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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

2020-UP-238
Case No. 2015-CP-10-03038
Appellate Case No. 2020-001371

Barry Clarke.....Petitioner,

vs.

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

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

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

Rule 242(a), SCACR, provides that the Supreme Court may issue a writ of certiorari to review a decision of the Court of Appeals on motion of any party or on its own motion. Here the Petitioner sought the writ. Rule 242(i), SCACR suggests that the review on certiorari at the request of a party is limited to the questions presented in the party's petition. In his Petition for Certiorari, Petitioner succinctly states three questions for review:

(1) Did the Court of Appeals' decision fail to consider the Recording Statute;

(2) Should the Court of Appeals construe any ambiguities in the right of first refusal against the drafter; and

(3) Did the Court of Appeals improperly rely on the case of Webb v. Reames?

Petition for Certiorari, p. 2. In his Brief, Petitioner adopts six (6) newly stated questions[1], not raised in his Petition for Certiorari. Respondent objects to the newly stated questions as improper. However, without waiving that objection, Respondent will respond to the six (6) newly-stated questions and rely on its Return to the Petition for Certiorari to address the questions Petitioner originally posed.

STATEMENT OF THE CASE

Petitioner seeks to enforce a claimed right of first refusal contained in a recorded lease for parking spaces against a subsequent purchaser of the land, the Respondent. Respondent acknowledges that it was on record notice of the lease and therefore is charged with notice of the provision of the lease purported to be a right of first refusal. Respondent has challenged the validity of the claimed right and, if valid, Petitioner's ability to assert the right because of his

[1] Petitioner's Brief contains five (5) separately numbered new questions, presented as Arguments, but it actually contains six (6). The sixth new question is set out under the heading STANDARD OF REVIEW, where Petitioner argues that the Court of Appeals did not apply the standard of review announced in its Opinion.

conduct. Petitioner agreed that these were the issues to be decided. Nothing makes this point more clear than Petitioner's opening remarks to the trial court.

> The question the Court is called to answer is does the [Petitioner] have an enforceable right of first refusal? If he does not, the inquiry stops and the case is resolved in favor of the [Respondent]. If he does, then the next question the Court is called upon to answer is whether he waived that right or whether he is precluded from exercising it by failing to act in a timely manner, which would be laches or estoppel."

Appx., p. 183, l. 20 to 184, l. 2.

Black's Law Dictionary instructs that a "red herring" is "[a]n irrelevant legal or factual issue… intended to distract or mislead." *Black's Law Dictionary* (11th ed. 2019). Most anglers know that herring are not naturally red, but they acquire that color when smoked. Smoked herring have a strong odor, and tradition offers that fox hunters used that smelly fish to divert hounds from chasing rabbit.[2] In our system of jurisprudence, the term has become shorthand for a legal or factual issue that may garner attention but is not relevant. *Johnson v. Little*, 426 S.C. 423, 827 S.E.2d 207 (Ct. App. 2019) ("We find this argument to be a red herring….Thus we find the argument lacks merit."), *Town of Mount Pleasant v. Jones*, 355 S.C. 295, 516 S.E.2d 468 (Ct. App. 1999) ("The Town maintains whether an illegal citizen's arrest is immaterial and merely serves as a red herring…").

Petitioner's brief is replete with red herrings to divert the Court's attention from the simple issue addressed by the Court of Appeals that is the subject of this review –the enforceability of the right of first refusal claimed by the Petitioner. The decision before this Court has nothing to do with predatory lending. It is not about bonds for title. This matter does not call on the Court to review claimed pressure by Respondent on a real estate closing attorney. The controversy before the Court does not involve the difference between constructive and actual notice. It is not a

[2] "Red Herring." *Oxford English Dictionary* (1991)

contractual dispute between parties to an agreement. Petitioner's gratuitous inclusion of those unnecessary matters furthers his attempt to paint Respondent as an "unworthy litigant" (Petitioner's Brief, p. 21) undeserving of any relief that could be awarded by a court of equity.

