

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2016-CP-10-03038

2015

Barry Clarke,)
)
Plaintiff,)
vs.)
)
Fine Housing, Inc. and)
RRJR, L.L.C.,)
)
Defendants.)
_____)

ORDER OF JUDGMENT

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SC Court of Appeals

BY _____

JULIE A. HARRINGTON
CLERK OF COURT

2017 SEP 28 PM 4:30

FILED

Date of trial: July 26, 2017

Plaintiff's attorneys: Ashley Andrews, Thomas R. Goldstein

Defendant's attorneys: Cliff Moore, Charles Altman (Mr. Altman was not counsel of record)

Court Reporter: M. Rebecca Hill

Procedural Background

This interesting real estate case came before the Court for trial on the merits on July 26, 2015. The plaintiff filed a complaint seeking specific performance on May 28, 2015, alleging that the defendant, RRJR, L.L.C., conveyed a parcel of real estate without notifying the plaintiff of his opportunity to purchase the property under a recorded right of first refusal. The plaintiff alleged that the defendant, Fine Housing, Inc., took title to the parcel subject to the plaintiff's right of first refusal and should be compelled to deed it to the plaintiff upon receipt of the purchase amount. The defendant, R.R.J.R., never answered the complaint, and the plaintiff filed an affidavit of default on August 3, 2015. The defendant, Fine Housing, answered the complaint on September 2, 2015, setting up the following defenses (the Court disregards the defense of statute of limitations, which defendant did not pursue):

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General denial.

Denial based on vagueness of the right of first refusal.

Waiver.

Laches.

Estoppel.

Prior to trial, the parties filed cross motions for summary judgment, which, after considering the parties' memorandums, affidavits, and argument of counsel, the Court denied. Thereafter, the plaintiff moved for an Order of the Court appointing a receiver to collect the rents on the disputed parcel until the Court ruled. However, prior to issuing a ruling, the parties announced that they resolved that motion by consent and will submit a separate Consent Order disposing of that issue.

At the trial on the merits, the plaintiff called three witnesses, Vincent DeStaso, the principal of Fine Housing, Inc., William Sloan, the closing attorney who handled the transaction from RRJR to Fine Housing, Inc., and the plaintiff, Barry Clarke. The plaintiff also subpoenaed a fourth witness, William Swope, attorney for RRJR, who the Court excused due to a death in the family. In the face of Mr. Swope's absence, and to avoid re-calling him to the stand, the parties stipulated as to the purpose for calling him; to wit, that John and Robin Robinson were the shareholders of Group Investment Co. and the members of RRJR, L.L.C., which stipulation obviated to leave the record open.

After the plaintiff's case, both sides made the appropriate motions under Rules 41(b) and 50 of the *South Carolina Rules of Civil Procedure*. (Plaintiff called the defendant's principal, Vincent DeStaso, sole member of Fine Housing, Inc., in his case in chief. After the plaintiff

rested, the defendant called no additional witnesses, thereby making the plaintiff's and the defendant's motions timely at the close of the plaintiff's case.) After the Court denied the competing motions, the defendant chose not to call additional witnesses, which made the case ripe for disposition on the merits.

Factual Background

The dispute in this case involves a parcel of real estate commonly referred to as 2028 Pittsburgh Avenue. 2028 Pittsburgh Avenue is unusual in that the center of the Pittsburgh Avenue is the boundary line between the City of Charleston and Charleston County. On the south side of the street is a properly licensed adult business, 2015 Pittsburgh Avenue, currently owned and operated by the plaintiff. On the north side of the street, 2028 Pittsburgh Avenue, is the parcel at issue in this case. It also houses an adult business currently owned and operated by the defendant's, Fine Housing, Inc.'s, tenant. (It is the collection of rents from Fine Housing's tenant that are the subject matter of the plaintiff's motion for appointment of receiver that the parties resolved and which will be addressed in a separate Consent Order.) Both parties agree that the greatest share of the value of the 2028 Pittsburgh Avenue property is its availability as lawfully licensed sexually oriented business because both the City of Charleston and Charleston County have adult use zoning and licensing ordinances that restrict the location and licensing requirements for such businesses. These ordinances limit the number of available parcels that can support an adult business.

Clarke's adult business at 2015 Pittsburgh Avenue opened first, having been started by the plaintiff and later operated for many years by John Robinson, whose lease with the plaintiff

Clarke is the subject of this action. The plaintiff testified that many years ago, his friend, John Robinson, approached him and solicited his advice about getting into the "club" business. Even though the plaintiff advised Robinson against it, Robinson did enter the "club" business and ultimately opened and operated a well-known and successful adult business known as "Diamonds" out of Barry Clarke's property at 2015 Pittsburgh Avenue. This is the property in the City of Charleston. Clarke testified that one of his main purposes of the parties' 1999 lease was to allow customers of either establishment to park at either site.

