THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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SC Court of Appeals

2020-UP-238
Case No. 2015-CP-10-03038
Appellate Tracking No.: 2017-002285

Barry Clarke...Petitioner,

vs.

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

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

PETITION FOR REHEARING

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As authorized by Rule 221 of the *South Carolina Appellate Court Rules*, the Respondent/Petitioner respectfully requests that the Court grant oral argument on this case and amend its August 12, 2020, Opinion because the Court overlooks and misapprehends two important, settled principles of law and misapplies the holding of *Webb v. Reames*.

1. THE COURT OVERLOOKS THE APPLICATION OF THE SOUTH CAROLINA RECORDING STATUTE

The trial court correctly relied on the South Carolina Recording Statute, § 30-7-10, S. C. Code, ann., but in reversing the trial court, the Court of Appeals overlooks the application of the controlling recording statute. The recording statute, as correctly relied on by the trial court, means:

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)

In the Opinion under review, the Court notes on page 2 that ". . . Fine Housing had refused to allow Clarke to acquire the Property in conformity with a lease (Lease)." (Opinion No. 2020-UP-238 at page 2) Throughout the Opinion, the Court refers to the Lease as a "Lease" and not, as the record establishes, a "Recorded Lease." This is a critical omission and distinction because the Appellant, Fine Housing, cannot complain about a putative ambiguity in a document it failed to review. Not to put too fine a point on it, the Purchaser is the author of its own dilemma by not examining the documents that the law requires it to examine. As the Court notes, Fine Housing rushed the transaction, which prevented any meaningful examination of the chain of title, and by doing so, it cannot turn a blind eye to the record and then complain that the recorded lease was not specific enough

for it to act. Well established case law does not permit a party to complain about an alleged ambiguity in a document it never bothered to examine. Opinion 2020-UP-238 rewards a sophisticated real estate developer for its own negligence.

2. IF THE RIGHT OF FIRST REFUSAL IS AMBIGUOUS, THEN THE AMBIGUITY MUST BE CONSTRUED AGAINST THE DRAFTER

As set forth above, Fine Housing chose to rush its transaction to purchase the property and did not avail itself of an opportunity to examine the record. There is nothing ambiguous or complicated about the right of first refusal in the recorded lease. It says simply, as the Court notes, that if the Seller decides to sell, it will give Lessee an opportunity to purchase the property at the same price. Just because the right is not constructed in elaborate terms does not render it invalid, especially where, as here, the time of performance and the purchase price is controlled exclusively by the Seller as the trial court found:

> 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)

Even if there were some ambiguity in the document, the ambiguity must be construed against Fine Housing and in favor of Clarke because Fine Housing stands in the position of the Lessor who controlled the terms of the Recorded Lease:

> We reject the suggestion of an ambiguity. In any event, were we to entertain the idea of an ambiguity, such ambiguity would have to be construed against the Bank which drafted the agreement. *Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (noting the rule of contract interpretation that an ambiguous contract will be construed against the drafting party); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) ("[A] court

will construe any doubts and ambiguities in an agreement against the drafter of the agreement.").
Duncan v. Little, 384 S.C. 420, 682 S.E.2d 788 (2009)

Of course, if the contract, right of first refusal, were ambiguous, then this issue becomes an issue of fact that must be resolved by the trier of fact, and, as the Court notes in its Standard of Review: "this [c]ourt is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." (Opinion at page 3) Assuming *arguendo* there is an ambiguity, the resolution of any such alleged ambiguity is a question of fact:

See *S.C. Dep't of Nat. Res. v. Town of McClellanville* , 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."). When a trust is susceptible of more than one reasonable interpretation, a motion for a directed verdict should be denied. See *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC* , 374 S.C. 483, 489, 649 S.E.2d 494, 497 (Ct. App. 2007) ("If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created . . . . ")
Harbin v. Williams, 429 S.C. 1, 837 S.E.2d 491 (Ct. App. 2019)

Here, the Court never reaches whether the right of first refusal is or is not ambiguous. The Opinion under review only spells out that the "[Recorded] Lease did not specifically set forth whether the Right of Frist Refusal applied to the leased parking spaces or the entire property; the Lease did not specify how the price of the Property would be determined for the Right of First Refusal; and the Lease did not state a time for exercising the Right of First Refusal." (Opinion at page 6) However, the law demonstrates that the failure to specify these terms does not create an ambiguity because the Court must read the document as a whole. It is clear from the overarching meaning of the Recorded Lease, that the Court's conclusion is not accurate because the Recorded Lease clearly provides for use of ½ of the parking lot during the life of the lease and the opportunity to match a tendered purchase price "should it wish to sell." (Opinion at page 4 quoting Recorded Lease) The Recorded Lease contains the exact legal description of the entire parcel, and this Court overlooked this important part of the whole. Of course, the Lease spelled out that the Right applied to the entire property because it

is the sale of the property that triggers the right. The price is determined by any acceptable offer made to the Seller by a third party "should it wish to sell." Finally, the time for performing is a reasonable time implied by the contract unless it made time of the essence and set a deadline. *Hobgood v. Pennington*, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1989) These facts are irrefutable, and even if they were not, they certainly were within the purview of the trial court to make, sitting as the fact finder, to determine by weighing the evidence and weighing the credibility of the witnesses. By vacating the right, this Court misconstrues the evidence, fails to examine the Recorded Lease as a whole, and disregards established precedent controlling the enforcement of contractual rights.

