THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2015-CP-10-03038
Appellate Tracking No.: 2017-002285

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SC Court of Appeals

Barry Clarke.....Respondent/Appellant,

vs.

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

Of which Fine Housing, Inc. is the ..... Appellant/Respondent.

OPENING BRIEF OF RESPONDENT/APPELLANT ON CROSS APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND OTHER AUTHORITIES:

STATEMENT OF ISSUES ON CROSS APPEAL

I. Did the trial court err in in fixing the acquisition price for the property at $350,000.00 when appellant paid $150,000.00 for it?

II. Did the trial court err in excluding admissible, relevant evidence?

STATEMENT OF CASE

This interesting case originates in 1999, when the respondent, Barry Clarke, signed a lease with Group Investment Company, Inc., which the parties recorded on January 17, 1999, in the Charleston County Register of Mesne Conveyance at Deed Book C 319 at Page 791. (R.O.A. page ___[Exhibit 1]) The property subject to the lease is located at 2028 Pittsburgh Avenue in North Charleston, S.C. For convenience, the respondent refers to this property throughout the brief as the "subject property." The respondent signed the lease in his individual capacity, and Robin Robinson signed the lease on behalf of the landlord as "President" of Group Investment Company, Inc., a company comprised of the husband and wife team of John and Robin Robinson. On February 19, 2007, for the consideration of $5.00, Group Investment Company, Inc. deeded the subject property to RRJR, L.L.C., one of the two defendants in this case. (RRJR stands for Robin Robinson and John Robinson.) R.O.A. page ___[Exhibit 33] In 2008, John Robinson died, and Robin Robinson took over managing his affairs. Her financial condition deteriorated to the point that she faced the loss of her home located at 2347 Sol Legare Road, Charleston, S. C. 29412 by foreclosure sale scheduled for

December 3, 2013. (R.O.A. page ____[tr. page ____]. The respondent refers to this property throughout as the "Sol Legare property." On December 2, 2013, the day prior to the scheduled foreclosure sale, and as part of a single transaction, Ms. Robinson executed a deed to the subject property to the appellant, Fine Housing Inc., for the sum of $150,000.00, which is recorded at Book 0377 at Page 843 on December 9, 2013. At the same time Robin Robinson executed a deed to Fine Housing for the Sol Legare property for $700,000.00, which is recorded at Book 0377 at Page ____ (R.O.A. page ___[Exhibit 3)

Fine Housing stipulated that neither Fine Housing nor RRJR notified Barry Clarke of the transaction. (R.O.A. page ___[tr. Page 61, line 13, 103, line 18 and stipulation] Clarke testified he first learned of the putative sale when to of Robinson's employees, the "two Terry's," came to his house in March, 2014 and told him "something is up with the club." (R.O.A. page ____[tr. Page 140, line 6 and 145, line 7] When the respondent learned of the putative sale of the subject property, he made a demand upon the appellant to sell the property to him, and when that failed, his lawyer sent a proposed purchase contract on April 10, 2014, offering to purchase the subject property for $650,000.00. (R.O.A. page ____[Exhibit 22]) Appellant refused, and after further efforts at negotiation failed, respondent filed suit on May 28, 2015, seeking specific performance to enforce his right of first refusal. (R.O.A. page ___[complaint]) Fine Housing Inc. timely answered. RRJR never answered, and the respondent filed an Affidavit of Default with the Court on August 3, 2015, (R.O.A. page ___[affidavit of default]).

Both parties moved for summary judgment, which the Court of Common Pleas denied by written Order dated August 29, 2016. (R.O.A. page ___) Thereafter, the Clerk

of Court called the case to trial on July 26, 2017. At the conclusion of the trial, the Court entered a written Order on September 28, 2017, finding that the defendants failed to notify appellant of RRJR's intent to sell, and required the plaintiff to tender the sum of $350,000.00 within 60 days to the appellant to exercise his right of first refusal. The appellant filed a Motion for Reconsideration on October 13, 2017, which the trial court denied by written Order dated October 20, 2017. (R.O.A. page ____) On October 31, 2017, the appellant filed a Notice of Appeal, and on November 10, 2017, the respondent filed a Notice of Cross Appeal as to the trial court's calculation of purchase price. (R.O.A. pages ___ and _____)

STATEMENT OF FACTS

There are no material facts in dispute. The appellant concedes that the respondent holds a recorded lease on the subject property and that the recorded lease contains a right of first refusal 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.