Years later, John Robinson moved across the street to 2028 Pittsburgh Avenue, the parcel in the County of Charleston, and Robinson and Clarke became competitors, each running an adult business on the north and south sides of the same street. By all accounts, both were successful. In 2009, John Robinson died, and his surviving spouse, Robin Robinson, assumed responsibility for running the business. (John Robinson is the "JR" of the defaulting defendant "RRJR." His surviving spouse, Robin Robinson, is the "RR," hence "RRJR, L.L.C.") Barry Clarke testified that he started an adult business at 2015 Pittsburgh Avenue many years ago, and testified he helped his deceased friend, John Robinson, get his start in the "club" business both against the advice and under the tutelage of the plaintiff, Barry Clarke. Over the years, John Robinson was both Barry Clarke's tenant at 2015 Pittsburgh Avenue operating an adult business known as "Diamonds," and also his competitor when he moved "Diamonds" from 2015 Pittsburgh Avenue to 2028 Pittsburgh Avenue. The evidence reveals that the two men enjoyed not only a close relationship but also a competitive one.

The friendly competition between the two gave rise to a lease (Plaintiff's Exhibit 1) between Barry Clarke and Group Investment Company, Inc. dated January 8, 1999, and recorded

in the R.M.C. Office for Charleston County on January 8, 1999 at Book C319 at Page 791. Group Investment Company, Inc. was the forerunner of RRJR, L.L.C.—see plaintiff's Exhibits 31, Secretary of State Report for Group Investment Company, 32 Secretary of State Report for RRJR, and 33, Deed from Group Investment Company to RRJR dated April 25, 2007, for the consideration of \$5.00, and stipulation of William Swope.

This lease is the central issue in this case.

According to plaintiff's testimony, Robinson and Clarke jointly met with a local lawyer, who drafted and recorded the lease (Plaintiff's Exhibit 1). Plaintiff testified there were negotiations between the two, and that the recorded lease represented the terms to which Plaintiff agreed—including the right of first refusal in Article V, as may be seen by their signatures on the lease. (Robin Robinson signed the lease for RRJR, L.L.C.—see Plaintiff's Exhibit 1, page 10.)

After Clarke and Robinson signed the lease, the lawyer who drafted it sent it to the Register of Mesne Conveyance for Charleston County where the R.M.C. recorded it on January 17, 1999, at Book C 319 at Page 791. The lease contains Article V, which is the heart of the dispute now before the Court. Article V reads as follows:

Article V

Section 5.1: Option to renew: There are no options to renew.

Section 5.2: Right of first refusal: Lessor grant Lessee the right of first refusal should it wish to sell.


After recording the lease in 1999, Robinson and Clarke continued their relationship that varied between friendly and competitive. Barry Clarke testified that his motivation for the lease

was to allow each man's customers the right to park on one another's property, the idea being that it benefitted both to allow patrons to visit both clubs without having to move a car. According to the plaintiff, when they signed the lease, adult business located on both 2015 Pittsburgh Avenue and 2029 Pittsburgh Avenue, and because there was an adult business across the street from one another, it made sense to allow parking for either business on either lot. Plaintiff also testified that his purpose of the right of first refusal was to secure adequate parking for his property and to ensure that Robinson always had at least two purchasers in the event he decided to sell his parcel.


After John Robinson died in 2009, his surviving spouse, Robin, assumed the duties of running the business. As the run-up to the transaction with Fine Housing demonstrates, she found herself in financial trouble, facing imminent foreclosure on her home, unsatisfied judgments, and tax liens. (See Plaintiff's Exhibit 4, December 2, 2013 Settlement Statement.)

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As the settlement statement shows, her financial troubles required her to secure financing from non-traditional sources, first through a mortgage on her residence and later through Fine Housing. Through financial missteps—as delineated on the settlement statement and the testimony of William Sloan—she ultimately found herself facing the loss of her waterfront home located on Sol Legare Road on James Island. Because of her financial missteps over the years, conventional lending institutions were unavailable to Ms. Robinson and relief through bankruptcy was unavailable, and thus, when faced with the loss of her home, she searched for additional nontraditional sources of financing, which led her to Fine Housing. The testimony of the witnesses at trial revealed that Ms. Robinson's lawyer, William Swope, reached out to financial brokers to find a source of financing for Mrs. Robinson. Mr. DeStaso testified that he

was unwilling to loan Ms. Robinson money, but his lawyer testified until shortly before the closing, he thought he was preparing a closing for a refinance. (As discussed more fully below, whether the transaction started out as a loan and matured into a sale, or whether it was a sale from the beginning does not change the legal analysis.) Mr. DeStaso testified he flew to Charleston shortly before Thanksgiving, 2013, inspected Mrs. Robinson's home and the business, and literally on the eve of the foreclosure sale scheduled for 11:00 a.m. on Tuesday, December 3, 2013, he "purchased," through his corporation, Fine Housing, Inc., the two properties from her for the sum of \$850,000.00. (The closing statement, Plaintiff's Exhibit 4, and Mr. DeStaso's testimony reveals that he wired \$815,000.00 to close the transaction. As discussed more fully below, whether the transaction was a straight purchase or a hybrid transaction as suggested by the lease-back and buy-back provisions does not change the legal analysis.)