Additionally, Petitioner twists authorities on contract interpretation to yield the awkward result that record notice of a Lease binds a third party to the unwritten intentions of the parties to the Lease. Finally, he concocts a Recording Statute controversy, despite the fact that Respondent's arguments have always acknowledged that the controlling document is recorded and that Respondent has record notice of everything in it. Rather than focus on the admitted, single question at issue, these arguments contort reason and require the Court to focus on a transaction other than the one that created the purported Right of First Refusal, attempt contract enforcement against a stranger to the contract, and blindly enforce a vague lease provision solely because it appears of record.

The Court of Appeals correctly focused on the heart of the matter – the enforceability of the claimed right of first refusal. It was not distracted by the Petitioner's red herrings. Petitioner challenges the determination by the Court of Appeals that the claimed right of first refusal is unenforceable because it is an unreasonable restraint on alienation. Facts beyond the document that contains the alleged right and those needed to assess whether or not that language gives the Petitioner an enforceable interest in real estate are not at issue and are unneeded distractions.

STATEMENT OF FACTS

To compound the confusion, Petitioner misstates the facts that he provides to advance his spurious arguments. While there are only a few facts relevant to the Court's review of the decision by the Court of Appeals, Respondent feels compelled to address the facts presented by the Petitioner and correctly state them as they appear in the record.

A. Creation of Lease.

Respondent and Group Investment Company, Inc. ("Group") entered a Lease and Agreement dated January 8, 1999 that was recorded in the Office of the Register of Deeds for Charleston County on January 27, 1999 in Book C319 at page 791 (the "Lease").[3] Appx., pp. 355-367. The Lease was for half of the parking spaces on real property located at 2028 Pittsburg Avenue, Charleston, SC (the "Subject Property"). Appx., pp. 312, l. 22 to 314, l. 21 and 355-367. The Lease did not concern the improvements on the Subject Property. Appx., pp 312, l. 22 to 314, l. 21.

The Lease contained the following language that Petitioner claims to be a right of first refusal (the "Right"):

> Section 5.2: Right of First Refusal: Lessor grants the Lessee the right of first refusal should it wish to sell.

Appx., p. 357.

On February 19, 2007 Group conveyed the Subject Property to RRJR, LLC, ("RRJR") by deed recorded in the Office of the Charleston County Register of Deeds on April 25, 2007 in Book H at page 181. Appx., pp. 434-437. On June 4, 2007 Group again conveyed the Subject Property to RRJR by deed recorded in the Office of the Charleston County Register of Deeds on June 13, 2007 in Book W628 at page 455. Appx., pp. 438-441. Petitioner and Respondent stipulated that John Robinson and Robin Robinson were shareholders of Group and members of RRJR and that there may be other shareholders of Group and other members of RRJR. Appx., p. 350, ll. 3-25.

[3] In his Brief, Petitioner states that RRJR, LLC signed the Lease with Petitioner (Petitioner's Brief, p.4) and also states that Group signed the Lease with Petitioner (Petitioner's Brief, p.5). The Lease is between Petitioner and Group. Appendix pp. 355-367.

There is nothing in the record suggesting Group "became" RRJR, as stated by Petitioner.[4] Petitioner's Brief, pp. 4, 5.

Petitioner did not exercise the claimed Right when Group transferred the Subject Property to RRJR. Appx., pp. 327, l. 23 to 328, l. 24.

B. Sale of Subject Property by RRJR to Respondent and Sale of the Residence by Robin Robinson to Respondent.

Vincent DeStaso is a shareholder of Respondent. Appx., p. 235, ll. 1-3. In 2013 a "broker" contacted Mr. DeStaso about a "real estate deal" in South Carolina and put Mr. DeStaso in contact with William Swope. Appx., p. 203, ll. 5-11. Mr. Swope is an attorney that represented the interests of RRJR and Robin Robinson concerning the Subject Property. Appx., p. 281, ll. 10-12. Mr. Swope asked Mr. DeStaso to make a loan to Robin Robinson and RRJR, but Mr. DeStaso refused, offering instead a purchase transaction. Mr. Swope did not pursue the purchase transaction proposed by Mr. DeStaso until Mr. Swope and his clients were unable to find other relief. Appx., p. 203, l. 11 to p. 205, l. 20.

