

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
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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 BRIEF OF APPELLANT/RESPONDENT ON CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE..... 1

ARGUMENT..... 1

 1. The Right of First Refusal in the Lease does not fix a price,
 or method of determining price, at which Clarke could exercise the right..... 1

 2. The evidence excluded by the lower court is not relevant and Clarke
 has not shown that prejudice resulted from the exclusion 2

 a. Clarke does not show error..... 4

 b. Clarke admits there is no prejudice. 5

CONCLUSION..... 5

TABLE OF AUTHORITIES

Cases

Poynter v. Century Builders of Piedmont, 387 S.C. 583, 694 S.E.2d 15 (2010)..... 2
Stonhard, Inc. v. Carolina Flooring Spec., Inc., 366 S.C. 156, 621 S.E.2d 352 (2005) 2
Timmons v. S.C. Tricentennial Comm’n., 254 S.C. 378, 175 S.E.2d 805 (1970)..... 4, 5

STATEMENT OF THE CASE

The Appellant/Respondent, Fine Housing, Inc., relies on the Statement of the Case and the Facts set out in the Brief of the Appellant. This Brief also incorporates the terms and definitions contained in the Brief of the Appellant.

ARGUMENT

1. The Right of First Refusal in the Lease does not fix a price, or method of determining price, at which Clarke could exercise the right.

Fine Housing contends that the claimed right of first refusal is not valid because it is ambiguous and incomplete. As set out in the Brief of the Appellant, the right of first refusal in the Lease is not valid for many reasons. One of the several essential provisions that it lacks is the price, or a method to determine the price, at which Clarke can exercise his right. Clarke's challenge of the lower court's ruling spotlights the absence of this necessary term.

To reach its decision that Clarke timely exercised his right of first refusal, the lower court determined that an offer to purchase the Property for Six Hundred Fifty Thousand Dollars (\$650,000.00) was an exercise of that right. Yet, the lower court decided that Clarke should only be required to pay Three Hundred Fifty Thousand Dollars (\$350,000.00) to exercise his right. On appeal Clarke argues he should only be required to pay One Hundred Fifty Thousand and One Dollars (\$150,001.00). Each of the offered exercise prices is arbitrary. A properly worded right of first refusal would have resolved the matter.

In support of his suggestion that One Hundred Fifty Thousand and One Dollars (\$150,001.00) is the correct number, Clarke retreats again to contract law and offers an analysis that characterizes the right of first refusal as an unambiguous contract. However, the right of first refusal in the Lease is incomplete and ambiguous concerning the essential term on which

Clarke bases his appeal— the price at which Clarke may exercise the right of first refusal. The language in the Lease does not mention price and does not provide a process for determining price. As Fine Housing argued in its Brief of the Appellant, Courts may not add or modify terms in a contract to make it enforceable or comport with public policy. *See Poynter v. Century Builders of Piedmont*, 387 S.C. 583, 694 S.E.2d 15 (2010); *Stonhard, Inc. v. Carolina Flooring Spec., Inc.*, 366 S.C. 156, 621 S.E.2d 352 (2005). A determination that the right of first refusal in the Lease requires a payment of One Hundred Fifty Thousand and One Dollars (\$150,001.00) would require an impermissible judicial re-writing of the Lease.

Moreover, Clarke’s contract analysis of the right of first refusal in the Lease is only a valid analysis of any dispute he may have with Group Investment, the other party to the Lease. Clarke’s claim against Fine Housing is not in contract. Clarke alleges that Fine Housing’s interest in the Property is burdened with the right of first refusal because Fine Housing had record notice of the Lease, not because it was a party to a contract.

Fine Housing has always acknowledged that it had constructive, record notice of the Lease, and notice is not the issue on appeal. Rather, Fine Housing argues that the language in the Lease does not create a valid interest in real estate and therefore cannot be enforced against it, as the owner of the Property. This case is not about contract interpretation; it is about the creation of a valid interest in real estate.

The provision of the Lease that attempts to create a right of first refusal is ambiguous and leaves the price at which the right can be exercised open for debate. This is a fatal flaw and destroys Clarke’s ability to enforce the right against anyone who was not a party to the Lease.

2. The evidence excluded by the lower court is not relevant and Clarke has not shown that prejudice resulted from the exclusion.

Clarke is relentless in his effort to weave irrelevant information into the record in an attempt to cloud the real issue on appeal with Fine Housing's business practices and DeStaso's character. Clarke apparently believes that these matters can suffocate the real questions on appeal. Fine Housing refused to engage Clarke on these irrelevant matters and offered no evidence to counter the suggestions made at trial. This has fueled Clarke's efforts, and he insists on continuing his quest to have this Court consider these matters, even though he has acknowledged that the exclusion did not prejudice him.

Clarke wants this Court to consider checks issued by Fine Housing's attorney from the settlement proceeds of the sale by RRJR to Fine Housing and claims that they were improperly excluded as evidence by the lower court. The details of the transaction between Fine Housing and RRJR have absolutely no bearing on the validity of Clarke's interest in the Property or Clarke's attempt to enforce his interest in the Property.

Clarke also wants this Court to consider the lawsuit that Fine Housing filed against its attorney, Sloan, for, among other things, his failure to discover and disclose the Lease containing the right of first refusal. Despite Clarke's repeated argument that "[t]he legal dispute arises from Fine Housing's decision to purchase real estate without examining the title and nothing more" (Brief of the Respondent/Appellant, p. 12), he believes that Fine Housing's action against Sloan for failure to reveal the recorded Lease is sinister and reflects poorly on Fine Housing and DeStaso. Fine Housing's lawsuit against Sloan has absolutely no bearing on the validity of Clarke's interest in the Property or Clarke's attempt to enforce his interest in the Property.

