

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.

RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT

Ashley G. Andrews, # 76667
Lafond Law Group, P.A.
544 Savannah Highway
Charleston, South Carolina 29407
(843) 762-3554
E-mail: andrews@lafondlaw.com
Attorneys for Respondent

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net
Attorneys for Respondent

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STATEMENT OF CASE

This interesting case originates in 1999, when the respondent, Barry Clarke, signed a lease with Group Investment Company, Inc., the predecessor of the defaulting defendant, RRJR. After signing the lease, the parties recorded it 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. (R.O.A. page ___[tr. Page 183]) 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 57 lines 5-11, page 87, line 2]. 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, Exhibit 13]) Clarke testified he first learned of the putative sale when two 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 ____ [Exhibits 16 and 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. After 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 ____ [Exhibit 1, 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 one 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. pages ___[tr. Pages 46-47, 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 (and as the defendant admitted at R.O.A. page ___[tr. Page 94, line 12 and 104, line 10]), 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 Vincent DeStaso, the principal of Fine Housing, Inc., 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 Mr. Sloan and advised him of the Lease." This is an incomplete statement of fact. The record shows that Sloan conducted a proper search **during** the closing by asking a lawyer, Charles M. Feeley, to examine the title. Mr. Feeley discovered the recorded lease that contained the right of first refusal and transmitted the lease to the closing attorney on December 2nd while the closing attorney was meeting with Mrs. Robison. However, no one noticed the right of first refusal contained in the lease until Mr. Clarke called on March 21, 2014. R.O.A. page ___[tr. Page 103, line 18]. See also Record on Appeal at page ___[Exhibit 12] It is true that Mr. Sloan did not detect the right of first refusal contained in the lease until after Mr. Clarke called on March 21, 2014 (R.O.A. page [tr. Page 103, line 18, page 119, line 19, Exhibit 12]), but he had the lease in his hand while Robin Robinson was in his office during the closing on December 2, 2013. In fact, he took exception to it in his title policy. R.O.A. page ___[tr. Page 122, line 25, 124, line 12].

The record shows that respondent first heard of the putative sale about three months after the closing in March 2014, following a visit from "the two Terry's." (R.O.A. p. ___[tr. page 145, lines 7-8]) Once he learned that the possibility existed that the defaulting defendant, RRJR, might have transferred the property to appellant 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 143, line 16, Exhibit 22]) When appellant ignored him—he said he "forgot" Clarke offered him \$650,000.00 (R.O.A. page ___tr.

Page 142, line 6))—respondent 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, four months after the court dismissed Robinson’s suit against Fine Housing, 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 2014, 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 above and below, appellant had the lease prior to disbursing, and the recorded lease gave constructive notice to the world of the respondent’s right of first refusal. Thus, the only reason appellant did not have “actual knowledge” of the right of first refusal is because he failed to look at the lease in his hands.

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)

REPLY ARGUMENT I

I. The Right of First Refusal is Enforceable.

A. The trial court addressed all of appellant’s arguments and found them unsupported by the preponderance of the evidence.

The appellant complains that the lower court improperly analyzed appellant’s reliance on *Page v. Page*, No. 2004-UP-110. This record demonstrates that appellant relied upon and cited *Page* is its primary authority. Appellant made *Page* a foundation of his argument at both summary judgment and at trial. In its May 5, 2016, motion for summary judgment (R.O.A. page ___), the appellant asserted to trial court:

A right of first refusal on real property is a pre-emptive right and pre-emptive rights

are subject to rules against restraints on alienation. *Page v. Page*, No. 2004-UP- 110 (Ct. App. 2004 Unpublished Opinion), citing *Webb v. Reames*, 326 SC 444, 446, 485 S.E.2d 306, 308 (1982) and *61 Am. Jr. 2d* Perpetuities and Restraints on alienation § 110 (2002). “A right of first refusal . . . is not a restraint on alienation, as long as both the price that the designated person must pay, and the time allowed for the exercise of the right of first refusal are reasonable.” *Page* at 2, citing *61 Am.Jr.2d* Perpetuities and Restraints on Alienation § 110 (2002). Conversely, “Any restraint on alienation in the form of a right of first refusal that is not specific in all required elements—Legitimacy of purpose, price and detailed procedures” is an “unreasonable limitation upon the power of alienation.” *Page* at page 2.

....
In *Page*, the Court found that (1) there was testimony of a legitimate purpose—assuring that property remained in the family—and (2) the language creating the right identified the price to be paid by the person exercising the right. However, the *Page* Court found that the document that created the right did not describe the procedure for exercising the right. Because of that single omission, the Court found that the offered right of first refusal was an unenforceable restraint on alienation.”

Appellant’s Motion for Summary Judgment at page 2, R.O.A. page ____

That is six references to *Page* in two paragraphs! Appellant’s supporting memorandum for summary judgement devoted two pages to an analysis of *Page v. Page* under its own heading called: “**b. The *Page* Decision.**” In its motion for involuntary nonsuit (R.O.A. page ____ [tr. Page 172]), the appellant made *Page* the foundation of his argument: “. . . if you put all of those pieces together, you get the unpublished decision of *Page v. Page*, which we think provides a roadmap. The record demonstrates that the appellant relied frequently and heavily on *Page* at summary judgment and at trial, and it is a material change of position to argue for the first time on appeal that the lower court mistakenly analyzed *Page* because the record demonstrates appellant made *Page* his sword and shield. Appellant parses its effort by explaining on page 12 that he was not offering *Page* as “controlling authority” but rather as a “roadmap or summary of South Carolina law as to the enforceability of restraints on the alienation of real property.” (Appellant’s brief at pages 12-13) After telling this Court that appellant did not rely on

Page below, appellant argues on page 13 that *Page* controls because the appellant “argued the second analysis found in *Page*—the enforceability of the right of first refusal as a restraint on alienation.” (Appellant’s brief at page 13)

Aside from being bi-polar on *Page*, the appellant attempts to construct a straw man argument. Relying on *Page*, the appellant asserts without authority that a right of first refusal is a “restraint on alienation.” According to appellant: right of first refusal = restraint on alienation. Neither the trial court’s analysis nor any case law supports this false equivalency. A right of first refusal is the opposite of a restraint on alienation. Consider the two terms side by side:

Right of first refusal is a right to have first opportunity to purchase real estate when such becomes available or right to meet any other offer.

Restraint on alienation: A provision in an instrument of conveyance which prohibits the grantee from selling or transferring the property which is the subject of the conveyance.

Black’s Law Dictionary, 5th Ed.

The lower court carefully weighed these arguments, including the appellant’s reliance on *Page*, and found:

Nowhere is the appellant’s straw man argument more efficiently exposed than in appellant’s reliance on *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997) discussing a clear violation of the rule against perpetuities. There, the grantor conveyed property to the grantee, but reserving unto, not only the grantor, but also the grantee’s heirs, for all time, to reacquire the property by assigning three appraisers to come up with a value, which would require the grantee and the grantee’s heirs to re-convey the property for the blended appraisal price no matter what offer grantee received from a third party. The facts in *Webb* are nothing like the present case. Not only is the respondent’s right of

first refusal limited by a specified time, but also the grantor, “should it wish to sell,” controls the purchase price. As the lower court found, the right of first refusal here does not “restrain” alienation; rather, it guarantees the grantor top dollar. Here, because the defendant Robinson, RRJR, defaulted and did not participate in the case, no one knows whether she failed to notify Clarke by oversight or because she regarded the transaction as a loan, as she alleged in her lawsuit against Fine Housing (R.O.A. page ___[Exhibit 14]), but appellant stipulates no one notified Clarke. Had Robinson notified Clarke—or if appellant had not overlooked the lease in his title exam—then Robinson could have driven up the bidding and obtained top dollar for her property. On the other hand, it is just as plausible to conclude she never notified Clarke because she did not regard the transaction as a sale, but rather a loan because the record reveals that Robinson sued Fine Housing alleging the transaction was a loan. (R.O.A. page __ [Exhibit 14]) Either way, Clarke’s right of first refusal is the opposite of a restraint on alienation.

