

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

RECEIVED
MAR 21 2018
SC Court of Appeals

Barry Clarke,

Respondent/Appellant,

v.

Fine Housing, Inc. and RRJR, LLC,

Defendants,

Of which Fine Housing, Inc. is the

Appellant/Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. Clarke misstates the facts..... 1

 a. Clarke misrepresents the trial testimony concerning his exercise of the claimed right of first refusal..... 1

 (1) Clarke’s Testimony..... 2

 (2) Sloan’s Testimony. 3

 (3) DeStaso’s Testimony. 4

 b. Clarke’s account of Fine Housing’s minimal investment in the Property is inaccurate..... 5

 c. Clarke’s statement that Sloan reviewed the Lease on the date of the closing of the sale from RRJR to Fine Housing is unsupported by the record..... 6

 d. Clarke misrepresents the date that Sloan first became involved in this matter..... 7

 e. Clarke misstates the significance of the title policy Sloan issued..... 8

 f. Clarke’s statement that Fine Housing did not review title is false..... 8

 g. Clarke’s statements concerning Fine Housing’s relationship with Sloan are incorrect..... 9

2. Clarke relies upon evidence that is not in the record..... 10

 a. Clarke’s assertion that Sloan did not have time to conduct a title examination is not found in the record..... 10

 b. The notion that Fine Housing had a copy of the Lease before the proceeds of the sale from RRJR to Fine Housing is not in the record. 11

 c. Clarke did not state in his testimony that he concluded DeStaso was a “liar.” 11

 d. Clarke’s statements concerning the ownership and control of RRJR and Group Investment are not found in the record..... 11

 e. There is no testimony that by not attending the closing on December 2, 2013, Fine Housing created any problem..... 13

 f. There is no testimony or other information in the record as to when DeStaso first visited South Carolina..... 13

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

State v. Buyers Serv. Co., 292 S.C. 426, 357 S.E.2d 15 (1987)..... 9

Rules

Rule 210(h), SCACR 1

ARGUMENT

This matter concerns the validity of a right of first refusal that the Respondent/Appellant Barry Clarke (“Clarke”) claims in real property located on Pittsburg Avenue in Charleston County (the “Property”). Clarke’s argument attempts to divert the Court’s attention from this simple issue, unnecessarily complicating the matter with facts that are not relevant.

Not only are these facts irrelevant, they are also either misstated or not found anywhere in the record. Rule 210(h), SCACR directs the appellate court not to consider any fact that does not appear in the Record on Appeal. Clarke’s brief to this Court includes gross misstatements of facts and matters not found in the record of the proceedings below.

1. Clarke misstates the facts.

The following are seven (7) examples of Clarke’s material misstatements in his Brief of Respondent/Appellant. This is not an exhaustive list.

a. Clarke misrepresents the trial testimony concerning his exercise of the claimed right of first refusal.

At least three times in his brief to this Court, Clarke offers that, upon learning of the transfer of the Property from RRJR to Fine Housing, he immediately attempted to exercise his right of first refusal by contacting DeStaso and offering to purchase the Property. Brief of Respondent/Appellant, pp. 10, 35, 40. An examination of the testimony offered at trial indicates that Clarke waited more than a year after he learned that RRJR sold the Property to Fine Housing before attempting to exercise the claimed right.

There were only three witnesses who testified at trial – DeStaso, Sloan and Clarke. Each of the witnesses testified concerning Clarke’s conduct after he learned of the sale from RRJR to

Fine Housing. The record establishes that Clarke learned of the transfer on or before March 21, 2014. There is no testimony that he attempted to exercise his claimed right until April 13, 2015.

(1) Clarke's Testimony.

Clarke had several opportunities to testify that he exercised the right of first refusal when he learned of the transfer of the Property from RRJR to Fine Housing; but he did not. On direct examination Clarke first stated, three times, that he did not recall exactly what transpired after he discovered the sale from RRJR to Fine Housing. (Transcript, p. 141, l. 9 to p. 142, l. 19). Then, instead of testifying that he exercised the right of first refusal by offering to pay the \$150,001.00 that he now claims is the price at which he can exercise his right, he testified that he offered to purchase the property for \$650,000.00 and did not mention the right of first refusal. *Id.* Clarke even explained his rationale behind the \$650,000.00 offer. (Transcript, p. 143, l.14 to p. 144, l. 3). The initial inquiry to Clarke of what transpired after he learned of the sale reflects that Clarke made a conscious decision not to exercise the right of first refusal.