R.O.A. page ____[Lease]

The parties stipulated that neither RRJR nor Fine Housing provided notice to the respondent of the intent to sell. (R.O.A. page ___[tr. page ____]

The other facts developed at trial demonstrated that after her husband died in 2008, Robin Robinson assumed the duties of running his various businesses. As may be

seen by the numerous pay-offs listed on the settlement statement between Robin Robinson and the appellant in this case (R.O.A. page ____[settlement statement, Exhibit 4], her finances were dire, and she could not turn to conventional lending sources. Facing the loss of her home to foreclosure sale, RRJR scheduled the transaction between appellant and Robin Robinson 1 day before the Charleston County Master-in-Equity was selling her home at a foreclosure sale. Because she was facing the imminent loss of her home, she turned to appellant to make her a loan to save her home and her business.

As the record shows, the agreement between appellant and Robin Robinson was a non-traditional loan, a hybrid bond-for-title. In exchange for paying off the loan to her home, several tax liens and judgments, Robin Robinson conveyed title to her home and the subject property to respondent but reserved the right to lease both back at the agreed upon monthly rental of $12,750.00 per month for 24 months and then reacquire both parcels by paying a fixed sum. (R.O.A. page ___[tr. page ___, Exhibits 10 and 11]) On page 6 of his brief, respondent asserts that he spent time and money "improving the Property and resolving issues that clouded title to the property." To the extent such statement implies appellant spent additional money, it is not correct. As the Settlement Statement demonstrates, the $850,000.00 loan cleared up all the tax liens and judgments, and in fact, the appellant held back $35,000.00 out of the "purchase price" for himself as a security deposit for Robinson's performance of the parties' buy-back agreement. He also paid himself $5,500.00 for acting as "broker," and he also paid $9,311.00 to cover his insurance premiums. See Record on Appeal page. ____[tr. page 102, line 19 – 105, lines 20-22, and page 106, line 4 – page 107, lines 5-8]. The record demonstrates that the appellant and Robinson agreed in writing that after 24 months, the appellant would

re-convey the property to Robinson for the sum of $1,250,000.00, which is equivalent to a 40% rate of interest. (R.O.A. page ___[Exhibit 35]). The entire transaction is summarized in the settlement statement found at page ___ of the Record on Appeal. [Exhibit 4]

There is no dispute that the appellant and Robinson rushed the transaction as they were up against an inflexible December 3rd deadline to save Robinson's home. Appellant's first visit to South Carolina was on November 26th, two days before Thanksgiving, and seven days before the foreclosure sale. (R.O.A. page ___[tr. Page 97, line 23] The record demonstrates Fine Housing hired a lawyer, William H. Sloan, Jr., to handle what he originally thought was a "refinance" on November 26, 2013. (R.O.A. page ____[tr. page 116, lines 11-19]) In 2013, Thanksgiving was on November 28th and the appellant gave Sloan a closing deadline of December 2, 2013. Thus, there is no factual dispute that appellant's closing attorney did not have sufficient time to conduct a proper title exam and relied on title information supplied by Robinson's personal lawyer. (R.O.A. pages ___[tr. Pages 97 and 116]) There is no dispute that from the time Robinson and DeStaso began negotiating in late November, 2013, up through the closing on December 2nd, neither Robinson nor appellant notified respondent of a contemplated "sale." Likewise, there is no dispute in the record that Respondent first heard about the "sale" three months later when two employees of the tenant informed respondent "that something is up with the club." (R.O.A. page ___[tr. page 140]) Respondent's closing attorney testified he did not have time to check the title and that he missed the lease to respondent. (R.O.A. page ___ [tr. page 103, line 15]) Respondent's brief at page 4 states that Sloan learned of the lease after Clarke spoke to him: "On March 21, 2014, Clarke

spoke with Mfr. Sloan and advised him of the Lease." This is an incorrect statement of fact. The record shows that Sloan conduced a proper search **after** the closing by asking a lawyer, Charles M. Feeley, to examine the title. Mr. Feeley discovered the recorded lease and right of first refusal and then informed Sloan of the Clarke lease on March 21, 2014. R.O.A. page ___[tr. Page 103, line 18]. See also Record on Appeal at page ____[Exhibit 12]