The testimony and evidence is uncontracted that Fine Housing Inc, through its principal, Vincent DeStaso, traveled to Charleston shortly before Thanksgiving, 2013, interviewed Mrs. Robinson and toured the Sol Legare property and the club on Pittsburgh Avenue. This visit occurred a short time prior to her home being offered for sale on the courthouse steps to satisfy an unpaid mortgage to another lender. Ultimately, a few days before Thanksgiving 2013, DeStaso committed either to loaning to Mrs. Robinson the sum of \$850,000.00 in exchange for deeds to both the Sol Legare property and the Pittsburgh Avenue property or committed to purchasing the properties with a lease-back and buy-back provisions so that Mrs. Robinson could avoid the foreclosure sale of her home scheduled for Tuesday, December 3, 2013, at 11:00 a.m. on the courthouse steps. (In 2013, Thanksgiving fell on November 28th.) Both the settlement



statement and Mr. DeStaso's testimony reveal that Fine Housing actually transferred \$815,000.00 because he retained the sum of \$35,000.00, and as Plaintiff's Exhibit 4 demonstrates, he sent other sums to entities affiliated with Vincent DeStaso. (See Plaintiff's Exhibit 4, testimony of Vincent DeStaso.) There was considerable testimony—none of which is contradicted—about the rush imposed on Fine Housing's closing attorney, who closed the transaction. Thanksgiving fell on the 28th; the Master's Office scheduled the sale for Tuesday, December 3rd. The closing attorney, William Sloan, testified he originally thought DeStaso's instructions were to prepare a closing for a refinance, and he learned only shortly before the closing to prepare the documents for a "sale." (Plaintiff argues forcefully that the lease-back and buy-back provisions demonstrate it was a hybrid loan/sale, not a pure sale, and Defendant argues just as forcefully that it was a pure sale. As stated throughout, this Court concludes that the law requires the same outcome regardless of whether the transaction was a hybrid or a pure sale.) As discussed more fully below, Mr. Sloan testified he initially thought he was preparing a refinance closing, and only days before the date for closing, discovered it was a "sale." It was this last-minute rush that contributed to his failure to examine thoroughly the chain of title that, in turn, gives rise to this dispute. (The defendant, Fine Housing, Inc. currently has a claim pending against his closing attorney, alleging negligence for failing to discover the Clarke lease.)

As the testimony of Vincent DeStaso and the exhibits (Plaintiff's Exhibits 4, December 2, 2013 settlement statement and Exhibits 10 and 11, leases and option to repurchase) establish—Mrs. Robinson agreed to deed both properties, her Sol Legare home and the 2028 Pittsburgh Avenue property, to Fine Housing, and in exchange, Fine Housing agreed to lease both properties back to Mrs. Robinson and gave her a written option to repurchase both properties for the agreed

upon repayment sum of 1.15 million dollars. In short, under the terms of the agreement, Mrs. Robinson signed deeds, agreed to pay monthly rent for 24 months and then repay principal and interest to Mr. DeStaso. Had Mrs. Robinson conformed to the payment schedule, she had the right to reclaim both properties at a fixed price. However, Mrs. Robinson did not make the payments. She did, however, file a lawsuit against Fine Housing Inc. on February 19, 2014, two months after the closing, at Case Number 2014-CP-10-01035, in which she alleged Fine Housing defrauded her. In essence, she alleged that the transaction was a loan, not a sale. However, that case ended in favor of Fine Housing Inc. on January 9, 2015, when the parties entered a stipulation of dismissal with prejudice. (See plaintiff's Exhibits 14 and 15.)

At no time before, during, or after the December 3, 2013, closing did anyone provide notice to the plaintiff of the proposed sale of the property. (See Plaintiff's Exhibit 13, November 19, 2016 Request To Admit.) The parties stipulated that neither Robin Robinson nor Fine Housing (or anyone acting on their behalf) gave notice to the plaintiff of the defendant's intention to purchase the property.

Discussion of the issues

A. South Carolina Recording Statute

The plaintiff's complaint sounds in specific performance. The defendant's defenses are both legal and equitable. Neither party requested a jury trial. The Court evaluates this case as a case brought in equity. "An action for specific performance is one in equity." *Fesmire v. Digh*, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009),

There are two broad principles of law invoked in this case. (The defendant's affirmative

defenses are separately analyzed below.) The first is the application of the South Carolina Recording Statute, § 30-7-10, S. C. Code, Ann. “Validity of conveyances, liens, and other transactions as to subsequent purchasers and creditors.” Every purchaser or mortgagee is regarded as having notice of documents properly recorded. Any properly recorded interest is valid as to subsequent purchasers without notice. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 662 S.E.2d 452 (S. C. App. 2008); *In Re Davis*, 490 Bkrcty. Rpts. 221 (D.S.C. 2013).