William H. Sloan is an attorney, licensed to practice law in the State of South Carolina. Appx., p. 264, ll. 8-12. Mr. Sloan represented the Respondent in the sale of the Subject Property by RRJR to Respondent. Appx., p. 264, l. 19 to p. 265, l. 4 and p. 281, ll. 1-9.

Mr. Swope referred real estate transactions to Mr. Sloan. Appx., p. 284, ll. 7-18. In the summer of 2013 Mr. Swope contacted Mr. Sloan about conducting a real estate loan closing that related to either the Subject Property or Robin Robinson's residence on Sol Legare Road in

[4] Throughout his argument Petitioner refers to RRJR and Robin Robinson interchangeably as if there is no distinction between the two. For example, Petitioner argues "[the Right] was more like a safety net for Robin Robinson…" (Petitioner's Brief, p. 30), "[t]he heartbreak of this sad case is that Robin Robinson overlooked the [Right]…" (Petitioner's Brief, p. 32), and "there is no evidence in this record to support the Court of Appeals' finding that it inhibited Mrs. Robinson in any way or was a 'restraint on alienation.'" (Petitioner's Brief, p. 33). The Right allegedly encumbers property that was owned by RRJR, not Robin Robinson.

Charleston County (the "Residence"). Appx., p. 283, l. 23 to p. 284, l. 6. Ms. Robinson could not find funding for the anticipated closing and filed for bankruptcy relief.[5] Appx., p. 284, ll. 2-4. Ms. Robinson "fell out of bankruptcy" and Mr. Swope again contacted Mr. Sloan about a closing in the fall of 2013. Appx., p. 284, ll. 4-6. On or about November 17, 2013, in anticipation of what Mr. Sloan believed would be a refinance involving the Subject Property and the Residence, Mr. Swope provided Mr. Sloan with title work for the Subject Property. Mr. Sloan relied on that title work for the anticipated closing.[6] Appx., p. 270, ll. 4-11, and p. 283, ll. 7-19. The title work provided by Mr. Swope did not identify the Lease. Appx., p. 270, ll. 12-15.

Mr. Swope advised Mr. Sloan that he was being retained to close a refinance. Appx. p. 265, ll. 5-11. On November 26, 2013, Mr. Sloan learned that the Respondent was his client[7]. Appx., p. 264, l. 19 to p. 265, l. 4. Mr. Sloan did not recall the date he first understood that the transaction would be a sale of the Residence by Ms. Robinson to Respondent and of the Subject Property by RRJR, LLC to Respondent and not a refinance, but he guessed that it would have been November 26 or 27 or December 2 of 2013. Appx., p. 265, l. 23 to p. 266, l. 2. The parties wanted the transaction to close before a foreclosure sale of the Residence scheduled for December 3, 2013 at

[5] In his Brief Petitioner states "In 2008, John Robinson died, and Robin Robinson took over managing his affairs. Because she lacked John's business acumen, her financial condition deteriorated …." (Petitioner's Brief, p. 7) and "The other facts developed at trial demonstrated that after her husband died in 2008, Robin Robinson assumed the duties of running his various businesses …. and she could not turn either to conventional lending sources or the Bankruptcy Court, a fact exploited by Fine Housing to its advantage." (Petitioner' Brief, p. 11). These "facts" do not appear in the record.

[6] In his Statement of Facts, Petitioner states "there is no factual dispute that neither Sloan, nor any closing attorney, had sufficient time to conduct a proper title exam". Petitioner's Brief, p. 14. In actuality, the record reflects that Mr. Sloan decided to rely on title work provided by Mr. Swope and that Mr. Sloan did order separate title work from Mr. Feeley, who delivered that separate title work to Mr. Sloan on the date of the closing. Appx., p. 275, l. 20 to p. 276, l. 22.