The core of the appellant’s argument is that the lower court failed to appreciate appellant’s assertion that the recorded lease constitutes a “restraint on alienation.” The trial court carefully digested this assertion and concluded that every case cited by the appellant stands for a different proposition than the one being asserted by the appellant.

As the trial court found:

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 once 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 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.

R.O.A. page ____ [Order under review at pages 13-14]

This record supports the trial court's findings and conclusions.

1. While the lease limits respondent's right to use the property and restricts respondent's use to one-half of the parking spaces, there is no confusion as to the property covered by the right of first refusal because the recorded lease contains a precise legal description.

Appellant's argument here is that the lease "does not specifically state that the right applies to the entire parcel." (Appellant's brief at page 14) The appellant confuses succinct for ambiguous. While Article V of the lease is succinct, appellant ignores the detailed legal description attached and incorporated into the lease and recorded with it in the R.M.C. office in 1999. Most deeds in South Carolina are two pages long, comprised of only a few brief clauses: the granting clause, the habendum, the date of the instrument and the signatures. However, all of them are recorded with an appended legal description, which sets out the property description in detail. In construing a contract, a party is required to construe the document and cannot ignore parts that are at variance with his or her legal position. As the trial court found:

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. Cassady*, 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.

(R.O.A. page ____ - ____ [Order Under Review pages 16-17])

The record refutes the appellant's argument because the precise legal description is part of the lease and recorded with it. Had appellant performed a proper title exam, it would have discovered the lease, including the detailed legal description. In short, this record provides overwhelming evidence supporting the findings of the trial court.

2. The lease provides the method to determine the price at which the right of first refusal may be exercised, and the price is determined by the seller.

Appellant's argument here is the same as advanced in Argument 1 above. Appellant attempts to create an ambiguity where none exists. There is no "subjective understanding" of the right of first refusal. (Appellant's brief at page 16). The appellant seeks to take advantage of the undisputed fact that both Robinson and Fine Housing

failed to notify Clarke of her intent to sell. Of course, as alleged in her complaint against Fine Housing, R.O.A. page ____ [Exhibit 14], Robinson thought the transaction was a loan, and if the transaction were a loan, then a loan would not trigger the right of first refusal. The record demonstrates that the transaction was not a typical sale—it had no contract of sale, and the “seller” had the unequivocal right to demand the property back upon payment of a specified sum. (R.O.A. page ____ and ____ [Exhibits 10 and 11]) As such the record shows that the only ambiguity in this case is whether the court should characterize the transaction as a loan or a sale because it has elements of both. On one hand, Robinson transferred title, but on the other hand, she retained the right to reacquire the property in 24 months upon payment of a fixed sum. As alleged in her complaint against Fine Housing, filed February 19, 2014, [Exhibit 14], Robinson alleged the transaction was a loan. However, Robinson and Fine Housing ended the potential for ambiguity through the course of their litigation over this issue. The record shows that Robinson sued Fine Housing 78 days after the closing, alleging Fine Housing defrauded her. (R.O.A. page ____, Exhibit 14) At the time of this litigation, Robinson knew about Clarke’s rights because she signed the original 1999 lease on behalf of Group Investment Company, and Fine Housing knew about Clarke’s right of first refusal because the respondent recorded it in 1999 and Charles Feeley sent it to the closing attorney on December 2, 2013.. In fact, the testimony of Fine Housing’s closing attorney was that he discovered the lease, with the right of first refusal, on December 2, 2013—before he disbursed Fine Housing’s money. See Record on Appeal page ____ [tr. Page 108-109]:

Q Okay. When did he [Charles Feeley] complete that title examination?

A In the late afternoon of December 3rd -- excuse me, the late afternoon December 2nd, 2013.

Q Okay. And that title exam, did it or did it not reveal the existence of the Barry Clarke lease?

A He did pick it up.

Q Okay. But was it too late because of the urgency brought on by the pending foreclosure?

A Yes. I was in the conference room with Ms. Robinson at the time that Mr. Feeley e-mailed the title search to me.

However, to be fair to the closing attorney, Fine Housing placed him in an untenable position for demanding he close the transaction and transmit the check to the foreclosing creditor before 10:00 a.m. on the 3rd. Fine Housing created the pressure on the closing attorney by not providing adequate time to prepare and then compounded this pressure by declining to attend the closing, which would have afforded the two of them an opportunity to read the lease and react to the right of first refusal. The fact is that Fine Housing rushed the transaction, did not review the title, and did not provide adequate time for his closing attorney to prepare properly, and Fine Housing now grasps at straws to excuse his failure to take notice of Clarke's rights.

Because Robinson failed to notify Clarke, and because Fine Housing failed to examine the title, appellant now argues this Court should overlook its failure and place the loss on Clarke because there is no "identified procedure" for notifying him. Motorists employ this reasoning hundreds of times a day when they ask to be excused from a ticket because "I didn't see the sign." When a party ignores his or her legal responsibility under

a recorded document, it is no excuse for a failure to perform that the party did not see the sign. The trial court considered this argument and rejected it, holding:

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.

R.O.A. page ____ [order page 11]

The appellant asks this Court to check its common sense at the courthouse door. Neither life nor law require infinite instruction for common occurrences. If A says to B, "I have an offer for x," it requires no advanced training to realize that B can either take a pass or offer x + 1. The appellant refuses to acknowledge the obvious conclusion that the right of first refusal protected Robin Robinson, and that she alone determined the price at which she would sell. Moreover, the record of the financial transaction between Fine Housing and Robinson demonstrates Fine Housing was motivated to take advantage of her.¹ After driving Robinson's lawyer to such frustration that he hung up, DeStaso told his broker, Mark Alfredo: "I think they'll be coming back around" because "I was told that they were unable to find anybody to invest given the problems that were there." (R.O.A. page ____ [tr. Page 38, lines 8-19])

After DeStaso promised to pay Robinson \$850,000.00, knowing how dire her situation was as she was up against a December 3rd foreclosure deadline, Destaso sent \$815,000. He was not through exploiting though. Out of the \$815,000.00 he did transfer

¹ The caselaw of New York informs the DeStaso family about the consequences of sharp practice. See *Vincent DeStaso v. Bottiglieri*, 861 N.Y.S.2d 676, 52 A.D.3d 2008) and *Vincent DeStaso v. Bottiglieri*, 2009 N.Y.S. Ct. Op. 52082, 25 Misc 3d 1213 (Aug 31, 2009). (Usurious note vacated.) Mr. DeStaso testified these cases involved his father.

to the closing attorney, he held back \$35,000.00 as “security” for the transaction and then he paid himself \$5,500.00 (Tamara Lane, Inc.) and his own flood insurance premiums of \$9,311.00. He also sent his personal lawyer in New York \$3,500.00 for preparing the Robinson lease even though the record shows the lease is a recycled Tamara Lane document with handwritten additions. (R.O.A. Exhibits 4, 6, and 10) Thus, out of \$850,000.00 he promised, he either retained or used to benefit himself \$49,811.00, or 6%. The record of the financial arrangement between Fine Housing and Robinson demonstrates that Fine Housing, Inc. is a predatory lender. In light of that financial overreach, combined with the fact that appellant moved to eject Robinson the month after closing and his e-mail to start listing the property for sale (R.O.A. page ___[Exhibit 34] renders appellant’s explanations hollow and pretextual. Thus, the appellant’s contention the right of first refusal is insufficient because it did not contain detailed instructions is a little like an errant motorist saying: I didn’t apply my brakes at a Stop sign because all it says is “Stop.” The trial court rejected these arguments, and the record contains no evidence to call the trial court’s conclusions into question.