Here, the defendant does not contest the applicability of the recording statute or dispute that the parties’ lease, containing the contested right of first refusal, is on file in the R.M.C. Office and constitutes notice to the defendant of its existence. On the stand, Fine Housing’s closing attorney, William Sloan, was candid about missing it (see plaintiff’s Exhibit 12), although his testimony makes clear that he was not originally clear about Fine Housing’s intentions—whether the transaction was a loan or a sale, and by the time Sloan knew what Fine Housing’s intentions were, it provided Sloan only a couple of days in order to review the title and prepare the closing documents for a December 3rd closing in time to avoid the foreclosure sale of Mrs. Robinson’s Sol Legare home. Also contributing to the confusion and undue pressure was the fact that the foreclosing creditor refused to grant additional time, and, in fact, made Mr. Sloan’s job even more difficult by refusing to accept his trust account check, thereby placing additional pressure on him to leave his office, obtain certified funds, and transmit those by hand delivery to the foreclosing creditor. Such pressure in combination with a failure to provide an adequate period to investigate the status of title created a recipe for disaster with the closing attorney. Sloan testified that he understood from Swope that he was charged with preparing a sales transaction on the Tuesday before Thanksgiving to prevent a December 3rd foreclosure sale.

In 2013, Thanksgiving fell on November 28th. The Master's Office scheduled the foreclosure sale for Tuesday, December 3rd. The evidence demonstrates that the short period of time afforded to Sloan to get the transaction ready for closing accounts for the misstep. Mr. Sloan testified that because time was so short, he had no choice but to rely on background title provided by Mrs. Robinson's attorney, William Swope, which contained no mention of the Clarke Lease that is the subject of this action. (See Plaintiff's Exhibit 12.) In fact, Mr. Sloan testified that he found the Clarke lease almost immediately **after** closing, when he had time to examine the chain of title more closely. Sloan was not so much negligent as prevented from having a reasonable opportunity to examine title because of the time constraints placed on him.

At trial, the defendant concedes that it is on notice of the Clarke Lease, but argues that the right of first refusal is invalid for vagueness and for waiver, estoppel, and laches. Thus, it is not disputed that the South Carolina Recording Statute gave notice to the defendant of the plaintiff's lease, containing a right of first refusal, and neither Robin Robinson nor Fine Housing, Inc., placed the plaintiff on notice of their intent to close prior to the closing on December 3, 2013.

B. Vagueness or Ambiguity

The heart of defendant's defense is that the right of first refusal is not enforceable because it is too vague or ambiguous to be enforced. Through cogent, well-researched, well-written and forcibly argued legal presentations, the defendant argues that the right of first refusal is not enforceable because it constitutes a "restraint on alienation" and the Court must, therefore, apply it narrowly. The defendant also urges the Court to ignore Article V because it does not contain a

mechanism for its operation, including a time for performance, set price, or method of determining price. To support its position, the defense handed up an unpublished opinion called *Page v. Page*, issued by the Court of Appeals on February 24, 2004, at Opinion No. 2004-UP-110.

At the outset, when the Court of Appeals issues an unpublished opinion, it releases it with all capital, boldface disclaimer at the top saying: **“THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.”** See Appellate Court Rule 268(d)(2): “Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.” This rule must mean something.

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However, in an abundance of caution, and to avoid overlooking controlling principles of law, the Court thoroughly reviewed *Page v. Page*, including the cases cited therein, and finds that it is not applicable in this case for the very reason asserted by the defendant who is relying on it: the right of first refusal in *Page* was a deed restriction inserted in the granting clause of a deed in an effort to cut down on a fee simple conveyance:

M.K. Page and Maude Page conveyed a parcel of real estate to S. M. Page, in fee simple absolute, reserving a life estate unto themselves. In the deed, M. K. and Maud placed a restriction on S. M. Page’s right to dispose of the property. The restriction created a right of first refusal as follows:

In the event S. M. Page decides to sell all or any portion of this property, it shall first be offered to Betsy Page Flinn, Carolyn Page Eaton, and Samuel D. Page under the same terms and conditions as the proposed sale. This restriction, on transfer, shall also apply to any heirs of S. M. Page.