[7] In his Statement of Facts, Petitioner states "With this immutable deadline looming, Fine Housing's principal arrived for his first visit to South Carolina on November 26th, two days before Thanksgiving and seven days before the foreclosure sale." Petitioner's Brief, p. 13. The authority for this statement points to testimony from Mr. Sloan about the date Respondent retained him. It does not state that this was the date of Respondent's first visit to South Carolina. The only evidence in the record of a representative of Respondent visiting South Carolina is found at Appx., p. 227, ll. 15-23 and does not state the date of the visit.

11:00 a.m. Appx., p. 266, l. 13-16. Mr. Sloan understood the time constraints on the transaction that he ultimately closed for Respondent. Appx., 266, ll. 9-25.

Prior to the closing on the sale of the Subject Property and the Residence, Respondent requested that Mr. Sloan inquire about the possibility of Respondent purchasing the debt of the creditor that was foreclosing on the Residence. Mr. Sloan was not successful in that effort. Appx., p. 275, ll. 10-15. Respondent's goal in attempting to purchase the debt was to allow more time to prepare for the closing of the sale of the Residence and the Subject Property. Appx., p. 228, l. 17 to p. 229, l. 5.

Mr. Sloan conducted the closing of the sale of the Residence and the Subject Property during the afternoon on December 2, 2013. Appx., p. 276, ll. 20-22. The transaction involved the sale of the Residence and the Subject Property[8], a lease by Ms. Robinson of the Residence, a lease by RRJR of the Subject Property, Ms. Robinson's right to repurchase the Residence at a set price, and RRJR's right to repurchase the Subject Property at a set price. Appx., p. 212, l. 18 to p. 213, l. 10. The lease for the Residence and the Subject Property was never finalized. Appx., pp. 380-393 (Agreement of Lease, not signed by Respondent) and p. 214, ll. 20-24. In his capacity as attorney for Robin Robinson and RRJR, Mr. Swope prepared the deeds (1) transferring title of the Residence from Robin Robinson to Respondent and (2) transferring title of the Subject Property from RRJR to Respondent.[9] Appx. p 268, ll. 11-14. Mr. Swope attended the December 2, 2012 closing. Appx., p. 282, ll. 3-7.

[8] In the Statement of Facts in his Brief, Petitioner refers to the transaction as a "highly predatory" "loan." He also refers to the transaction as a "non-traditional sale/loan, a hybrid bond-for-title." Petitioner's Brief, p. 12. These are inflammatory and argumentative characterizations, not facts.

[9] Petitioner's option to repurchase the Subject Property and the Residence is set out in the Option to Purchase Real Estate Agreement. Appx., pp. 394-400. In his Brief, Petitioner refers to the Option as an "…an irrevocable right to require Fine House to transfer both properties back to her…". Appx., p. 7. There is nothing in the Option to Purchase Real Estate Agreement that describes an irrevocable right.

At some point in time, Mr. Sloan retained Charles Feeley to examine title to the Subject Property and provide a title report in addition to the one that Mr. Swope provided Mr. Sloan. Mr. Feeley provided the title examination report to Mr. Sloan during the closing on December 2, 2013. Appx., p. 275, l. 20 to p. 276, l. 22. Mr. Feeley's title report identified the Lease, but Mr. Sloan did not see it because he was distracted by information in the report about a tax lien that was not identified in the title work that had been provided by Mr. Swope.[10] Appx., p. 277, ll. 2-17 and p. 285, ll. 10-24.