3. The exercise of a right of first refusal does not require detailed instructions on how to exercise it to be valid.

Appellant’s argument here is identical to the foregoing argument; to wit, that because every step in the process is not delineated, it is, therefore, invalid. Appellant’s argument 3 contains two parts:

Part one is not precisely spelled out, but it appears to be a variation of a waiver argument. Appellant argues that Clarke waived his right because he did not exercise his

right of first refusal when John and Robin Robinson transferred the property from one entity controlled by them, Group Investment Company, to another entity controlled by them, RRJR, for five dollars. (At page ___ of the Record on Appeal [tr. Page 183], the parties stipulated that both entities were controlled by the same two persons: John and Robin Robinson.) As the record demonstrates Group Investment Company transferred the subject property to RRJR in May, 2007 for five dollars consideration. (R.O.A. page ___[Exhibit 33]) First, appellant ignores the evidence that the respondent had a long relationship with John Robinson and knew that the “transfer” was a name change only. Robinson and Clarke came up in the club business together and were involved for many years as collaborators and competitors. Respondent testified he knew about the transfer and made no claim because he knew it was a name change only and he had no right to demand the property for six dollars:

Q. Why didn't you exercise your right of first refusal when the property was transferred [to RRJR]?

A. Because it was the same people. I wouldn't bother John with something like that; it would be wrong.” R.O.A. page ___[tr. page 161, lines 3-6]

This transfer from Group Investment to RRJR contains no indicia of being a “sale.” It was not an arm's length transaction; there was no *bona fide* offer to buy/sell; no consideration changed hands, and it did not result in any change in control of the property. See stipulation at page ____ R.O.A. [tr. Page 183].

By contrast, the record shows that Group Investment and Clarke signed the recorded lease in 1999, and the record shows that Robin Robinson signed this document

on behalf of Group Investment Co. As the record shows, the transfer from Group Investment Company to RRJR is a name change only because the same principal conveyed to the same principal for five dollars consideration. The deed affidavit reflects that the deed is exempt from recording stamps because it did not involve consideration. Moreover, DeStaso, the principal of Fine Housing, testified he dealt only with Robin Robinson, and only Robin Robinson signed the documents at closing. Thus, there is not a shred of evidence in this record to support an assertion that the transfer from Group Investment to RRJR triggered the right of first refusal.

Second, the May 2007 transfer between Group Investment Company to RRJR occurred six years before Fine Housing showed up in Charleston as a potential lender for Robin Robinson. Appellant has no reason to address this transfer unless he is prepared to allege that the transfer to RRJR was improper, and if this is so, then Fine Housing does not have title. He has, of course, made no such assertion, and such a suggestion raised at this stage is another example of sharp practice by an out-of-state, predatory lender. Rather than confine the analysis to the germane legal point, appellant asks this Court to check its common sense on the courthouse steps to provide cover for its ethically questionable practices. In other words, appellant's effort to make the Group Investment transfer an issue in this case is pure red herring that shines no illuminating analysis on the issues before the Court.

The second part of Appellant's argument is that because the right of first refusal does not spell out the manner of notification or the time for notification, it is invalid. Once again, the appellant seeks to excuse his failure to check the title before purchase by

shifting the responsibility for his failure onto the respondent. The method of notice is nothing more than the seller notifying the holder of the right of her intent to sell: "A pre-emptive right merely requires the owner, when and if he decides to sell, to offer the property first to the holder of the pre-emptive right so that he may buy at a price set out in the pre-emption agreement." *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997). (The Court struck down the right of first refusal in *Webb v. Reames* because it violated the Rule Against Perpetuities.) Here, the right did not violate the Rule Against Perpetuities, and the purchase price remained in the exclusive control of the seller, and Robinson was free to set the price as she saw fit. Therefore, the right in this case is not a "pre-emptive" right because the seller controls the sales price.

As the trial court discussed in detail, a right of first refusal is a contract, and as the trial court found, South Carolina has a well-developed body of law governing the enforcement of contracts. The trial court held:

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)
R.O.A. page ____ [Order page 18]

The trial court's reliance on *Hobgood* is important because the appellant in *Hobgood* made the same argument appellant asserts here. In *Hobgood* the tortfeasor interfered with Hobgood's contract of sale for a condominium because the date of closing set in the contract of sale expired without a closing, and the tortfeasor then asserted it was free to

interfere with Hobgood's contract because it could no longer be enforced. A jury disagreed, and so did the trial judge and so did the Court of Appeals. The appellant here employs a similarly flawed strategy, seeking to profit from his own sharp practice and negligence in failing to examine the title to the subject property.

All of appellant's arguments spring from the same fountain, which is the assertion that the right of first refusal is too vague to be enforced. Nowhere in his well-written brief does the appellant mention, let alone discuss, the fact that respondent's lease is recorded at the R.M.C. Office and appellant ignored it. As the record below shows, there were many reasons the appellant's closing attorney missed the right of first refusal, the most salient being that he knew Robinson was facing an inflexible deadline of December 3rd and that the creditor refused to grant additional time. DeStaso even testified he attempted to purchase the creditor's position: "Q. Prior to going to the closing on December 2nd, did you contact us [*sic.*] or ask him if his foreclosing client would sell you the paper? A. Yes. Q. Okay. And he refused, correct? A. Correct. Q. But you explored that? A. Yes." (R.O.A. page ___[tr. Page 61, lines 17-24]) He knew that Robinson had no equal bargaining position, and so he pushed the closing to benefit himself, even to the point of transferring less money than he promised. In fact, and this is shocking, Robin Robinson walked away from the closing with nothing. R.O.A. page ___[tr. Page 104, line 13]) Appellant used the time constraints to his advantage to drive a bargain less favorable to Robinson. In fact, she would have been in a better financial position to let her house go to foreclosure and keep her business. Appellant's sharp practice toward Robinson fits the pattern of coming up with every excuse he can formulate to justify the failure to notify

Clarke of the pending “sale,” which would have changed Robinson’s bargaining position to her advantage. However, one controlling fact is not disputed and that it is that Fine Housing missed the right of first refusal in the recorded lease until after the closing. Thus, it is one thing to find the Lease and argue it is not enforceable because it is too vague, but quite another to miss it and then argue that missing it does not matter because it is too vague. In essence, the appellant’s entire argument is the same as the inattentive motorist trying to talk his way out of a ticket by claiming he did not see the stop sign.