As the Court of Appeals explained in *Page*, it found the right of first refusal invalid because it represented an effort “to cut down a fee simple estate contained in the granting clause.” *Page* at page 3. The reason the Court of Appeals’ opinion is unpublished is because it is relying entirely on the published *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 498, 159 S.E.2d 46, 47 (1968). *Stylecraft* has caused more than a few real estate lawyers sleepless nights. Only a few cases in South Carolina law have: (1) generated as much comment or (2) caused as much anguish for real estate lawyers as *Stylecraft*. There, the Supreme Court held that any efforts to impose restrictions in a deed that are contained in granting clauses of deeds are ineffective to prevent the conveyance of an unrestricted fee simple transfer. Thus, the defendant is correct: when a granting clause in a deed attempts to impose a reversion of title in a deed, it is, under *Stylecraft*, ineffectual to cut down the grant of a fee simple estate for the very reason defendant advocates: it represents a restraint on alienation. As the Court of Appeals notes in *Page*, such a limitation “runs counter to the commonly acknowledged concept in this state that one of the attributes of fee simple ownership is the ability to freely convey it with few if any restrictions.” Thus, under *Page*—and more importantly under *Stylecraft*—this Court would not hesitate to invalidate a right of first refusal if it were ineffectively expressed in the granting clause of a deed of conveyance. *Stylecraft* requires it.

However, unlike *Page*, but more importantly, unlike *Stylecraft*, this case does **not** present a *Stylecraft* issue of whether a restriction in the granting clause of a deed of conveyance is or is not effective. There is no question that Group Investment Company and/or RRJR, L.L.C. had fee simple title and the right to sell the property to any person in the world for the highest obtainable price. The Clarke lease in no way attempts to cut down the fee simple ownership. Here, the

issue is whether a recorded lease—which the parties agree is: (1) of record, and (2) in full force and effect—does or does not contain a valid right of first refusal. Thus, the present case is more akin to a case of a missed mortgage or a missed judgment or a missed mechanic's lien. A properly recorded mechanic's lien is a "restraint on alienation" in one sense because whoever purchases the property, purchases it subject to the lien. This Court is not called upon to decide if a limiting reversion in the granting clause in a deed does or does not effectively cut down the fee simple ownership of the grantee—especially because *Stylecraft* laid that issue to rest. Rather, the issue here is whether the defendant took title to the property subject to the plaintiff's lease. Since the defendant concedes he took title subject to the plaintiff's lease, the question distills down to whether the right of first refusal is or is not valid. Contrary to the defendant's argument, had RRJR, L.L.C. notified Clarke of its intent to sell, then it could have maximized its return instead of accepting what Fine Housing was willing to pay. Not to put too fine a point on it, but RRJR's haste deprived it of an opportunity to drive up the bidding. This is the opposite of a restraint on alienation.

The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract. If the language is clear and unambiguous, the language alone determines the contract's force and effect. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992). *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (1993). On the issue of whether the right of first refusal is or is not too ambiguous to enforce is an issue analyzed by the Court of Appeals in 1996 in the so-called "Grease Monkey" case, *Minter v. GOCT, Inc.*, 322 S. C. 525, 473 S.E.2d 67 (1996). There the plaintiff brought a breach of

contract action, alleging that the defendant had failed to live up to its contractual obligation to allow the plaintiff the right of first refusal to own and operate any "Grease Monkey" franchise in Richland or Lexington counties. The plaintiff alleged the agreement contained a provision giving Carolina Properties a "first right of refusal on any other Grease Monkey sites developed by GOCT [322 S.C. 527] in Richland or Lexington County South Carolina." The plaintiff sued when the defendant built another facility on Rabon Road in Richland County without offering it first to the plaintiff. The trial court granted a directed verdict for the defendant on the breach of contract claim, and the Court of Appeals reversed. In sending the case back for trial on damages, the Court of Appeals quoted the plaintiff's testimony as follows: "According to William S. Minter, III, the right of first refusal was a negotiated part of the agreement because he was in the real estate development business and the parties contemplated a chain of oil change facilities."

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The testimony of William S. Minter in the *Grease Monkey* case and the testimony of the plaintiff here is almost identical. Here the plaintiff testified at length about his friendship with John Robinson, the negotiations leading up the lease, and the fact of its recording, and the purpose for the right of first refusal. As the plaintiff testified, the right of first refusal is the opposite of a restraint of alienation because it guarantees the seller will always have at least two bidders for his property in the event he wishes to sell. Nothing in the lease prevents the owner from selling; in fact, it guarantees there will always be two bidders.

In construing a similar right of first refusal contract between two equal parties, the Court of Appeals said:

"In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." *Southern Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct. App.2002); accord *D.A. Davis Constr. Co., Inc. v. Palmetto Proprs., Inc.*,

281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984); *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976); *RentCo., a Div. of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct.App.1984). "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958).

The parties' intention must, in the first instance, be derived from the language of the contract. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *C.A.N. Enters., Inc. v. S.C. Health & Human Services Fin. Comm'n.*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) ("In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties."); *Jacobs v. Service Merch. Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988). To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 [649 S.E.2d 502] S.E.2d 767, 769 (1976); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93-94, 594 S.E.2d 485, 493-94 (Ct.App.2004); *accord Kable v. Simmons*, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950).