3. THE COURT'S RELIANCE ON *WEBB V. REAMES* IS INAPPLICABLE BECAUSE *WEBB V. REAMES* STRUCK DOWN A RIGHT OF FIRST REFUSAL FOR VIOLATING THE RULE AGAINST PERPETUITIES

In determining that the Clarke Right of First Refusal is not enforceable, the Court misapplies the law. First, a right of first refusal is **not** a restraint on alienation. A right of first refusal does not inhibit or restrict a property owner in any manner, and as the trial court found, it enhances the value of property by guaranteeing there will always be two potential purchasers vying for the right to purchase. More importantly, the Court misplaces its authority on *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997). Here the Lease ran from January 8, 1999 until the 6th anniversary after Clarke's death. (R.O.A. Vol. 2, page 355) Thus, it could not possibly run afoul of the Rule Against Perpetuities as did the Lease in *Webb v. Reames*:

> The right [of first refusal] represented an attempt by the grantor Blease to reserve to himself, his heirs, and assigns a perpetual option to purchase the property described at the price of $64. Because the right or interest was one that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter, the interest violates the rule against perpetuities and is therefore void.

The Recorded Lease in this case specifically limits the right of first refusal to the lifetime of the lease, which is specifically drawn so as to avoid the Rule Against Perpetuities (6th anniversary of Clarke's death). Therefore, the right is enforceable, and the **purchase price is determined by any price being paid by any third party**. Thus, under the Court's own reasoning: "Whether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right," the record demonstrates Respondent meets all these. There is nothing in the record suggesting the right is illegitimate. The purchase price is determined entirely by the landowner who can sell at any price he chooses. Finally, the procedure for exercising the right is simple and solely determined by the Seller. As the Restatement (Third) of Property (Servitudes) § 3.4 says: "A servitude . . . is valid unless it is illegal or unconstitutional or violates public policy." The test for "reasonableness" under the Restatement's formulation is as follows: "Reasonableness is determined by weighing the utility of the restraint against injurious consequences of enforcing the restraint." § 3.4 "Direct restraints" Here, the trial court found that the right of first refusal enhanced Seller's ability to sell by guaranteeing a minimum of two competing purchasers at any time Seller wished to sell, and there is not a *scintilla* of evidence in the record to the contrary. As stated above, Fine Housing asks this Court to indemnify it from its own lack of due diligence, and that is not the function of the Court. The function of the Court is to enforce the agreement as written. " When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 428 S.E.2d 705 (1993). The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. *Id.*" *Ellis v.*

Taylor, 449 S.E.2d 487, 316 S.C. 245 (S.C. 1994) Fine Housing is a sophisticated real estate speculator and it knew the risks of hurrying a transaction to take advantage of a weak Seller, and it now seeks to enlist the Court of Appeals in pulling off a sharp practice. The Court should not do so.

Conclusion

For the above reasons, the Respondent/Petitioner respectfully submits the Court of Appeals overlooked these important legal considerations and misapplied the holding of *Webb v. Reames* to the facts presented in this case. The Respondent/Petitioner prays, therefore, that the Court reconsider its decision, set the case for oral argument, and amend Opinion 2020-UP-238 to affirm the trial court's decision to enforce the right of first refusal and allow Respondent/Petitioner an opportunity to be heard on his cross appeal setting the purchase price as the purchase price of $150,000.00.

Respectfully submitted,

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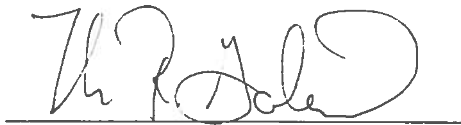

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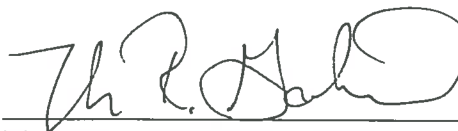
PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Appellant/Respondent, Fine Housing, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on August 21, 2020, addressed to its attorney of record, W. Cliff Moore, III, Adams & Reese, L.L.P. at P. O. Box 2285, Columbia, S. C. 29202.

August 21, 2018



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