B. The trial court properly relied on well-developed South Carolina law including *Minter and Ecclesiastes*.

The trial court properly relied on *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (1996). The so-called “Grease Monkey” case is particularly germane to this case. Appellant argues the case illuminates nothing here because the Court of Appeals affirmed the lower court’s decision that there was no proof of a separate fraudulent act accompanying the breach of contract. In South Carolina, a party cannot recover for breach of contract accompanied by a fraudulent act unless there is a separate fraudulent act accompanying the breach. “We agree with the trial court’s decision to grant a directed verdict in favor of GOCT on the Minter’s’ cause of action for breach of contract accompanied by a fraudulent act. In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention, and (3) that the breach was accompanied by a fraudulent act.” *Minter v. GOCT, Inc. d/b/a Grease Monkey*, 322 S.C. 525, 473 S.E.2d 67 (1996) citing *Smith v. Canal Ins. Co.*, 275 S.C. 256, 269 S.E.2d 348 (1980)

In other words, if Clarke had sued Fine Housing alleging breach of contract

(assuming *arguendo* the parties, Clarke and Fine Housing, had a separate contract) accompanied by a fraudulent act, the trial court would properly direct of verdict on this record because this record contains no evidence of a separate fraudulent act. Appellant is, therefore, arguing about an issue not before the trial court or this court. The issue before the trial court and this Court is simple: the appellant acquired a parcel of real estate without conducting a title exam and overlooked respondent's rights. This failure is why appellant is asserting a claim against his title company for failing to conduct a title exam even though Fine Housing deprived its closing attorney of a reasonable opportunity to be prepared properly. See *Fine Housing v. Sloan*, 2016-CP-18-00340 where appellant alleges damages against his closing attorney for not disclosing the right of first refusal. Not only did Fine Housing expect its lawyer to conduct a full title exam between November 26th and December 2nd, when November 28th was Thanksgiving, it compounded the difficulty by remaining absent. When appellant criticizes the trial court's reasoning, including its reliance on *Minter*, it is because appellant seeks to twist *Minter's* dismissal of a tort claim as somehow excusing it from examining the title prior to closing. In making this argument, appellant is advancing another classic straw man argument. The trial court did not rely on *Minter* for its holding on the absence of an independent fraudulent act, but rather for the obvious principle that a right of first refusal does not require a magic formula to be effective. (See *Webb* quoted above on page 23.) It is fair for appellant to argue that *Minter's* right of first refusal involved business development of future *Grease Monkey* franchises, but that is a distinction that makes no difference. It is like saying the rules pertaining to motor vehicles only apply to electric cars because only electric cars have

“motors,” and internal combustion cars have “engines.” The rules of the road obviously apply to both, and the rules of *Minter* obviously apply to all rights of first refusal.

As for the trial court’s reliance on *Ecclesiastes*, while the case does involve an enforceable right of first refusal through a lease like *Minter* did, the trial court cited the case for the principle that in construing contracts, the Court’s function is to enforce the parties’ intent. At its core, appellant’s argument is an argument against *stare decisis*. Appellant argues that because neither *Minter* nor *Ecclesiastes* have identical facts, the trial court “misreads” them because “[t]he parties in each action were in contractual privity with each other.” (Appellant’s brief at page 21) This statement is nothing more than an effort to divert the Court from applying the recording statute, which puts the parties in constructive privity with one another, and is nothing more than an explanation as to why respondent brought an action in equity for specific performance instead of an action at law to enforce a contract. Of course, respondent did sue the party with whom he is in privity, and that party, RRJR, chose not to participate in the litigation.

On the same page, however, appellant finally arrives at the issue in the case: **“Here, Clarke seeks to bind Fine Housing to the terms of the Right of First refusal because it is a recorded interest in real estate of which Fine Housing had record notice, not because it was a party to the contract.”** (Appellant’s brief at page 21.)

Appellant’s statement is notable for three reasons:

First, the effect of the recording statute is the issue in the case. The effect of the recording statute is the issue that the trial court analyzed in detail but which the appellant ignores; to wit, that he purchased property without examining the title and now complains

there is an encumbrance he did not see.

Second, as a matter of pure logic, the appellant's statement refutes itself, which is simple to demonstrate. All one must do is look at the negative of appellant's statement and absurdity reveals itself. The inverse of appellant's statement is: **Here, Fine Housing seeks to escape the legal effect of the recorded lease because it never looked for it. Because Fine Housing never looked for or saw the recorded lease, the Court cannot bind Fine Housing to the terms of the Right of First refusal because Fine Housing did NOT see it and because it was NOT a party to the recorded lease.** This inverse statement is both logically meaningless and legally meaningless. It is logically meaningless because to assert one cannot believe anything one cannot see eliminates most of the world. It is legally meaningless because the respondent recorded the lease in 1999, which gave notice of it to the world. It is not legally (or logically) significant that the recorded document is a contract only between Robinson and Clarke because Fine Housing took title subject to it, just like it took title subject to other liens, which were contracts between other parties. We are all subject to rules that we did not prepare, and the reason the General Assembly adopted a recording statute is to put an end to such nonsense. The purpose and effect of the recording statute is to put Fine Housing on notice that there is a lease on the property that contains a right of first refusal. Not only did appellant stipulate to this fact and to the application of the statute, but also the trial court thoroughly analyzed this issue. Nowhere does appellant address the effect of the recording statute even though the application of this statute is the primary legal issue in the case.

Third, and most importantly, appellant has not thought through his statement. If appellant states his legal position as: “**Here, Clarke seeks to bind Fine Housing to the terms of the Right of First refusal because it is a recorded interest in real estate of which Fine Housing had record notice, not because it was a party to the contract,**” then appellant is agreeing with the respondent’s legal position in his cross appeal that the price for right of first refusal should be fixed at \$150,001.00.² Fine Housing is correct: it was not a party to the contract between the Robinsons and Clarke just like any purchaser of real estate is not subject to the contracts that give rise to liens on the property, such as mortgages or mechanic’s liens. The respondent sued RRJR and properly served RRJR by serving Robin Robinson. (See R.O.A. page ___[affidavit of service]. RRJR did not answer or appear. R.O.A. page ___ [affidavit of default]. Appellant’s allegation that the lease is a contract between RRJR and Clarke is a tautology, and respondent accepts the tautology is true. (All tautologies are true.) The respondent sued RRJR for breaching its contract with respondent and named appellant because he claims an interest in the property by virtue of the lease recorded in the R.M.C. Office. However, no one disputes that appellant took voidable title subject to all properly recorded encumbrances, and this is the legal issue appellant ignores. It is the purpose of § 30-7-10, S. C. Code, ann. Throughout the litigation, the respondent asserted **equitable** positions consistent with equity, which included respondent’s acknowledgement that he offered more than \$150,001.00 to settle the dispute because respondent attempted to resolve this case

² Appellant’s position conflicts with the legal position he asserts in Argument V. There, Fine Housing argues the Court erred in setting the purchase price. If the contract is only between Clarke and Robinson, then he has no grounds to complain, and the price is fixed by contract as respondent asserts.

short of litigation and acknowledges that appellant might assert equitable liens on the property. Instead of asserting legal defenses or instead of relying on principles of equity, appellant asserted purely legal defenses in his effort to convince the trial court that the document is legally unenforceable.³ Appellant adopted a legal position to try to shift the blame for his failure to examine the title by alleging the trial court did not understand its legal theories. Distilled to its essence, appellant argues he is not obligated to obey the rules everyone else follows.