Petitioner provides in his Statement of Facts that "[Mr. Sloan] testified that [Respondent] did not provide him either accurate information about what it was asking him to do or provide him sufficient time to check the title." Petitioner's Brief, p. 14. He also states as fact that "[o]bviously [Respondent] hamstrung Mr. Sloan and precluded him from having a reasonable opportunity to examine the title by conveying him inaccurate information about what he was expected to do and not affording him a reasonable amount of time to do it." Petitioner's Brief, p. 15. The record does not contain testimony or other evidence of Respondent providing Mr. Sloan with inaccurate information. If Petitioner's reference to inaccurate information pertains to the closing being a sale and not a refinance, Mr. Swope provided that information to Mr. Sloan, not Petitioner. Appx., p. 265, ll. 9-11. Mr. Sloan's testimony concerning lack of time to adequately prepare was in response to questions posed by Petitioner's counsel as to why he did not see the reference to the Lease in Mr. Feeley's title work, a review that occurred during the closing. Appx., p. 277, ll. 2-24.

[10] Petitioner's Statement of Facts offers that "it is undisputed [Mr. Sloan] had the lease in his hand while Robin Robinson was in his office during the closing on December 2, 2013. Petitioner's Brief, p. 16. Petitioner also states that "[Petitioner] did have actual knowledge of [the Lease] because Charles Feely sent it over on December 2nd." Petitioner's Brief, pp. 17, 18. Petitioner also states that Respondent knew about the Lease prior to closing. Petitioner's Brief, p. 32. These facts are not in the record. Mr. Sloan's testimony is that he had an abstract of title in his possession on December 2, 2013, not the actual documents identified in the abstract. Appx. p. 285, ll. 10-24.

Petitioner's Statement of Facts contains statements as to the timing and motivation for Respondent's actions. For instance, Petitioner offers "[Respondent] was in no rush to come to terms with Robinson because the longer it waited, the more desperate she became" (Petitioner's Brief, p. 13) and "[u]ndeniably, Sloan, [Respondent], and Robinson were under intense time pressure to get the transaction completed before it was too late, but that rush was brought on by [Respondent] because doing so allowed it to dictate harsh terms." Petitioner's Brief, p. 16. These statements have no support in the record.

Respondent admits that it did not advise Petitioner of its December 2, 2013 purchase of the Subject Property from RRJR, LLC. Appx., p. 402. RRJR did not advise Petitioner of the sale of the Subject Property to Respondent. Appx. p 311, l. 18 to p. 312, l. 2.

C. Post Sale Conduct of Petitioner and Respondent.

1. Petitioner's discovery of sale of the Subject Property.

At some point following December 2, 2013, Petitioner discovered that Respondent purchased the Subject Property. Appx., p. 307, ll. 3-20. Petitioner responded by contacting his counsel to guide his next steps. Appx., p. 308, ll. 9-17.

Petitioner called Mr. Sloan on March 21, 2014 and advised Mr. Sloan of the Lease and that it contained the Right. Petitioner did not tell Mr. Sloan that he wished to exercise the Right. Appx., p. 285, l. 25 to p. 286, l. 24.

Mr. Sloan reviewed the Lease for the first time on March 21, 2014. Appx., p. 285, l. 25 to p. 286, l. 1. He communicated with Petitioner's counsel, Thomas R. Goldstein, to inquire as to the Petitioner's intentions. Mr. Goldstein indicated that he was unsure what Petitioner wished to do. Appx., p. 286, l. 25 to p. 287, l. 8.

Mr. Sloan contacted Respondent and Respondent's counsel, Charles Altman, by email on March 21, 2014, to advise them of Petitioner's call, the Lease, and the language in the Lease, purported to be a right of first refusal. Appx., p. 286, ll. 2-13 and p. 401. This was the Respondent's first actual knowledge of the Lease. Appx., p. 239, l. 4 to p. 240, l. 12 and p. 287, ll. 13-16.

On March 21, 2014, in response to the communication from Mr. Sloan, Mr. DeStaso called Petitioner. Appx., p. 240, l. 13 to p. 241, l. 25. Petitioner did not indicate that he wanted to purchase the Subject Property or exercise the alleged right of first refusal during that telephone call.[11] *Id.*

Petitioner does not recall exactly what happened after he advised Mr. Sloan of the Lease. He looked to his counsel to direct him.[12] Appx., p. 308, ll. 9-12.