The record shows that respondent first heard of the putative sale about three months later in March 2014, after a visit from "the two Terry's." (R.O.A. p. ____[tr. page 145, lines 7-8]) Once he learned the property had been transferred without notice to him, he attempted to resolve the matter by contacting the appellant directly in March 2014, and tried to purchase appellant's interest in the Pittsburgh property for an agreed upon sum. (R.O.A. page ____[tr. page ___ Exhibit 22]) When appellant ignored him, he contacted counsel and attempted again to resolve the matter without litigation. When that failed, he filed a summons and complaint on May 28, 2015, 17 months after the putative sale, alleging that Robinson failed to notify him of his right of first refusal and asking the Court to order the property conveyed to him after he tendered the acquisition price. Appellant argues on page 7 of his brief that ". . . Goldstein first raised the Right of First Refusal to Fine Housing and advised that Clarke was exercising his right." This is misleading because the record shows that Clarke attempted to resolve the matter with the appellant directly in March, but appellant ignored him, forcing respondent to consult with counsel. R.O.A. page ____[tr. page 141, line 24-142, line 13]

The most important statement of fact in appellant's brief is found on page 9 where appellant writes: "Fine Housing also stipulated that no one gave Clarke notice of the

transfer from RRJR to Fine Housing, a transfer that would trigger the right of first refusal Clarke claims. **Fine Housing did not provide notice to Clarke because it did not have actual knowledge of the Lease.**" (emphasis added) This is, of course, an inaccurate statement of fact because, as discussed below, the recorded lease gave constructive notice to the world of the respondent's right of first refusal, and the only reason appellant did not have "actual knowledge" is because he failed to look.

STANDARD OF REVIEW

"Because this case requires us to answer a question of law—whether equitable estoppel may be used to prevent the enforcement of an unambiguous contract—we apply a different standard of review than in the typical fact-based challenge to summary judgment." *Rodarte v. University of South Carolina*, 419 S.C. 592, 799 S.E.2d 912 (2017). In general, the appellant cites the correct standard of review citing *Wachovia Bank Nat. Ass'n. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014), but cites the standard as if it were in a vacuum. In an appeal from a non-jury trial in equity, this Court can review the record and find its own facts, but this does not mean the appellate court ignores the findings of the trial court who had the opportunity to observe the witnesses and judge their credibility and believability: On appeal from an action in equity, this Court may find facts in accordance with its view of the preponderance of the evidence. *Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, we need not disregard the findings of the special referee, who was in a better position to weigh the credibility of witnesses. *Tiger, Inc. v. Risher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989) *Walker v. Brooks*, 414 S.C. 343, 778 S.E.2d 477 (2015) The admission

or exclusion of evidence is within the sound discretion of the trial court and the trial court's decision will not be disturbed on appeal absent an abuse of discretion. [citations omitted] An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. [citations omitted] *Conner v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905 (2005)

ARGUMENT

I. The trial court erred by not fixing the acquisition price for the property at $150,001.00 when appellant paid $150,000.00 for it?

The trial court has wide discretion in equitable matters. However, as the Supreme Court instructs in *Rodarte v. University of South Carolina*, 419 S.C. 592, 799 S.E.2d 912 (2017):

> Because this case requires us to answer a question of law—whether equitable estoppel may be used to prevent the enforcement of an unambiguous contract—we apply a different standard of review than in the typical fact-based challenge to summary judgment. Cf. Eagle Container Co. v. County of Newbery, 379 S.C. 564, 567-68, 666 S.E.2d 892, 894 (2008) (noting that interpretation of an unambiguous ordinance is a question of law and the Court has a broader scope of review in those instances than when it reviews questions of fact.