C. The trial court made sufficient findings of fact to support its decision.

The appellant's arguments here are recycled from previous arguments. In fact, appellant says exactly this: "The offered Right of First Refusal lacks the specificity required to be an enforceable interest in real estate." Appellant's brief at page 22. Appellant once again complains that Clarke only testified as to what his intentions were and could not testify as to what the Robinson's intentions were. First, the right of first refusal does not require testimony to understand it because it is clear. Robinson's intentions are expressed by the writing, and it is the function of the court to enforce the terms. The trial court stated this principle of law at pages 15-17 of the Order under review. (R.O.A. pages ____ - ____) The appellant ignores the fact that the lease contains a precise legal description as part of the recorded document. Moreover, if the lease were ambiguous, as appellant points out, he was not a party to it, and RRJR did not appear in the action to assert ambiguity or unenforceability. Of course, the lease is not ambiguous,

³ In Argument IV on pages 32-34, appellant argues that respondent should be **equitably** estopped from asserting his rights. In Yiddish, such an assertion, on this record, is called *chutzpah*. There is no word in English that serves as well.

so the Court need look no further than the words used in the document to discover lessor and lessee's intentions. Whether looking at Group Investment Company or RRJR, the principal is either John or Robin Robinson, and Robin Robinson is who the respondent served at the commencement of this action and who handled the transaction with Fine Housing. See R.O.A. page ____ [affidavit of service] In short, the appellant wants to discuss anything other than the facts that he purchased a parcel of real estate without either examining the title or calling Robin Robinson to testify if he thought she was necessary to his legal defense. Instead, he has the temerity to argue that this Court should protect him because "the right of First Refusal is an unreasonable restraint on alienation of real property that violates the public policy of the State of South Carolina." Appellant's brief at page 22. There is no evidence in this record to support appellant's unsupported speculation that RRJR felt restrained. As for public policy, the record here of predatory lending and sharp practice by Fine Housing demonstrates that this appellant is the least qualified person in South Carolina to cloak himself in the "public policy of the State of South Carolina." The predatory lending terms he imposed on Robin Robinson are unconscionable, and, even though Ms. Robinson put herself in the position of having to turn to an unsavory lender to try to save her home, does not excuse the lengths Fine Housing went to in its plan to take advantage of her at every step in the process. If appellant wishes to ground his legal argument on the public policy of South Carolina, respondent accepts that characterization and replies that the public policy of South Carolina is for purchasers of real estate to examine title to real estate prior to acquiring it.

II There is no evidence supporting appellant's assertion that Clarke waived his right to enforce his right of first refusal.

The appellant's argument on waiver is demonstrably frivolous and contradicted by its own brief. On page 24, appellant points out the stipulation that Group Investment Company and RRJR are controlled by the same individuals. See R.O.A. page ____ [Exhibit 13] As pointed out above, RRJR stands for "Robin Robinson/John Robinson." Appellant then relies on the spurious suggestion that there **may** have been other shareholders of Group Investment Company. Appellant ignores the record that Barry Clarke and John Robinson were friends and colleagues for over 40 years:

Well, I just happen to have a picture with me of John Robinson and myself. It's a Polaroid as you can see, so it's a little old. But John asked me to take this picture of him. It had to be, my goodness, '80's or '90's. He had the club going on Market Street. The first time I met John, he was 19 years old. He wanted to go into the club business. I'm a little older than him by about nine years, and I said let me give you some good advice. He said, what? I said, don't go in the club business. You won't get but \$10,000 to help with that. But he went in it anyway and became pretty successful. We were friends a very long time.

R.O.A. page ____ [tr. page 131, lines 6-16]

Barry Clarke had been both John Robinson's landlord and his tenant for years, which provided him with intimate knowledge of John's business. Moreover, Mr. Clarke testified in detail about his efforts to pay the lot rent on time to ensure that he kept his right of first refusal in effect. It is not credible for the appellant, who does not know the area or the people or their background course of conduct, to offer an unsupported speculation that there **may** have been other shareholders of Group Investment Company when appellant knows for a fact there were not.

In addition, the record shows that the transfer between Group Investment Company and RRJR was for five dollars (\$5.00) consideration. (R.O.A. page ____ [Exhibit 33]. The trial court rejected appellant's contentions, pointing out: "First, the record shows

that the transfer was a name change only, going from a corporation owned and operated by John 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, [tr. Page 183] 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. The instrument, Exhibit 33, at page ___ of the R.O.A., shows that the deed was "EXEMPT from the deed recording fee because (exemption #1, no consideration)." Thus, the affidavit of true consideration demonstrates the transfer is a name change only because no consideration passed between Group Investment Company and RRJR, L.L.C., and the property remained in the hands of the same persons before and after the transaction.

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." R.O.A. page ___[Order under review at page 20]. See testimony of Barry Clarke quoted above at page 16. It strains credibility and approaches frivolous to assert that a transfer from Group Investment Company to RRJR for no consideration triggered respondent's right of first refusal to purchase the property for six dollars. The transfer was an obvious name change since it had none of the indicia of a sale—no contract, no consideration, and the property remained in control of the same people as before the name change: John and Robin Robinson

Appellant's summary of the evidence at trial is incomplete at best, misleading at worst. In summarizing the testimony about Clarke's March 2014 phone calls to Vincent

DeStaso, the appellant omits the key evidence. Vincent DeStaso closed the transaction with Robin Robinson on December 2, 2013, about six days after visiting South Carolina for the first time. 34 days after closing, DeStaso filed an ejectment action against Robinson. On February 19, 2014, 79 days after the closing, Robin Robinson sued Vincent DeStaso (R.O.A. page ____ [Exhibit 14]) for four causes of action, including fraud, seeking to unwind the transaction and restore to her the ownership of her property, or as she put it in her complaint: “rescinding the entire agreement between the parties, including but not limited to ordering or otherwise causing to be recorded deeds transferring record title to the properties in Exhibit ‘A’ and Exhibit ‘B’ back to their respective prior owners. . .” Appellant resolved this lawsuit in his favor, but not until January 9, 2015. (R.O.A. page ____ [Exhibit 15]) Until that time, ownership of the subject property was in dispute and only decided with finality on January 9, 2015. Only then did respondent know who owned the property. Up until that moment, respondent did not know if Fine Housing, Inc. owned the property or if Fine Housing was Robinson’s creditor. Appellant makes much of the fact that “It was not until April 13, 2015, one (1) year and twenty-four (24) days after Clarke learned of the transfer from RRJR to Fine Housing, and after Clarke’s attempts to purchase the Property failed, that Clarke first raised the Right of First Refusal.” (Appellant’s brief at page 28) This statement is disingenuous because the appellant omits any discussion of the contents of the April 13th letter. It says:

Dear Charlie,

I see that your litigation with Robin Robinson came to an end by consent stipulation of dismissal filed January 9, 2015. As you are aware, my client, Barry Clarke, has a lease. The lease (recorded January 27, 1999, at Deed Book C 319 at Page 391) a copy of which I enclose for your convenience, contains a right of first refusal to purchase the property.

We were aware that Robin Robinson was contesting your client's purchase of the property. In her pleadings, she alleged that it was not a sale, but rather collateral to secure a loan. It appears that in light of the January 9th Stipulation of Dismissal, that legal issue has been laid to rest, and there is no longer a challenge to your client claiming he purchased the property from Robin rather than foreclosing on a loan as she raised in her answer in the *Robinson v. Fine Housing, Inc.* (2014-CP-10-1035) case. In the run-up to the *Robinson* case, I sent your client a copy of the lease, and therefore he is aware that the property is subject to my client's right of first refusal. We suspected that we might be drawn in to your litigation as a result of that, but we were not. Under the right of first refusal, we can demand that your client convey the property to us for \$150,001.00. Therefore, we are now exercising our right of first refusal, and we are prepared to tender to your client the sum of \$150,001.00. Please let us know when we can schedule a closing in order to avoid the potential for conflict between us and leave your client with a clear path to liquidating the waterfront property, which is far more valuable. . . .

(R.O.A. page ____ [Exhibit 6])

The appellant ignores the legal challenge Robin Robinson filed against Fine Housing disputing ownership of the property. Notwithstanding the pending legal contest between them, this record shows that in spite of the controversy over ownership, Clarke was diligently asserting his rights. The record shows that immediately following the March 2014, visit of "the two Terry's," (Terry Hill and Terry Johnson, R.O.A. page ____ [tr. Page 140]) respondent attempted to exercise his right of first refusal, first by contacting Vincent Destaso and reaching an agreement with him and then by notifying counsel and authorizing counsel to make an offer to purchase:

Q Did Vincent Destaso ever call you or did you ever call him?