2. Petitioner and Respondent attempt to negotiate a sale.

Petitioner generally recalls speaking with Mr. DeStaso after the discovery of Respondent's purchase, but he does not recall the details of their conversations other than that he offered $650,000.00 to purchase the property and that Respondent and Mr. DeStaso did not follow up on the offer. Appx., p. 308, l. 18 to p. 309, l. 13.

Mr. DeStaso testified to several additional telephone conversations with Petitioner following the March 21, 2014 call that resulted in the presentation on April 10, 2104 of a contract, prepared by Petitioner's counsel, for the sale of the property by Respondent to Petitioner for

[11] In his Statement of Fact, Petitioner offers that "When Clarke got through to [Respondent's] principal, Vincent DeStaso, he informed DeStaso of his Right of First Refusal and tried to purchase its interest in the Pittsburgh property for an agreed upon sum that would provide [Respondent] a generous return on its investment." Petitioner's Brief, pp.16-17. This summary is not supported by the record and Petitioner's references to the Appendix do not support the facts offered.

[12] In his Brief, Petitioner states that "he made a demand upon Fine Housing to sell the property to him as required by the Right of First Refusal, and when that failed, his lawyer sent to Fine Housing a proposed purchase contract on April 10, 2014, offering to purchase the subject property for $650,000.00." Petitioner's Brief, p. 8. There is nothing in the testimony offered at trial that suggests Petitioner made such a demand before the parties began the negotiation for Respondent's sale of the Subject Property to Petitioner for $650,000.00.

$650,000.00. Appx., p. 242, l. 1 to p. 243, l. 11, and pp. 420, 464-470. Following the presentation of that contract, Petitioner submitted a revised contract for $650,000.00 on April 21, 2014. Appx., p. 243, ll. 11-20, and pp. 421, 471-479. Petitioner and Respondent did not execute either contract. Appx., p. 248, ll. 2-3. The negotiations between Petitioner and Respondent for the sale of the Subject Property continued from April 10, 2014 beyond July 8, 2014 (Appx., p. 246, ll. 11-24, and pp. 420, 421, and 460-463), with Respondent raising its asking price above $1,000,000.00. Appx., p. 247, ll. 15-19 and p. 463. Petitioner and his counsel did not raise the Right in these negotiations (Appx., p. 246, l. 25 to p. 247, l. 8) and neither version of the contract he presented mentioned the Right.

3. Petitioner's Lease Payments to Respondent.

On April 7, 2014, Mr. Goldstein sent the $1,000.00 annual payment due on the Lease to Respondent based on instructions from Petitioner. Appx., p. 329, l. 4 to p. 330, l. 14 and p. 422. Mr. Goldstein submitted another payment under the Lease to Respondent on December 11, 2014. Appx., p. 423. Petitioner made both rent payments under the cover of a letter from Mr. Goldstein to Mr. DeStaso. The letters did not mention the Right. Appx., p. 250, l. 1 to p. 251, l. 7.

4. Litigation between Respondent and RRJR, LLC and between Respondent and Robin Robinson.

Following Respondent's purchase of the Subject Property, RRJR defaulted on the terms of the lease of the Subject Property and Respondent moved to eject RRJR, LLC from the Subject Property ("Ejectment Action"). Appx. p. 214, ll. 9-12.

Robin Robinson and RRJR filed an action against Respondent challenging the sale of the Subject Property and the Residence on February 19, 2014 ("RRJR Action"). Mr. Swope represented Robin Robinson and RRJR in the RRJR Action. Appx., pp. 403-412.

In September 2014 the parties settled the Ejectment Action and the RRJR Action. Appx. pp. 443-453. Robin Robinson told Mr. DeStaso that the RRJR Action was a delay tactic to allow Robin Robinson to stay in possession of the Residence and RRJR to stay in possession of the Subject Property. Appx., p. 259, l. 10 to p. 260, l. 4. On January 9, 2015, the parties to the RRJR Action filed a Stipulation of Dismissal. Appx. pp. 50-56.