Clarke's counsel made a second attempt to elicit testimony from Clarke that he immediately exercised his right of first refusal when he discovered the sale that triggered the right:

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 Ashley. I believe she got in touch with you. And whatever you told me to do, that's what I did.

(Transcript, p. 143, ll. 9-13). Again, when he was given the opportunity, Clarke did not testify to the immediate exercise of the right of first refusal that he asserts in his brief to this Court.

On cross examination Clarke had an opportunity to testify concerning his exercise of the right of first refusal in March of 2014, but failed to do so. In fact, he even testified that he failed

to raise the right of first refusal with his counsel. (Transcript, p.163, l. 15 to p. 164, l. 16). This testimony is consistent with Clarke's statements on direct examination – he elected not to exercise the right of first refusal in favor of an offer at a price that he believed Fine Housing would not refuse.

On redirect examination, Clarke's counsel made a final attempt to secure the needed testimony from Clarke.

Q Okay. Now, Mr. Moore asked you when you would exercise the right of first refusal. Would it be to your benefit to exercise it as quickly as possible or to drag your feet?

A I would do it as quickly as possible. I don't know if it would be to my benefit or not, but I would be too anxious to find out what the heck is going on and deal with it. Now, I don't know what the advantage would be. I'm not sure about that.

Q Okay. Now, if you're in control of the club and you're running it properly, are you making a profit, based on your past experience?

A Yes.

Q Okay. And if you make a profit operating these clubs, would you rather start operating it sooner or later?

A The sooner the better. Start making profit right away. Well, not right away, but you know.

Q And is that why you offered \$650,000 to get it?

A Well, yes, the sooner I got the property, the better -- every minute that goes by I'm losing -- a guy that wants the property and knows how to operate a place is losing money.

(Transcript, p. 165, l. 24 to p. 166, l. 18). Instead of testifying to the prompt exercise of the right of first refusal, Clarke continued to suggest that he abandoned the right to demand the property on the payment of \$150,001.00 in favor of offering \$650,000.00, hoping to score a quick purchase.

(2) Sloan's Testimony.

Sloan was the attorney that represented Fine Housing in the sale of the Property from RRJR. Clarke contacted him by telephone on March 21, 2014 to inquire about the transfer from

RRJR to Fine Housing. (Transcript, p. 118, l. 25 to p. 119, l. 17). This was the only communication with Clarke to which Sloan testified. Sloan testified that Clarke did not state that he intended to exercise a right of first refusal during this call. (Transcript, p. 119, ll. 18-24).

Sloan also testified that he communicated electronically with Mr. Goldstein, Clarke's counsel, concerning Clarke's discovery of the sale of the property by RRJR to Fine Housing.

Q Have you ever had a conversation with Mr. Goldstein where he said Mr. Clarke has a right of first refusal if he wants to exercise that right.

A In the two e-mails, there was no more than two that I had with Mr. Goldstein. He sent me the first e-mail. I sent him a reply e-mail and asked him what does Mr. Clarke want to do and as **I recall Mr. Goldstein e-mailed me back and said he, referring to Mr. Clarke, was unsure what he wanted to do.**

(Transcript, p. 119, ll. 18-24). (emphasis added). This testimony does not support an immediate exercise by Clarke of his alleged right. Rather, it suggests that Clarke's immediate reaction was uncertainty.

(3) DeStaso's Testimony.

DeStaso testified that Clarke did not raise the claimed right of first refusal in his first conversation with Clarke. (Transcript, p. 73, l.13 to p. 74, l. 25). In fact, DeStaso testified that it was not until April 13, 2015 that Clarke first asserted the claimed right of first refusal in a letter his attorney wrote to Fine Housing's counsel. (Transcript, p. 84, l. 8 to p. 85, l. 3).

The record is devoid of any testimony or evidence to support Clarke's position that he exercised the claimed right of first refusal when he learned of the transfer from RRJR to Fine Housing in March 2014. Clarke stated that he does not recall specifically what happened, but does remember that he turned to his attorneys for guidance. One of Clarke's attorneys told Sloan that Clarke had not decided if he wanted to buy the Property and another lawyer prepared a contract for Clarke to purchase the Property from Fine Housing for \$650,000.00 that did not

reference the Lease or the right of first refusal in the Lease. The evidence shows that Clarke did not exercise the claimed right under the Lease when he learned of Fine Housing's purchase. Rather, he abandoned the right in favor of a strategy to quickly purchase the Property for a price he believed Fine Housing would not refuse. Clarke tried to revive the claimed right more than a year later when his strategy failed.

b. Clarke's account of Fine Housing's minimal investment in the Property is inaccurate.

