

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
J. C. Nicholson, Circuit Court Judge

Opinion No. 28126
Case No. 2015-CP-10-03038
Appellate Case No. 2020-001371

Barry Clarke..... Petitioner,

vs.

Fine Housing, Inc. and RRJR, L.L.C..... Defendants,

Of which Fine Housing, Inc. is theRespondent.

RETURN TO PETITION FOR REHEARING

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“In order to prevail on a petition for rehearing, [Petitioner] must demonstrate the Court overlooked or misapprehended [his] argument. Rule 221(a), SCACR.” *Kennedy v. South Carolina Retirement System*, 394 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The Petition for Rehearing claims that the Court overlooked five (5) principles of fact and law. Significantly, Petitioner does not claim that the Court misapprehended anything. The five (5) principles that Petitioner claims this Court overlooked were not only advanced by Petitioner in his written Briefs to this Court, the Court addressed each in its Opinion. Petitioner merely reworks the same arguments, hoping for a different result. Because Petitioner cannot meet his procedural burden, the Petition should be denied.

Petitioner’s first ground for rehearing is that the Court overlooked basic contract law that requires the Court to enforce contracts as written. The entire Opinion analyzes the written contract, resulting in a determination that a specific term – the right of first refusal – is not enforceable because it is an unreasonable restraint on alienation.¹ No part of Petitioner’s argument as to this issue was overlooked.

The sufficiency of the description of the real property encumbered by the right of first refusal is the subject of Petitioner’s second ground for rehearing. Petitioner suggests that this Court overlooked the exact description contained in the lease containing the right of first refusal. This Court acknowledged this very argument in its Opinion (Opinion No. 28126, III.A.) but found it unpersuasive.

¹ Petitioner suggests that “there is an unresolved question of whether this Court uses the terms “ambiguous” and “vague” synonymously – the two terms are interchangeable.” Petition for Rehearing, p.8. The terms “ambiguous” and “vague” were not used in Opinion No. 28126. The Court’s decision did not rest on the determination that the right of first refusal was vague or ambiguous; its decision was that the right of first refusal was unreasonable because it lacked essential terms and was, therefore, an unenforceable restraint on alienation.

Similarly, the third principle Petitioner claims to have been overlooked concerns improper inferences drawn by the Court of Appeals regarding Robin Robinson's absence from trial. The Court specifically addressed the third argument in the third footnote of the Opinion.

Petitioner does not expound on his listed fourth and fifth ground beyond listing them.² Regardless, it is clear that both of the grounds were not overlooked by the Court. Prior to the filing of the Petition for Rehearing, Petitioner briefed and argued that the right of first refusal is not a restraint on alienation (Petitioner's Brief, filed July 15, 2021, pp. 27-35 and Petitioner's Reply Brief, September 21, 2021, pp. 10-11), and the Court's Opinion addresses those arguments (Opinion No. 28216, III). Likewise, Petitioner's attempt to sully Respondent and thereby block it from any equitable relief listed by Petitioner as his fifth ground for rehearing was addressed by this Court (Opinion No. 28216, footnote 1).

In the opening of his Introduction in the Petition for Rehearing, Petitioner offers that he agrees with the Court's adoption of Restatement (Third) of Property: Servitudes §3.4 (Am. L. Inst. 2000), comment *f*. Petition for Rehearing, p.4. It is inconsistent to make that concession and advance the arguments Petitioner presents. First, the Court accepts the Lease as written and acknowledges that the Respondent had record notice of the terms of the written Lease. It then determines that an analysis of the reasonableness of the right of first refusal is necessary based on the factors listed in the Restatement, only after determining that all rights of first refusal are restraints on alienation and that only reasonable restraints are enforceable. Accordingly arguments that the right of first refusal is not a restraint on alienation and that the Court should rewrite the

² Following the first three detailed arguments explaining the ground for requesting rehearing and reconsideration, the Petition For Rehearing proceeds with paragraphs numbered 4, 5, and 6. However it appears that headings of these numbered paragraphs trace what Petitioner identified as factors 4, 5, and 6 in the Iowa Court of Appeals' review of the reasonableness of a right of first refusal in *Franklin v. Johnston*, 899 N.W.2d 741 (Iowa Ct. App. 2017) (unpublished table decision), a decision referenced in footnote 4 of Opinion No. 28126, concerning the Court's search for decisions addressing the required clarity as to the real property encumbered by the right of first refusal.

recorded lease to make it enforceable do not agree with Petitioner's endorsement of the Court's application of the Restatement. Further, the facts surrounding Respondent's purchase of the property from RRJR, LLC, and Ms. Robinson's attendance at trial have no bearing on the conceded analysis under the Restatement.

The Petition for Rehearing does not identify anything that this Court overlooked and should be denied.

Respectfully submitted,

January 27, 2023

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