A I can't remember exactly. What I do remember. I remember a couple of things. I remember talking one time to Vincent -- I forgot his last name.

Q Destaso.

A Mr. Destaso, and somehow Ashley and I gave him that price of \$650,000, right? And that was sort of a sweet spot for me because it was half a million more than it was

worth, and I could afford to get the money for that, so I said, "Okay, we'll do that," and he has to say yes to this thing, right? So, he said, "I'll call you back in two weeks." So, I wait four weeks and I called him back. What he told me I will never forget this, "I forgot about it."

Now, a half a million dollars is pretty good money to make on something you paid \$150,000 for. He said he forgot it and I turned around, and I believe it was Ashley who I was talking to, and I said, "I don't want to ever talk to him again." And I think from that time on, unless he called me, unless I'm mistaken, only Ashley spoke to him and you spoke to him.

Q Did you authorize Ashley Andrews to extend a purchase -- a proposed purchase agreement on your behalf to Mr. Destaso?

A Yes.

Q Did she do that?

A I believe so, Yes, sir.
(R.O.A. page ____ - ____ [tr. 141, line 18—142, line 19])

. . .

Q. . . . Who made the first contact between you and Vincent DeStaso about the right of first refusal? Was it the nighttime visit between the two Terry's? Was that your first notice?

A. I believe that was the first time I heard that the property was being conveyed to someone else.

Q. As soon as you found out that there might be a claim to the property, did you attempt to exercise your rights in a diligent and straightforward, honest way?

A. I called Ashely. I believe she got in touch with you. And whatever you told me

to do, that's what I did.

R.O.A. page ____, [tr. page 145, lines 3-13]

Mr. DeStaso attempted to spin these facts by testifying that the purchase agreement Ashley Andrews transmitted to him on April 10, 2014, contained other terms not discussed. The document, of course, speaks for itself, R.O.A. page ____ [Exhibit 16], and it represents a standard purchase agreement, calling for an earnest money deposit of \$50,000.00, and a 120-day inspection period. However, what is more important than the document is Mr. DeStaso's omission of the language in the correspondence conveying the purchase agreement:

April 10, 2014

Dear Mr. DeStaso:

I have attached the proposed Purchase Agreement for 2028 Pittsburgh Avenue for your review. The attachment is in Word format so that you and/or your attorney may redline it if necessary. Please contact me if you have any questions or concerns.

April 23, 2014

Dear Mr. DeStaso:

Thank you for taking the time to speak to Barry and me last week. 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.

I have attached the most recent draft of the Agreement for Purchase and Sale. I made a few changes and I added a provision that would allow Barry to lease the property should the property become vacant during the time the contract is contingent (Section 17 and Exhibit B). Barry is concerned that if the property is vacant that the county and/or state may not issue liquor and business licenses in the future. What he proposes is that he lease the property for \$750.00 per month so that he can apply for the licenses. During the time he is leasing the property for \$750 he does not intend to operate a business there.

R.O.A. page ____ [Exhibits 16 and 17]

Respondent sent these proposals less than 30 days after the late-night visit of the “two Terry’s.” They not only demonstrate that respondent was operating with alacrity in good faith, and tailoring his proposals to assist Fine Housing, which was currently in litigation to eject its tenant, Robin Robinson, but also demonstrate Fine Housing’s lack of credibility. Mr. DeStaso ignored Ms. Andrews’ request for comment or changes [Exhibit 16], and Mr. DeStaso pretends that the lawsuit filed against him by Robin Robinson to unwind their transaction posed no risk to Clarke. However, one looks at the evidence here, there is no evidence to support an allegation of waiver.

Waiver is an affirmative defense that must be plead and proved. See Rule 8(c), *South Carolina Rules of Civil Procedure*. The appellant had the burden of proof to produce sufficient evidence to prove, by a preponderance of evidence, that Barry Clarke voluntarily, knowingly, and intentionally waived his right of first refusal. Yet, appellant produced no evidence other than his unsupported legal argument that the doctrine of waiver exists in South Carolina jurisprudence. The record is clear that Clarke acted forcefully and prudently following the late-night visit of the “two Terrys” in March of 2014:

A couple of guys came to my house, called me up, and one was a friend and one I didn’t know. They explained to me that they thought the property sold. I said it can’t be sold, because I have first right of refusal.

R.O.A. page ____ [tr. page 140]

The record is undisputed that upon hearing this information three months after the closing, respondent did everything possible to: A) find out what the facts were, and B) made an offer of settlement of \$650,000.00 to avoid litigation. Normally, offers of settlement are

inadmissible. Rule 408 *S. C. Rules of Evidence*. Notwithstanding the rule, such offers are admissible to negate “a contention of undue delay,” and respondent’s quick action eviscerates any claim of “waiver.” The evidence shows that the respondent acted with alacrity and generosity.

On the witness stand, Mr. DeStaso simultaneously lied and contradicted himself in the same testimony. First, he testified that Clarke’s offer of \$650,000.00 contained numerous conditions that the two of them did not discuss. It does not. See R.O.A. page ____ and ____ [tr. page 143, lines 6-13, and Exhibit 22]: “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.” Second, he claimed that respondent insisted that he, DeStaso, get rid of Robin Robinson. However, the evidence shows that DeStaso lied about this as well because the record shows he filed an ejectment proceeding against Robinson 33 days after the closing. (See R.O.A. page ____ [tr. Page 47, line 9—line 19, Exhibit ____]) When asked directly if he took any action that can be construed as a “waiver,” respondent testified: “Absolutely not.” (R.O.A. page ____ [tr. page 144, line 17].

Thus, the appellant fails to identify any evidence that supports his assertion that Clarke “waived” his rights. As the trial court held: “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.” R.O.A. page ____ [Order under review page 20]) Here, appellant attempts to use “waiver” or “estoppel” as offensive weapons to preempt plaintiff’s equitable claim of specific performance to enforce the

contractual right he had with RRJR as the successor of Group Investment Company.

The elements of “waiver” are: an intentional relinquishment of a known right. An implied waiver results from acts and conduct from which an intentional relinquishment of a right is reasonably inferable. It is an affirmative defense, and the burden of proof is with the party asserting it, who must demonstrate by a preponderance of the evidence that Clarke possessed all of the material facts on which a waiver depended. *Parker v. Parker*, 313 S.C. 482, 443 S.E.2d 388 (1994): Waiver is a question of fact for the finder of fact. *Janaski v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992)

However, this record contains no evidence to support a finding of respondent’s “knowing or voluntary relinquishment of a right.” As the trial court found:

... 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 that same month, informed him of his right to purchase the property, and Mr. DeStaso promised to call him back with 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 DeStaso a proposed purchase agreement. (Plaintiff’s Exhibits 16 and 17.)

In light of these facts as applied to South Carolina law, the appellant’s assertion of waiver or estoppel or laches is frivolous.

III For the same reason as set forth above, there is not a scintilla of evidence in this record supporting a claim of laches.