Clarke challenges Fine Housing's statement in the Brief of the Appellant that it spent its time and money improving the Property and resolving title issues. He submits that the record only includes evidence that the proceeds from the purchase of the Property from RRJR and the Sol Legare Road Property from Robin Robinson resolved tax liens and judgments, provided Fine Housing with a security deposit on the Property, and paid insurance premiums due on the Property. Clarke's assertion only considers part of the record and ignores other portions of testimony offered at trial that support Fine Housing's recitation of the facts.

At trial, DeStaso testified to expenses incurred by Fine Housing after it purchased the Property. He outlined the following expenses:

- Hiring attorney Charles Altman to help resolve outstanding tax liens (Transcript p. 69, ll. 13-16);
- Costs associated with the eviction of Robin Robinson as a tenant (Transcript p. 69, l. 17 to p. 70, l. 7);
- Payments and rent concessions made to Robin Robinson (Transcript p. 69, l. 17 to p. 70, l. 7);
- Time, effort and expense related to curing problems with permitting and licensing

(Transcript, p. 70, ll. 8-17);

- A \$102,000.00 settlement with former employees who had placed a lis pendens on the Property (Transcript, p. 70, l. 18 to p. 71, l. 1);
- Expenses related to improvements made to the Property and building code violations (Transcript, p. 71, ll. 2-13); and
- Rent concessions to a tenant to account for improvements to the Property (Transcript, p. 71, ll. 2-13).

c. Clarke's statement that Sloan reviewed the Lease on the date of the closing of the sale from RRJR to Fine Housing is unsupported by the record.

Sloan clearly testified at trial that he did not see the Lease until March 21, 2014 following a telephone call made by Clarke to Sloan (Transcript, p. 118, l. 10 to p. 119, l. 17). Yet, Clarke's statement of facts includes the representation that Sloan and Fine Housing knew of the Lease on the date of the closing of the sale from RRJR to Fine Housing, December 2, 2013. Clarke implies that because Sloan received a title report during the closing that contained a copy of the Lease, he reviewed the Lease at that time. That was not Mr. Sloan's testimony. The portions of the trial transcript to which Clarke directs this Court's attention are only part of the picture.

Clarke asks the Court to consider only part of the testimony elicited by his attorney on direct examination - Transcript, pp. 108-111. He omits the other part of the testimony provided in response to his attorney's questions on this topic.

Q When did you discover that there was a lease on file at the RMC office in favor of Barry Clarke?

A March 21st, 2014.

(Transcript, p. 103, ll. 16-18). The testimony on which Clarke focuses is in response to questions posed by his counsel. The questions mistakenly assume that Sloan saw the Lease

notation on the title report and read the Lease. That was not Sloan's testimony. The conclusion Clarke suggests from this assumption is that Sloan missed the language creating the claimed right of first refusal because of his haste. In fact, Sloan's testimony is that he did not review or even see the Lease on December 2, 2013 because the author of the title abstract did not provide him with a copy of the Lease. Sloan did not review the Lease until March 21, 2014 following Clarke's telephone call. (Transcript, p. 103, ll. 16-18 and p. 118, l. 10 to p. 119, l. 17).

d. Clarke misrepresents the date that Sloan first became involved in this matter.

Clarke's attack on Fine Housing includes several suggestions that Fine Housing was culpably unreasonable in the demands that it made concerning the timing of the closing of the sale of the Property from RRJR to Fine Housing. He argues "[t]he 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...". Brief of Respondent/Appellant, p. 18. To support this contention, Clarke maintains that Sloan was not engaged until November 26, 2013 and that Fine Housing demanded a closing on December 2, 2013, noting that the Thanksgiving Holiday occurred between the date of engagement and the closing date. Consideration of all of the relevant facts demonstrates that Clarke's argument is misleading.

