CONTRAT DE VENTE, TREATISE ON THE CONTRACT OF SALE, translation by L. S. Cushing, Charles C. Little and James Brown, MDCCCXXXIX, Part I, Sect. II #19, p. 12. A “buyer expects . . . that the price he pays is the equivalent, in value, of the thing he receives from the seller.” LA. LAW OF SALE & LEASE, *supra*, at 31. This transfers perfectly to the instant case. Forestland bought, in globo, an assortment of things from Martin, and agreed to pay, in globo, seventy-five million dollars.

This does not mean that each item is worth its pro-rata share; it means that Forestland believed that the in globo items it purchased were worth the in globo price paid. Martin desired to sell its timber rights in totality; some were worth more than others but, presumably, it wanted to sell them all at one time. If Martin and Forestland had priced each acre (or, more reasonably, each plat), Forestland could have purchased some, but not all, of the plats. They did not do so. The obvious goal was to come up with a mutually agreeable price for the entirety of the items being sold.

The Louisiana Civil Code further provides that “if the seller is unable to deliver the full extent specified in the contract, the price must be proportionately reduced.” La.Civ.Code art. 2492. In the instant case, Martin was unable to deliver the thing in its entirety, thus necessitating that the price be reduced proportionately. The price was reduced by \$820,000 for the exclusion of the subject timber from the final sale.

McCann would have this court ignore the offer from Forestland to Martin, the communications between Martin and McCann, the amendment, the escrow agreement between Forestland and Martin, and the write up of the final sale between Forestland and Martin, all of which indicate that the sale price agreed upon between Martin and Forestland for the subject timber was \$820,000. Further, McCann erroneously states that Martin receives seventy-five million dollars regardless of the price for which McCann purchases the timber. This argument is without merit. The sale occurred nearly three years ago. The amount of \$820,000 was placed in escrow. If McCann exercises its right of first refusal and purchases the property for anything less than \$820,000, Martin loses the difference.

We find nothing in the record to support a conclusion that \$412 per acre is the price agreed upon by Forestland and Martin for the subject timber. After carefully

reviewing the record, it is obvious to this court that the price offered by Forestland that triggered Martin's desire to sell the subject timber was \$820,000. We reverse the trial court's finding that the price of the subject timber was \$412 per acre.

### **DECREE**

We reverse the trial court's grant of specific performance requiring Martin to sell the subject timber to McCann for \$412 per acre, and we reverse the trial court's finding that the price agreed upon between Forestland and Martin was \$412 per acre. We affirm the portions of the judgment finding that McCann has right of first refusal in the subject timber and that Martin intended to sell the subject timber. We give McCann thirty days from the release of this opinion to notify Martin in writing that either it chooses to exercise its right of first refusal by paying Martin \$820,000 or it chooses not to exercise its right of first refusal. Costs are cast against McCann.

### **REVERSED IN PART, AFFIRMED IN PART, AND RENDERED.**

This opinion is NOT DESIGNATED FOR PUBLICATION. Uniform Rules—Courts of Appeal, Rule 2-16.3.