Appellant’s argument here is identical to the argument advanced above. Appellant sets forth a correct statement of law on laches: “The equitable doctrine of laches is defined as ‘neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.’” Appellant’s brief at page 31, citing *Robinson v. Estate of Harris*, 389 S.C. 360, 698 S.E.2d 801 (2010), quoting *Hallums v. Hallums*, 296 S.C. 195, 371 S.E.2d 525 (1988). The Supreme Court explained in *Robinson* why a **thirty-nine-year delay** in making a claim constituted laches, explaining:

The equitable doctrine of laches is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have been done.” *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). “Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights.” *Chambers of S.C., Inc. v. County Council for Lee County* 315 S.C. 418, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and *(3) prejudice. *Hallums*, 296 S.C. at 199, 371 S.E.2d at 528. (The delay in *Hallums* was 22 years.)

Appellant asks this Court to grope in the dark as to what evidence exists in this

record to support a finding of “neglect for an unreasonable and unexplained length of time.” Respondent filed his claim for specific performance within four months after the court determined Fine Housing owned the property. Moreover, the record shows that respondent contacted appellant within days of discovering appellant’s claim to the property, and only appellant’s unreasonable demands made litigation necessary. There is no evidence in the record to support an assertion of “unreasonably” delayed. Likewise, the appellant suffered no prejudice by any delay because there was no delay.

Respondent made efforts to resolve the matter the same month he discovered “something is up with the club” in March of 2014. Within days he telephoned DeStaso, and after DeStaso told him he “forgot” about respondent’s offer to purchase for \$500,000.00, respondent concluded he was dealing with a liar:

Q Did Vincent Destaso ever call you or did you ever call him?

A I can't remember exactly. What I do remember. I remember a couple of things. I remember talking one time to Vincent -- I forgot his last name.

Q Destaso.

A Mr. Destaso, and somehow Ashley and I gave him that price of \$650,000, right? And that was sort of a sweet spot for me because it was half a million more than it was worth and I could afford to get the money for that, so I said, “Okay, we'll do that,” and he has to say yes to this thing, right? So, he said, “I'll call you back in two weeks.” So, I wait four weeks and I called him back. What he told me I will never forget this, “I forgot about it.”

Now, a half a million dollars is pretty good money to make on something you paid \$150,000 for. He said he forgot it and I turned around, and I believe it was Ashley who I was talking to, and I said, “I don't want to ever talk to him again.” And I think from that

time on, unless he called me, unless I'm mistaken, only Ashley spoke to him and you spoke to him.

Q Did you authorize Ashley Andrews to extend a purchase -- a proposed purchase agreement on your behalf to Mr. Destaso?

A Yes.

R.O.A. page _____, lines [tr. Page 141, line 18—142, line 17]

Once respondent determined appellant was unreliable, he authorized his lawyer to send a written proposal to purchase on April 10, 2014, within 30 days of the visit of the "two Terry's." When negotiations failed, and when Robinson's effort to unwind the transaction ended on January 9, 2015, respondent filed his suit 4 months later, well before the statute of limitations expired. If a litigant files a claim within the statute of limitations, then laches will rarely apply because laches means:

Unreasonable delay [that] causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. *Rabon v. Maili*, 289 S.C. 37, 344 S.E.2d 608 (1986); *Mack v. Edens*, 306 S.C. 433, 412 S.E.2d 431 (S. C. App. 1991). The court is vested with wide discretion in determining what is an unreasonable delay. *Ham v. Flowers*, 214 S.C. 212, 51 S.E.2d 753 (1949)

Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner. *Privette v. Garrison*, 235 S.C. 119, 110 S.E.2d 17 (1959). Furthermore, in determining whether a party is barred by laches, the circumstances of each case should be considered, including whether the delay has worked injury, prejudice, or disadvantage to the other party. *Id.*

Chambers of South Carolina, Inc. v. Lee County, S.C. , 434 S.E.2d 279 (1993)

This record is silent as to: respondent's undue lapse of time, negligence, opportunity to act earlier, or resulting injury, prejudice, or disadvantage to appellant. In fact, the evidence shows that the only reason this dispute exists is because appellant took title to property without examining the title. The evidence proves that respondent swung

into action within days of learning “something was up with the club,” and when negotiating failed, respondent filed suit within four months after the court determined Fine Housing did possess title. Appellant turns the law of laches on its head, grasping at straws to excuse his own negligence.

Moreover, in constructing a lifeboat of equity, Fine Housing, Inc.’s conduct here is not the conduct of clean hands. Since there is no evidence in this record of delay, especially unreasonable delay when the respondent asserted his rights within four months of the court resolving the title issue and after appellant made generous overtures to appellant to avoid this litigation, there is not a shred of evidence in this record to support a claim of laches. Looking at the evidence in this case in the light most favorable to appellant—the opposite of the standard—the appellant’s reliance on laches is a waste of limited judicial resources.

Moreover, appellant’s claim of laches must contain an essential element of prejudice, and since the appellant created his own dilemma, and since respondent filed his claim well within a statute of limitations in a law case, there can be no prejudice as a matter of law because the law sets an outer limit for filing claims. Even though Courts have more discretion in equity cases, the appellant must identify the evidence supporting his claim, including prejudice. The only prejudice identified by Fine Housing is self-inflicted because it purchased property without examining the title. In essence, the appellant asks this Court’s assistance in relieving it from its own negligence. While Fine Housing complains about having to “manage” the property (Appellant’s brief at page 32), it misleads this Court by omitting mention of the rent it improperly collected on the property

that rightfully belongs to the respondent. See R.O.A. page ____ [tr. page 64]:

Q But you've been collecting rent since the new tenant came in at what, \$15,000 a month, 20?

A Incorrect. Initially, I had to give up 20 or 30, over \$30,000 because of issues with the building and improvements that were needed. Since then, our new current lease is for \$15,000 a month.

Q Okay. And you've been collecting that rent?

A Well, that lease commenced just January of this year.

Q Okay. So, you've had the property since 2013, correct?

A December 2nd, 2013 is when I bought the property.

Q Okay. You sold Sol Legare for \$500,000?

A Yes.

Q You've collected rent on 2028 Pittsburgh in some amount of money?

A Yes.

. . .

A Well, again, at the time when I purchased the property, there were multiple problems that were there that I eventually was able to correct and get rid of the non-paying tenant and put a paying tenant in there and maintain the licensing, which is where the value is.

In complaining about having to "manage" the property, not once does the appellant mention the compensation he receives. The record shows that in exchange for a \$805,000.00 investment, the appellant has already received \$500,000.00 for the sale of the Sol Legare property R.O.A. page ____ [Exhibit 26] and at least \$15,000.00 a month in rent. What the appellant does not analyze is his responsibility to examine the title to real

estate prior to purchasing it or the existence or application of the South Carolina recording statute.

IV The record does not include proof of the elements necessary for equitable estoppel.

The appellant's argument here is frivolous. The existence of the South Carolina Recording Statute bars the application of equitable estoppel. The appellant cannot assert it was not in possession of the true facts by refusing to look at them. § 30-7-10 S. C. Code, ann. governs the manner and effect of recording in South Carolina. Applying the statute to the facts of this case, the trial court found:

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 Bkrtcy Rpts. (221 D.S.C. 2013)
R.O.A. page ____ [Order page 10]

The appellant concedes that the respondent's recorded lease gave notice to the appellant of his lease and that his recorded lease contains a right of first refusal. As cited above, the appellant admits he did not see it until **after** the closing, and the appellant admits that no one gave notice to respondent of the proposed sale. Thus, the appellant's legal position is to ask this Court to excuse him from the operation of South Carolina law and reward him for his negligence in not looking at the record.

Had he looked at the agreement, appellant would have seen the right of first refusal prior to closing. As the Supreme Court said in *Rodarte v. University of South Carolina*, 419 S.C. 592, 799 S.E.2d 912 (2017):

Indeed, an unambiguous, written contract 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." *Rodarte* at page 918. Here, the appellant's lack of knowledge was because of his lack of due diligence not because respondent suppressed the information, another essential element missing. "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. [citations omitted] The essence of equitable estoppel is that the party entitled to invoke the principle was misled to his injury." *Rodarte* at 916. "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 subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (2) 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 part being estopped." *Rodarte* at page 916.