Attorney William Swope ("Swope") represented Robin Robinson. (Transcript, p. 114, ll. 10-12; p. 115, ll. 3-7; and 116, ll. 11-19). Swope refers legal work to Sloan. (Transcript, p. 117, ll. 7-18). In the summer of 2013 Swope contacted Sloan about doing a refinance for Robin Robinson. (Transcript, p. 116, l. 20 to p. 117, l. 2). Swope contacted Sloan again in the fall of 2013 to discuss a refinance transaction. (Transcript, p. 117, ll. 4-6). On November 17, 2013, Swope provided Sloan with his title examination in anticipation of a transaction concerning the Property. (Transcript, p. 117, ll. 7-19). Fine Housing became Sloan's client on November 26,

2013. (Transcript, p. 118, ll. 14-15).

Fine Housing did not control the date of the closing of the sale from RRJR. The timing was dictated by an imminent foreclosure sale of Robin Robinson's residence that was scheduled for December 3, 2013. (Transcript p. 99, ll. 13-16).

Swope knew for some period of time that a transaction concerning the Property was imminent. Clarke's assertion that Swope was surprised and pressured by an emergency retention by Fine Housing seven (7) days before the required closing has no support in the record.

e. Clarke misstates the significance of the title policy Sloan issued.

As evidence of his conclusion that Sloan knew of the Lease on the date of the closing, December 2, 2013, Clarke argues that Sloan took exception to the Lease in the title policy that he issued concerning the transaction. Brief of the Respondent/Appellant, p. 9. While it is true that Sloan testified that he included the Lease as an exception in the title policy that he issued to Fine Housing, that policy was not issued until after March 21, 2014. (Transcript, p. 122, ll. 14-23). Sloan also testified that he did *not* take exception to the Lease in the title insurance policy commitment (Transcript, p. 122, ll. 14-23) that would have been issued before the title insurance policy. Under these facts, the inclusion of the Lease as an exception in the title policy does not indicate that Sloan knew of the Lease on December 2, 2013.

f. Clarke's statement that Fine Housing did not review title is false.

A recurring theme in Clarke's factual summary is that no one knew of the Lease containing the claimed right of first refusal because Fine Housing did not examine title to the Property (*see, e.g.*, Brief of the Respondent/Appellant, p. 18). This statement is false.

The examination of the title to real property in South Carolina is the practice of law and can only be performed under the supervision of an attorney licensed to practice law in this state.

State v. Buyers Serv. Co., 292 S.C. 426, 357 S.E.2d 15 (1987). Testifying as Fine Housing's witness at trial, DeStaso stated that he was not aware that the closing attorney was responsible for the title examination in South Carolina because his experience in New York was that the title company preformed the examination of title. (Transcript, p. 39, ll. 15-24).

Sloan was Fine Housing's attorney for the transaction at issue (Transcript, p. 144, ll. 1-9) and he made the conscious decision to close the transaction in reliance on title work provided to him by Swope. (Transcript, p. 103, ll. 7-9). He had that title work in his possession on November 17, 2013. *Id.*

Swope's title work failed to reveal the Lease. (Transcript, p. 103, ll. 12-15). That is why Fine Housing and its counsel, Sloan, did not know of the Lease at the closing.

g. Clarke's statements concerning Fine Housing's relationship with Sloan are incorrect.

In his argument, Clarke states "[h]owever, 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." Brief of the Respondent/Appellant, p. 18. This is one of several instances in his Brief where Clarke attempts to distract the Court from the true issues before it by fabricating a feud between Fine Housing and Sloan at the time of closing as the source of all that went awry.

The time constraints on the closing were not created by Fine Housing, as Clarke suggests. A looming foreclosure sale is what drove the timing of the transaction. (Transcript p. 13, ll. 13-16).

Clarke tried to elicit testimony from Sloan at trial that Fine Housing placed undue and unreasonable demands on Sloan, causing Sloan to cut corners and miss the recorded Lease that

contained the claimed right of first refusal. However, Sloan did not testify as Clarke represents in his Brief. Rather, he simply stated that he chose to rely on a title examination provided to him by Swope that did not contain a reference to the Lease. (Transcript p. 103, ll. 4-11).

For reasons not explained by his trial testimony, Sloan decided to order a second title examination. (Transcript, p. 108, l. 20 to p. 110, l. 24). The record does not reflect when Sloan ordered the examination, but he received the title report during the closing on December 3, 2013. *Id.* The report contained a reference to the Lease, but Sloan did not see it because he was focused on new tax liens contained in the report that were not included in Swope's title report. *Id.* It was not pressure exerted by Fine Housing that caused Swope to miss the Lease in the second report; it was the timing of the receipt of the second report and Swope's failure to completely review that report.