Here, there is no dispute that the right of first refusal (R.O.A. page ___[Exhibit 1]) is succinct. The appellant's attack on it is not that it is ambiguous, but incomplete, an issue fully analyzed in respondent's brief. However, as our Supreme Court instructs in *Rodarte*"

"In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." *28 Am. Jur.2d* Estoppel and Waiver § 27 (2011); see *e.g., Parker v. Parker*, 313 S.C. 482, 488, 443 S.E.2d 388, 391 (1994) (holding that equitabel estoppel was a valid defense to a paternity challenge brought by the children of an intestate decedent against a putative heir because the children had "lulled her into a position where she could no longer defend her parentage"). "The essence of equitable estopple is that the party entitled to invoke the principle was misled to his injury." *S. C. Publ. Serv. Auth. V. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). "The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel." *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007) The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequent attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estopppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped. *Id.* at 84-85, 650 S.E.2d at 470.

Here it is not disputed that appellant demonstrates none of these factors; in fact, without realizing the duality of his position, argues in his opening brief that the right of first refusal cannot be asserted against him because he was not a party to contract. Of course, appellant neglects to mention that the party to the contract, RRJR, defaulted and did not participate in the litigation. The undisputed point is that Barry Clarke did nothing to Fine Housing. The legal dispute arises from Fine Housing's decision to purchase real estate without examining the title and nothing more. The legal error committed by the trial court was in using its discretion to fashion an equitable remedy even though the parties' relationship is governed by an unambiguous, recorded right of first refusal. As the Supreme Court held in *Rodarte*, equitable claims are not permitted against unambiguous enforceable contracts. "Indeed, an unambiguous, written contact is inherently incompatible with the doctrine of equitable estoppel. To succeed on a claim for equitable

estoppel, a party must prove 'lack of knowledge, and the means of knowledge, of the truth as to the facts in question.' [citation omitted] However, an unambiguous contract is by definition capable of only one reasonable interpretation." *Rodarte* at page 918.

Therefore, because the contract is clear, recorded, and enforceable, the trial court is obligated to enforce it as written. As written, the respondent has the right to purchase the subject property for any amount greater than the seller's sales price. Since the seller is in complete control in setting the purchase price and accepted $150,000.00 for the property, the respondent is entitled to acquire it for any amount greater than the consideration paid by the appellant.

II. The trial court erred by not allowing the respondent to introduce the cancelled checks related to appellant's payments to himself and others.

The trial court admitted the appellant's closing statement, R.O.A. ___, Exhibit 4, but denied respondent's effort to offer the specific checks to Cherie DuMez Agency for $9,3111.00 for flood insurance (Exhibit 5), $3,500.00 to Joseph Scarmato for allegedly preparing a lease that is nothing more than a recycled form with handwriting on it(Exhibit 6), $5,500.00 to AAA (which was voided in favor of the next exhibit) (Exhibit 7) and $5,500.00 to Tamara Lane, which was Vincent DeStaso paying himself for acting as "broker" (Exhibit 8). Even though the trial court allowed respondent/appellant a full and fair opportunity to cross-examine on the four exhibits, it refused to admit them into evidence on the ground that the four checks were "cumulative":

MR. GOLDSTEIN: Well, before we release this witness, can I renew my request to -- you said Five, Six, Seven and Eight are not in?

THE COURT: Right.

MR. GOLDSTEIN: I'm renewing my request to move them in, in light of his testimony.

MR. MOORE: Same objection.

THE COURT: All right. He has the same objection.

MR. GOLDSTEIN: I understand.

THE COURT: What's relevant about it?

MR. GOLDSTEIN: Oh, well, he testified -- Mr. Sloan testified about them. I thought they were already in evidence and he testified about them in response as to how much he received and how much he dispersed out. But Your Honor is correct that they are shown on the closing statement.

THE COURT: I mean they ought to show on the closing statement.

MR. GOLDSTEIN: They are.

THE COURT: My thoughts are it's cumulative. Motion denied. I don't know why you want them in. The HUD statement shows them. Testimony says what they are for.