To succeed in his effort to have this Court reverse the exclusion of the identified evidence by the lower Court, he must prove error and resulting prejudice. *Timmons v. S.C. Tricentennial*

Comm'n., 254 S.C. 378, 175 S.E.2d 805 (1970). Clarke cannot show error and admits that there was no resulting prejudice.

a. Clarke does not show error.

Clarke's argument only refers to a portion of the lower court's consideration of the excluded exhibits. This partial presentation is misleading.

The portions of the trial transcript recited in Clarke's brief recall Clarke's efforts to elicit testimony from DeStaso concerning documents marked for identification purposes as Plaintiff's Exhibits 5, 6, 7, and 8. Trial Transcript, pp. 127 and 128. Fine Housing's objection that is referenced in the offered portions of the transcript, which was sustained by the lower court, makes reference to a prior objection when Clarke first attempted to introduce the exhibits during his direct examination of DeStaso. Trial Transcript, p. 58, ll. 10-25 and p. 59, l. 16 to p. 60, l. 2.

When Clarke first posed questions to DeStaso about Plaintiff's Exhibits 7 and 8, Fine Housing objected on grounds of relevancy, and the objection was sustained. Trial Transcript, p. 58, ll. 10-25. When Clarke first posed questions to DeStaso about Plaintiff's Exhibit 5, Fine Housing objected because of a lack of foundation. The lower court sustained the objection and not only excluded Plaintiff's Exhibit 5, it also excluded Plaintiff's Exhibit 6 and again excluded Plaintiff's Exhibits 7 and 8.

Clarke's argument on appeal refers to the lower court's exclusion of "the lawsuit Fine Housing filed against William Sloan, *Fine Housing, Inc. v. Sloan*, 2016-CP-18-00340, Exhibit 30." Brief of Respondent/Appellant, p. 15. The record contains no reference to "Exhibit 30" and Clarke made no effort to introduce any exhibit concerning the referenced lawsuit into the record. In fact, Clarke actually questioned DeStaso about the lawsuit. Trial Transcript, p. 37. Clarke has

fabricated this controversy to highlight his irrelevant character assassination of Fine Housing and DeStaso that he believes will lead to success on appeal.

Clarke’s argument fails to address the lower court’s ruling on the admissibility of the checks he claims were improperly excluded. The record contains nothing about an “Exhibit 30” or efforts to introduce documents from the Sloan litigation. Therefore, Clarke fails to show error by the lower court, the first requirement of *Timmons*.

b. Clarke admits there is no prejudice.

The second *Timmons* requirement is that the error must have resulted in prejudice to Clarke. By Clarke’s own admission, there is no prejudice. In his brief to the Court, Clarke concedes “he cannot show prejudice resulting from the exclusion of this evidence at the non-jury trial of this equity matter” (Brief of Respondent/Appellant, p. 14) and “he cannot demonstrate prejudice” as it relates to the exclusion of the Sloan lawsuit document. Brief of Respondent/Appellant, p. 15.

Clarke’s arguments concerning excluded evidence are so hollow that the only conclusion to be drawn from them is that he hopes to smear Fine Housing and Clarke’s reputations. Such information is not relevant, and such tactics are not appropriate.

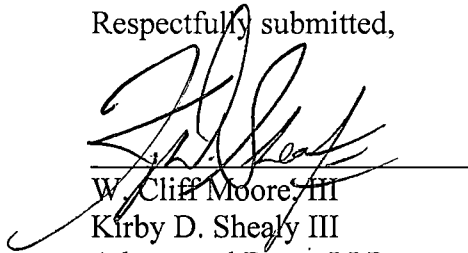
CONCLUSION

The two points Clarke makes in his challenge to the lower court’s Order are diversions from the true issues on appeal in this matter– the enforceability of the claimed right of first refusal and the consequences of Clark’s conduct as it relates to the enforcement of the right of first refusal. Clarke’s belief that he can subjectively fabricate, and then justify, the price at which he can exercise his right of first refusal speaks to the necessity of specifically stated terms

for a right of first refusal to be enforceable. His efforts to broaden the scope of the appeal to the irrelevant by including self-defeating arguments and non-existent records should be ignored.

April 2, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kirby D. Shealy III", is written over a horizontal line.

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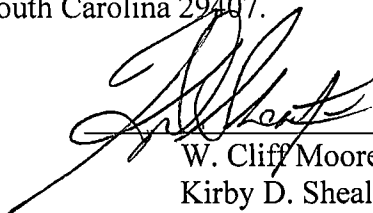
Of which Fine Housing, Inc. is the

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PROOF OF SERVICE

I certify that I have caused the Initial Brief of the Appellant/Respondent on Cross-Appeal to be served on Barry Clarke by having a copy of it deposited in the United States Mail, postage prepaid, on April 2, 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.

April 2, 2018



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RE: Barry Clarke, Respondent/Appellant, v. Fine Housing, Inc. and RRJR, LLC, Defendants,
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Appellate Case No. 2017-002285

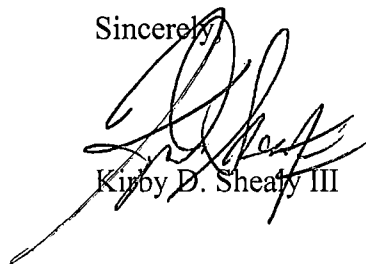
Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and one copy of the Initial Brief of the Appellant/Respondent on Cross-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 brief, 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.

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