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The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); *see also Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct.App.2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used."). "Documents will be interpreted so as to give effect to all of their provisions, if practical." *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct.App.1997) (citing 17A Am.Jur.2d *Contracts* § 385 (1991)). In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); *Bruce v. Blalock*, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962); *Mattox v. Cassidy*, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986).

In *Brady v. Brady*, 222 S.C. 242, 72 S.E.2d 193 (1952) the South Carolina Supreme Court asseverated:

It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning.

Agreements should be liberally construed so as to give them effect and carry out the intention of the parties. In arriving at the intention of the parties to a lease, the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties at the time, are to be regarded, and the lease construed as a whole. Different provisions dealing with the same subject matter are to be read together.

Id. at 246-47, 72 S.E.2d at 195.

If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); *Blakeley* at 72, 221 S.E.2d at 769. "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ellie* at 93, 594 S.E.2d at 493 (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)). However, where an agreement is ambiguous, the court should seek to determine the parties' intent. *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct.App.2001); *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct.App.1998).

Ecclesiastes Production Ministries v. Outparcel Associates, LLC., 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) (Court of Appeals reversed grant of directed verdict when plaintiff sought to enforce lease with right of first refusal.)

Finally, the defendant contends the right of first refusal is too ambiguous and indefinite to be enforced because it does not contain a time for performance or a method of determining price. As to the time for performance, every contract in South Carolina contains within it implied terms of good faith and reasonableness. In a contract for the sale of land, where a contract does not contain a "time is of the essence" clause, the Court supplies the time for performance as being "reasonable":

It is well established in this state that time is not of the essence of a contract to convey land unless made so by its terms expressly or by implication from the nature of the subject matter, the object of the contract or the situation or conduct of the parties. When the contract does not include a provision that time is of the essence, the law implies that it is to be done within a reasonable time; and the failure to incorporate in the memorandum such a statement does not render it insufficient. *Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588 (1948).

Hobgood v. Pennington, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1989)

As for defendant's suggestion that the right of first refusal fails to set the price, the Court is persuaded not only by the lease itself, but also by the testimony of the plaintiff, Clarke, that the price is controlled by the property owner and set by the owner's acceptance of any price from any purchaser whose offer is acceptable to the owner, after which the plaintiff, as the holder of the right, can either match the price or waive the right to exercise it. Such a process is the opposite of a "restraint" on alienation. Instead of being a "restraint," it is a facilitator. However, (as discussed below) a holder of a right of first refusal cannot waive the right to exercise it when the seller and the purchaser—who are on notice of the right—keep the holder of the right of first refusal in the dark and deprive him of an opportunity to exercise it. Such conduct is inequitable. Therefore, under well-established principles of South Carolina jurisprudence, the right of first refusal here is at least as definite as the right enforced by the Court of Appeals in the *Grease Monkey* case, and the intention of the parties is clear and unmistakable under the holding of *Ecclesiastes Production Ministries*: "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it."

C. Waiver, Estoppel and Laches

The final defenses asserted by the defendant are both legal and equitable. "By waiver is meant the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right. Therefore, to establish waiver, the person against whom the waiver is claimed must have full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such right." *Sims v. Ham*, 275 S.C. 369, 271 S.E.2d 316 (1980). "Where an implied waiver is involved, the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins." *Id.* Whether a party is barred by estoppel or waiver can only be determined in light of the circumstances of each case. *Janasik v. Fairways Oaks Villas*, 307 S.C. 339, 415 S.E.2d 384 (1992) Likewise, "Laches is 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.'" *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988). *Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005)

The evidence in this case does not support either theory. The defendant contends that the plaintiff "waived" his right to first refusal in 2007, (Plaintiff's Exhibit 33, June 13, 2007, Deed from Group Investment Co. to RRJR, L.L.C.) when Group Investment Company, Inc. transferred

its interest in the 2028 Pittsburgh Avenue property to RRJR, and the plaintiff failed to exercise his right at the time of that conveyance. The evidence does not support such a theory. First, the record shows that the transfer was a name change only, going from a corporation owned and operated by John Robinson and Robin Robinson to a limited liability company owned and operated by John Robinson and Robin Robinson for the consideration of five (\$5.00) dollars. (See plaintiff's Exhibits 31, 32, and 33, Stipulation of William Swope, and testimony.) Second, the consideration for the 2007 transfer is five dollars (\$5.00), and the affidavit of true consideration demonstrates that it is a name change only. Third, the plaintiff testified he was aware of the name change and knew it was not a sale to a third party. The defendant failed to produce evidence otherwise. Estoppel and waiver are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, be made the instruments of gain or profit. See *Herring v. Volume Merchandise, Inc.*, 252 N.C. 450, 113 S.E.2d 814 (1960); 28 *Am. Jur.2d Estoppel and Waiver* § 33 (1966). See also *Ott v. Ott*, 182 S.C. 135, 188 S.E. 789 (1936). While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons. *Janasik v. Fairway Oaks Villas*, 307 S.C. 339, 415 S.E.2d 384 (2002)