2. Clarke relies upon evidence that is not in the record.

Many of the facts that Clarke uses throughout his argument in his Brief of the Respondent/Appellant are not found in the record of this matter. Several appear to be assumptions made by Clarke and his counsel or facts known to them that were not offered at trial. This Court's review is limited to the record that has been established and should not include matters not contained in the record of this case. Examples of these statements of fact follow.

a. Clarke's assertion that Sloan did not have time to conduct a title examination is not found in the record.

In his argument to this Court, Clarke repeatedly states that Sloan did not have sufficient time to conduct the title examination needed to close the sale transaction from RRJR to Fine Housing. However, Sloan did not testify that he lacked the time to conduct an examination of

the title to the Property. Rather, his testimony was that he chose to rely on title work provided to him by Swope on November 17, 2013. On examination by Clarke's counsel, Sloan testified:

Q Okay. Did you have enough time to conduct a full 40-60-or even 20 year search without relying on information that was provided to you?

A Mr. Swope, I relied on the title work of Mr. Swope that he furnished sometime earlier in the month, sometime around -- around November the 17th, sometime around there.

(Transcript, p. 103, ll. 4-9). Sloan consistently testified to this reliance throughout his examination. (Transcript, p. 98, ll. 17-22 and p. 117, ll. 7-19).

- b. The notion that Fine Housing had a copy of the Lease before the proceeds of the sale from RRJR to Fine Housing is not in the record.

Clarke challenges Fine Housing's explanation of why it did not notify Clarke of its purchase of the Property from RRJR. Fine Housing explained that it did not provide the notice because it did not have actual knowledge of the Lease at the time of purchase. Clarke submits that this statement is inaccurate because "appellant had the lease prior to disbursing." Brief of the Respondent/Appellant, p. 10. There is nothing in the record indicating that Fine Housing had actual possession of the Lease until March 21, 2014.

- c. Clarke did not state in his testimony that he concluded DeStaso was a "liar."

Clarke states that "respondent concluded he was dealing with a liar" (Brief of the Respondent/Appellant, p. 42), referring to Mr. DeStaso. Clarke directs the Court to the Trial Transcript, p 141, l. 18 to p. 142, l. 17 as authority for that conclusion. The cited trial testimony does not contain any opinions by Mr. Clarke as to Mr. Destaso's propensity for telling the truth.

- d. Clarke's statements concerning the ownership and control of RRJR and Group Investment are not found in the record.

Clarke states as fact that:

- Group Investment Company, Inc. (“Group Investment”) was “a company comprised of the husband and wife team of John and Robin Robinson. Brief of Respondent/Appellant, p. 4;
- “RRJR stands for Robin Robinson and John Robinson”. Brief of Respondent/Appellant, p.4;
- Group Investment was owned and operated by John and Robin Robison and that RRJR was owned and operated by John and Robin Robinson. Brief of Respondent/Appellant, p. 33.

These assertions are not contained within the stipulation to which the parties agreed at trial concerning the composition of Group Investment and RRJR.

At trial, the parties stipulated as follows:

MR. GOLDSTEIN: The stipulation is that the parties are stipulating that the shareholders of Group Investment Company, Inc., were Robin Robinson and John Robinson and that two members of RRJR were Robin Robinson and John Robinson, although there may have been other members.

MR. MOORE: Same thing with the shareholders. There may have been other shareholders. We will stipulate that Robin Robinson and John Robinson were both shareholders of Group Investment and members of RRJR, LLC.

THE COURT: They were the same members in both corporations?

MR. MOORE: We just don't know if there were other members.

THE COURT: Okay. So you don't know if it was just the two of them or other people?

MR. MOORE: Right.

THE COURT: In the corporation or the LLC?

MR. MOORE: Right. They both have those two in common.

THE COURT: All right.

(Transcript, p. 183, ll. 7-25). The stipulation specifically left room for the fact that there were other shareholders of Group Investment and other members of RRJR. The stipulation did not mention the other facts concerning Group Investment and RRJR that Clarke offers in his Brief.

- e. There is no testimony that by not attending the closing on December 2, 2013, Fine Housing created any problem.