Appellant identifies none of these factors, and as pointed out above on page ____ asserts that he is not bound by the right of first refusal because he was not a party to it. This logical inconsistency escapes appellant.

In short, there is not a scintilla of evidence in this record supporting appellant's assertion that equitable estoppel applies in this case. As the closing attorney, William Sloan testified:

Q Now, you did hire a separate title examiner abstractor to check the title, correct?

A Yes.

Q And who was that?

A Charles Feeley, Esquire.

Q Okay. When did he complete that title examination?

A In the late afternoon of December 3rd -- excuse me, the late afternoon December 2nd, 2013.

Q Okay. And that title exam, did it or did it not reveal the existence of the Barry Clarke lease?

A He did pick it up.

Q Okay. But was it too late because of the urgency brought on by the pending foreclosure?

A Yes. I was in the conference room with Ms. Robinson at the time that Mr. Feeley e-mailed the title search to me.

Q Okay. What were your instructions upon learning that information?

A I'm sorry, could you repeat that?

Q Once Mr. Feeley transmitted ---

THE COURT: What was the date that Mr. Feeley produced the title?

MR. GOLDSTEIN: December 2nd.

THE COURT: Of '13?

MR. GOLDSTEIN: Yes, 2013. It was just hours after the closing.

A It was December 2nd, 2013, around 4:30 in the afternoon at the time I was in the conference room with Ms. Robinson doing the closing.

Q Okay. And once you received that information, what were your instructions then?

A Once I had received ---

Q The Feeley report.

A Oh, okay. I had a very few minutes to review Mr. Feeley's search and there was one tax lien that I was concerned about that was not reported in Mr. Swope's search. So, I made a nervous phone call to Mr. Swope and sent him an e-mail about that tax lien and he called me back moments later and reassured me that that lien was only against now the late John Robinson, Ms. Robinson's husband and not Ms. Robinson. I relied on that

representation by Mr. Swope. So, at that point, I moved forward the next morning to get the bank check and take it to Mr. Altman's office to stop an imminent foreclosure sale.

Q At that moment, were you or were you not aware that the lease contained a right of first refusal?

A Unaware.

Q Unaware?

A Unaware.

Q And is that because of the urgency of the closing and the lack of time to prepare adequately?

A Yes.

Q Okay. Now, if you had had the luxury of the proper amount of time, would you have reviewed the lease since you now know there is a least recorded?

A Yes.

Q And if you had become aware of the right of first refusal, would you have closed the transaction or would you have taken additional steps?

A I would have immediately called Mr. Destaso and discussed it with him on whether to move forward or cancel the closing.

Q Okay. And you did not do that in this case?

A No.

Q Because you didn't have time?

A Correct.

Q Okay. Because at 10:00 the following day, the Sol Legare property is gone?

A Correct.

R.O.A. page ____ - ____ [tr. Page 108, line 18 through page 111, line ____]

The appellant stipulated that neither he nor RRJR gave respondent notice of the

proposed sale. Finally, the appellant's closing statement (R.O.A. page ___[Exhibit 4], shows an astonishing amount of sharp practice and overreaching. Such conduct makes the appellant ineligible to assert equitable defenses. This predatory lending when combined with the fact that the appellant has been collecting rent to which he is not entitled makes his appeal to equity hollow.

V. The trial court erred in calculating the purchase price, which it should have calculated at \$150,001.00.

The issue of fixing the purchase price is cross-appealed by the respondent, and respondent addresses this legal issue fully in his Opening Brief on Cross Appeal, which is incorporated here. As set forth more fully in the cross-appellant's opening brief, the right of first refusal is not ambiguous, and the purchase price is controlled entirely by the seller, RRJR. When RRJR decided to accept \$150,000.00 for the property, that decision fixed the purchase price and established the respondent's threshold for purchase.

VI. Additional sustaining Ground

In his well-written and well-constructed brief, not once does appellant acknowledge South Carolina's recording statute's effect on this transaction. The existence and application of the recording statute governs every legal issue in this case.

CONCLUSION

The lower court correctly determined that the respondent holds an enforceable right of first refusal. This is a case brought in equity for equitable remedy of specific performance because the appellant chose to purchase real estate without examining the title. The

appellant fails to explain why the application of § 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. The terms of the contract are clear, and the law provides that the terms must be fulfilled in a reasonable time in a reasonable manner. The trial court set forth specific findings of fact and conclusions of law, which are supported by the overwhelming weight of the evidence, and for these reasons, the Order of the trial court should be affirmed.

Respectfully submitted,



Ashley G. Andrews, # 76667
Lafond Law Group P.A.
544 Savannah Highway
Charleston, S. Carolina 29407
(843) 762-3554
E-mail: andrews@lafondelaw.com

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 711121
N. Charleston, S. Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b) of the *South Carolina Appellate Court Rules*.

February ____, 2018

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Respondent

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MAR 05 2018

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., 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 Hosing, Inc., and RRJR, LLC..... Defendants,

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



Thomas R. Goldstein, #2186
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554-4291; (843) 554-5566 fax
Attorneys for the Appellant

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.

Harry C. Belk (1919-2003)
Dale T. Cobb, Jr.

Peggy M. Infinger
pinfinger@cobblaw.net

Thomas R. Goldstein
tgoldstein@cobblaw.net

ATTORNEYS AT LAW
2344 COSGROVE AVENUE
CHARLESTON, SC 29405

Mailing Address:
P.O. Box 71121
Charleston, SC
zip 29415-1121
Ph: (843) 554-4291
Fax: (843) 554-5566

March 1, 2018

Hon. Jenny Abbott Kitchings
Clerk of Court
ATTN.: AMELIA
South Carolina Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

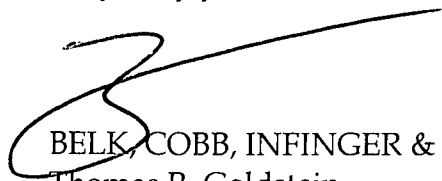
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Re: Barry Clarke vs. Fine Housing, et. al. Case #: 2015-CP-10-03038
Appellate Tracking Number: 2017-002285

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,



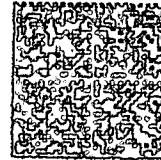
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Thomas R. Goldstein

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

cc: Cliff Moore, Esq.

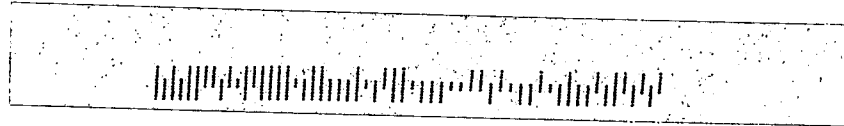
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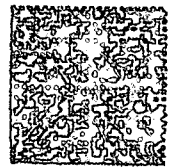


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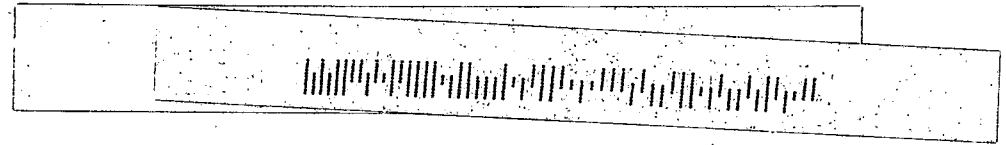
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