Likewise, the defendant asserts that the plaintiff waived his right to enforce his right of first refusal because of his inaction upon the transfer to Fine Housing, Inc. There is no evidence in this record to support any theory based on plaintiff's alleged inaction. Fine Housing, Inc. acquired title on December 3, 2013. Two months later Robin Robinson filed suit against Fine Housing, seeking to unwind the transaction. Fine Housing admits it never gave notice of the

transfer to Clarke. RRJR, L.L.C. is in default and has walked away from the entire dispute. Mr. Clarke testified he received a late-night visit from "Terry and Terry" sometime in March 2014, telling him that "something was up with the club." Mr. Clarke then testified he contacted Mr. DeStaso, informed him of his right to purchase the property, and Mr. DeStaso promised to call him back within two weeks. When DeStaso failed to call Clarke back, Clarke testified he called him a second time, and DeStaso told Clarke "he forgot." It was at that point, Clarke testified, that he turned the matter over to his lawyers, and on April 10, 2014, Clarke's lawyer sent to DeStaso a proposed purchase agreement. (Plaintiff's Exhibit 16.) When DeStaso failed to respond, Clarke's lawyer sent to DeStaso a second letter, Plaintiff's Exhibit 17, dated April 21, 2014, reminding him that Clarke was "ready, willing, and able" to purchase: "Barry wanted me to convey to you that he is ready, willing, and able to purchase the property without owner financing and only mentioned that as an option if you were interested in it." In fact, it was not until January 9, 2015, there was certainty as to who held title. (See order of dismissal in *RRJR vs. Fine Housing, Inc.*, plaintiff's Exhibit 15.) Under these facts, the defendant has failed to establish by a preponderance of the evidence that the plaintiff failed to act in a timely manner or took such action as would equitably esstop him from claiming the right to enforce his lease.

In summary, there is no evidence in this record to support a theory of either waiver or estoppel.

As to the affirmative defense of laches, the record is likewise devoid of evidence supporting defendant's affirmative defense. The defendant stipulated it never notified the plaintiff of his acquisition, and the defendant, RRJR, never notified anyone of anything. The plaintiff testified that he heard a "rumor" that a third party had "taken over the club" after he

received a late-night visit in March, 2014, at his home from "Terry and Terry." The plaintiff testified that when he heard rumors about the putative sale of the club, he immediately contacted Ashley Andrews and undertook an investigation to, as he put it, find out what was going on. This led to a telephone call to Vincent DeStaso. Plaintiff testified he offered DeStaso a sum of money to exercise his right to the club, and DeStaso promised to call him back. Plaintiff testified he heard nothing back and therefore placed a second call to DeStaso a month later, who informed plaintiff that "he forgot." Plaintiff testified that he knew then he could not rely on DeStaso's representations and turned the matter entirely over to his attorneys.

The documentary evidentiary record corroborates the plaintiff's testimony. The evidentiary record demonstrates that the transfer of the property occurred on December 3, 2013. (Plaintiff's Exhibit 4) The evidentiary record demonstrates that no one gave notice of this transfer to plaintiff. (Plaintiff's Exhibit 13) The evidentiary record demonstrates that less than two months after closing, on February 19, 2014, Robin Robinson filed a lawsuit at case number 2014-CP-10-01035, seeking to rescind the closing. (Plaintiff's Exhibit 14) The evidentiary record demonstrates that this action terminated in Fine Housing's favor on January 9, 2015. (Plaintiff's Exhibit 15) The evidentiary record demonstrates that the plaintiff's first written expression of his attempt to exercise his right of first refusal occurred on April 10, 2014. (Plaintiff's Exhibit 16) On April 17, 2014, plaintiff renewed his effort to exercise his right of first refusal, emphasizing that he was "ready, willing, and able" to complete the transaction. Under these sequences of events, it is impossible to find evidence to support a defense of laches. (The defendant abandoned the defense of statute of limitations.)