Clarke contends that Fine Housing “compounded” the pressure on Sloan by “declining to attend the closing.” Brief of the Respondent/Appellant, p. 18. There is no testimony that Fine Housing declined to attend the closing on December 2, 2013. There is no testimony of compounded pressure or any adverse effect generated by Fine Housing’s absence from the closing. The only testimony on this point was simply that DeStaso did not attend the closing. (Transcript, p. 107, ll. 22 to p. 108, l. 1).

- f. There is no testimony or other information in the record as to when DeStaso first visited South Carolina.

The Brief of the Respondent/Appellant contains the statement, twice, that DeStaso’s first visit to South Carolina was on November 26. Brief of the Respondent/Appellant, pp. 8 and 24. Fine Housing does not understand the relevancy of this fact, but is not contained anywhere in the record.

Most of the misstatements of fact and all of the facts identified as not being in the record are irrelevant to the issues before this Court. From the beginning of this dispute, Clarke has attempted to make this case about the character and conduct of Vincent DeStaso. Those matters are not germane to whether the right of first refusal is enforceable or not.

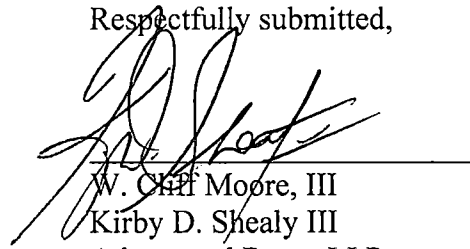
Furthermore, both at trial and in his brief, Clarke treats Fine Housing as DeStaso’s alter ego. He does not acknowledge that DeStaso is only a shareholder of Fine Housing. Clarke made DeStaso his first witness at trial and never questioned him about his relationship to Fine Housing. It was not until Fine Housing’s counsel’s cross-examination that the shareholder relationship was revealed (Transcript, p. 68, ll. 1-5). That is the only record of DeStaso’s

relationship to Fine Housing. Clarke's treatment of Fine Housing's alter-ego has no foundation in the record.

CONCLUSION

Setting aside these misstated facts and the facts not contained in the record guts Clarke's argument. Clarke is left with his position on the law that does not support the decision of the lower court.

Respectfully submitted,



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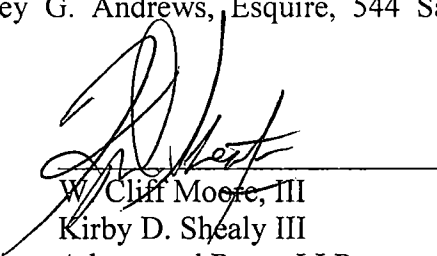
Of which Fine Housing, Inc. is the

Appellant/Respondent.

PROOF OF SERVICE

I certify that I have caused the Initial Reply Brief of the Appellant and the Supplemental Designation of Matter to be Included in the Record on Appeal to be served on Barry Clarke by having a copy of it deposited in the United States Mail, postage prepaid, on March 21, 2018, addressed to his attorneys of record, Thomas R. Goldstein, Esquire, Post Office Box 71121, Charleston, South Carolina, 29415, and Ashley G. Andrews, Esquire, 544 Savannah Hwy., Charleston, South Carolina 29407.

March 21, 2018


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RECEIVED

Via Hand Delivery

MAR 21 2018

The Honorable Jenny Abbott Kitchings
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RE: Barry Clarke, Respondent/Appellant, v. Fine Housing, Inc. and RRJR, LLC, Defendants,
of which Fine Housing, Inc. is the Appellant/Respondent.
Case No. 2015-CP-10-03038
Appellate Case No. 2017-002285

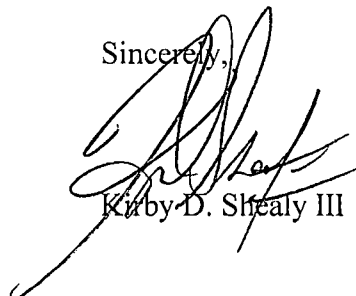
Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and one copy of the Initial Reply Brief of the Appellant, a Supplemental Designation of Matter to Be Included in the Record on Appeal, and a Proof of Service. Please file the originals and return the clocked-in copies to me via our courier.

By copy of this letter, I am serving Mr. Goldstein and Mrs. Andrews with the reply brief and supplemental designation as set forth in the enclosed Proof of Service.

Thank you for your attention to this matter.

Sincerely,



Kirby D. Shealy III

KDS/jas

Enclosure(s)

cc: *via U.S. Mail*
Thomas R. Goldstein, Esq.
Ashley G. Andrews, Esq.