R.O.A. page 127-128

Under the rules of evidence, all evidence "having any tendency to make the existence of any fact that is of consequence . . . more probable" is relevant. Rule 401. Rule 403 authorizes a court to exclude relevant evidence if represents a "needless presentation of cumulative evidence." The respondent concedes he cannot show prejudice resulting from the exclusion of this relevant evidence at the non-jury trial of this equity matter, but the exclusion prejudices a party on appeal when the reviewing court may make its own findings based only on a printed record. Moreover, since the trial was a non-jury trial, there was no chance of confusion or the possibility of "needlessly" complicating a record. Since the trial court agreed with respondent/appellant that the

evidence is relevant, it was error to exclude relevant evidence when the documents are not numerous and provide a reviewing court a full opportunity to view all the relevant evidence of the facts below. Since the evidence is relevant and material and does not amount to a "needless presentation," the evidence should be admitted, and the trial court erred in excluding it.

The trial court also erroneously excluded the lawsuit Fine Housing filed against William Sloan, *Fine Housing, Inc. v. Sloan*, 2016-CP-18-00340, Exhibit 30, but the cross appellant concedes he cannot demonstrate prejudice since this Court, in making its own findings of fact, can take judicial knowledge of a lawsuit pending in the South Carolina judicial system. Rule 201, South Carolina Rules of Evidence. "A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability. *Bowers v. Bowers*, 349 S.C. 85, 561 S.E.2d 601 (S.C. App. 2002), *cert. den.*

CONCLUSION

Therefore, as set forth in respondent's brief the lower court correctly determined that the respondent holds an enforceable right of first refusal. Even though this is a case brought in equity for equitable remedy of specific performance, this Court is being asked to enforce an unambiguous contract as written and recorded, and, as appellant points out, since he was not a party to the contract, the only available remedy is in equity. Because the appellant chose to purchase real estate without examining the title, he cannot be heard to complain that the purchase price is set by the terms of the written and recorded document. The

appellant never explains why § 30-7-10 does not apply to him. Under the appellant's theory of the case, the orderly transfer of real estate in South Carolina would end overnight. To provide a reliable system of transferring property, the law must feed every citizen from the same spoon. The appellant produced no evidence of waiver or estoppel, and a right of first refusal in a lease is not a restraint on alienation. Nothing in the lease or the right of first refusal prohibited RRJR from selling the property to anyone it chose for any amount it was willing to take. Because it was willing to sell the property for $150,000.00, and because the terms of the contract are clear, the law requires that the court enforce the terms of the contract must be fulfilled in a reasonable time in a reasonable manner. The acquisition price was established by the seller, and for that reason the trial court is obligated to make the property available to the respondent for the amount of $150,001.00. For all the reasons set forth in the respondent's brief and as dictated by the overwhelming weight of the evidence, the Order of the trial court should be affirmed but modified as to the amount respondent must pay to acquire the property.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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Of which Fine Housing, Inc. is the ..... Appellant/Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent, Initial Brief of Cross Appellant and Designation of Contents of Record on Appeal on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on March 1, 2018, addressed to its attorney of record, W. Cliff Moore, III, Adams & Reese, L.L.P. at P. O. Box 2285, Columbia, S. C. 29202.

March 1, 2018

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March 1, 2018

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Re: Barry Clarke vs. Fine Housing, et. al. Case #: 2015-CP-10-03038
Appellate Tracking Number: 2017-002285

Dear Amelia,

I enclose the respondent/appellant's respondent's brief, cross appellant's brief, designation of contents of record on appeal, and a proof of service. Would you be so kind as to file the originals and return clocked-in copies to me in the envelope provided. By copy of this letter, I am sending a copy to opposing counsel. I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,

BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Thomas R. Goldstein

TRG/
enclosure: Respondent's brief, Cross-appellant's brief, designation of contents of record on appeal, return envelope

cc: Cliff Moore, Esq.

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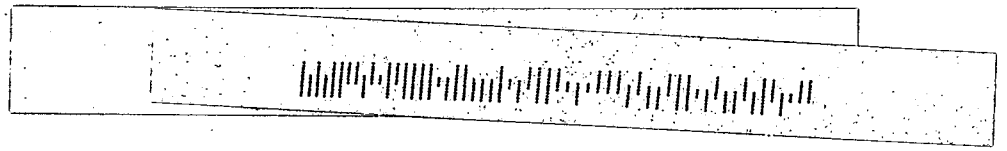

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