Therefore, based on the totality of the evidence, which includes evaluating the witnesses'

testimony for credibility and believability, the documentary evidence, and the arguments of counsel and their written memoranda, the Court makes the following

FINDINGS OF FACT

1. The plaintiff recorded a lease allowing shared parking of the property commonly referred to as 2028 Pittsburgh Avenue.
2. The defendant, Fine Housing, Inc., had notice of the lease by virtue of it being recorded and properly indexed upon the rolls of the Register of Mesne Conveyance for Charleston County.
3. The lease contains Article V, which grants to the plaintiff the right of first refusal in the event the owner offers the property for sale.
4. The lease contains an exact legal description of the property so encumbered by the lease and the right of first refusal.
5. Neither seller nor purchaser provided the plaintiff with notice or with an opportunity to exercise his right of first refusal prior to the sale or afterwards.
6. Fine Housing Inc. acquired title to the property on December 3, 2013, for the stated consideration of \$150,000.00.
7. Robin Robinson challenged the sale on February 19, 2014, by filing a summons and complaint at Case Number 2014-CP-10-01035. This lawsuit ended in Fine Housing's favor on January 9, 2015.
8. The first notice of any kind to the plaintiff occurred on or about March 21, 2014 when he received a late-night visit from "the two Terry's" telling him the club was in

the hands of a new person.


9. The plaintiff first attempted to exercise his right of first refusal on April 10, 2014, when his lawyer conveyed an offer to purchase to the defendant.
10. The right of first refusal contained in Article V of the lease between Group Housing, Inc. and Barry Clarke contains sufficient terms to be enforceable.
11. The right of first refusal contains an exact legal description of the property encumbered.
12. The lease containing the right of first refusal is properly indexed in the Register of Mesne Conveyance for Charleston County.
13. The defendant failed to produce sufficient evidence to establish by a preponderance of the evidence the defenses of waiver, laches, or estoppel. (The defendant abandoned the other defenses.)
14. The right of first refusal is sufficiently articulated to be enforceable.

Based on these facts, the Court makes the following

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction and jurisdiction over the parties.
2. The plaintiff personally served the defendant, RRJR, L.L.C., who failed to appear and is adjudged to be in default.
3. The plaintiff has established by a preponderance of the evidence that he has a valid right of first refusal that identifies the property with sufficient particularity to be enforced.
4. The defendants failed to give the plaintiff notice of the purported sale to Fine Housing.

5. The plaintiff acted timely after receiving notice of the transfer on or about March 21, 2014.
6. Fine Housing's Agreement was to purchase both properties (Sol Legare property and the 2028 Pittsburgh Avenue property) for \$850,000.00.
7. Fine Housing allocated \$700,000.00 of the purchase price for the acquisition of the Sol Legare property and \$150,000.00 of the purchase price for the acquisition of the 2028 Pittsburgh Avenue property.
8. Fine Housing sold the Sol Leagare property for \$500,000.00 on December 5, 2016.
9. Fine Housing is entitled to receive \$200,000.00 + \$150,000.00 for a total of \$350,000.00 in order to be made whole on the right of first refusal.
10. The right of first refusal contains an implied condition of timeliness, and sixty (60) days is a reasonable time for performance.



It is therefore **ORDERED**:

That the plaintiff has proven by a preponderance of the evidence that he is entitled to specific performance of his right of first refusal, and it is further

ORDERED that the sum of \$350,000.00 is an equitable sum to be paid to Fine Housing, Inc. in satisfaction of the plaintiff's right of first refusal, and it is further

ORDERED that the plaintiff shall have sixty (60) days from the date of receipt of a copy of this signed and filed Order (or such Final Order as may be entered by the Court of final appellate authority) to consummate his acquisition of the property defined by the legal description contained in the right of first refusal, and it is further

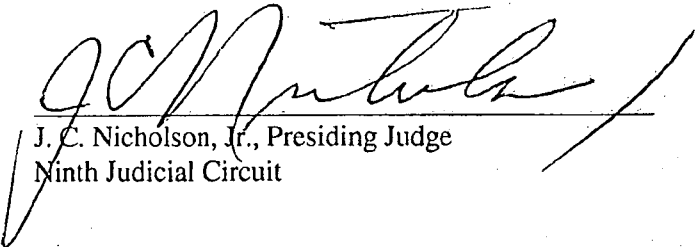
ORDERED that if the plaintiff does not perform under the terms of this Order within sixty

(60) days from the date of receipt of this signed and filed Order (unless the date for performance be postponed by judicial review of this Order), the plaintiff shall immediately file a release of the right of first refusal in recordable form with the Register of Mesne Conveyance. In such case, the remainder of the lease will remain in full force and effect. It is further

ORDERED that upon receipt of the amount of \$350,000.00 within sixty (60) days from receipt of this signed and filed Order—unless postponed by timely petition for judicial review—the defendant shall execute a limited warranty deed in favor of the plaintiff for the consideration set forth here. In the event the defendant refuses to execute such deed, then the plaintiff will notify the Court of the defendant's refusal, and the Court will issue such supplemental Order as is necessary in order to put into effect the intent of this Order to convey title to the plaintiff upon payment of the consideration required here.

AND IT IS SO ORDERED!

Sept. 26
~~August~~ 26, 2017
Charleston, S. C.



J. C. Nicholson, Jr., Presiding Judge
Ninth Judicial Circuit