5. Sloan issues title policy.

In connection with the transactions closed on December 2, 2013, Mr. Sloan issued a title insurance commitment that did not list the Lease as an exception. Appx., p. 289, ll. 14-21. The final title insurance policy issued by Mr. Sloan contained an exception for the Lease and it was issued after March 21, 2014. Appx. p. 289, l. 10 to p. 290, l. 3.

6. Respondent's investment in Subject Property post December 2, 2013.

a. At trial, Mr. DeStaso testified concerning Respondent's investment in the Subject Property after purchase on December 2, 2013. Appx. p. 235, l. 6 to p. 239, l. 3.[13] That testimony identified Respondent's efforts to cure title defects, resolve pending litigation and make improvement that enhanced the value of the Subject Property, including: Initiating litigation to resolve and remove tax liens from the Subject Property;

b. Removing a tenant that was not paying rent, a process that included waiving past due rent for more than $100,000.00;

c. Resolving permit and licensing issues;

[13] These facts are offered to refute Petitioner's representation in his Statement of Facts that "[t]o the extent this statement implies Fine Housing spent additional money beyond the acquisition price to clear title, it is not correct, and there is no evidence in the record identifying improvements to the real estate." Petitioner's Brief, p. 13.

d. Resolving litigation with former employees of RRJR, LLC by paying them $102,000.00 and thereby removing a *lis pendens* that had been placed on the Subject Property; and

e. Providing rent abatements of over $30,000.00 to a new tenant in return for the new tenant to make improvements to the Subject Property.

D. Procedural history of this action.

On April 13, 2015, Mr. Goldstein, in his capacity as Petitioner's attorney, wrote to Mr. Altman, Respondent's counsel, to exercise the Right. Mr. Goldstein took the position that Petitioner could exercise the right of first refusal by paying Respondent $150,001.00. Appx. p. 480.

On May 28, 2015, Petitioner filed a Complaint against the Respondent and RRJR asserting a single cause of action for Breach of Lease.[14] Appx. pp. 32-49. RRJR did not appear in that action. Appx. p. 60. Respondent filed its Answer on September 2, 2015 which contained a general denial, asserted that the Complaint failed to state a cause of action, alleged that the contract advanced by Petitioner was too uncertain and indefinite to be enforced, and asserted the affirmative defenses of waiver, laches, estoppel, prior breach by Petitioner, and statute of limitations. Appx. pp. 62-66.

A one day trial of Petitioner's action occurred on July 26, 2017[15]. At trial, Respondent abandoned the affirmative defenses it asserted, with the exception of waiver, laches and estoppel.[16] Appx., p. 490 and p. 342, l. 6 to p. 343, l. 12. The trial court entered its Order for Judgment on

[14] Petitioner suggests that Robin Robinson was also named as a Defendant in the case, but she was not. Petitioner's Brief, p. 29 ("Moreover, although Robin Robinson did in fact default after the plaintiff served her with the Summons and Complaint…"), p. 34 ("Here, because the defendant Robinson, RRJR, defaulted and did not participate in the case…"),

[15] The Order of Judgment states that the trial occurred on July 26, 2015, but that is in error.

[16] Petitioner's Brief states "[a]t trial, [Respondent] abandoned all [defenses] except the sufficiency of the Right of First Refusal." Petitioner's Brief, p 23. This statement is not accurate.

September 28, 2017. Appx. pp. 2-27. The Order for Judgment determined that the Right was valid and required Respondent to transfer the Subject Property to Petitioner on payment of $350,000.00.

Respondent filed a Notice of Appeal on November 2, 2017, (Appx. p. 482) and Petitioner filed a Notice of Cross Appeal on November 14, 2017. Appx. p. 484. The Court of Appeals reversed the trial court in its Opinion filed August 12, 2020 (the "Decision"). Appx. pp. 489-495. In that Decision, the Court of Appeals determined that the Right was unenforceable because "the lack of specificity in the language of the Right of First Refusal creates an unreasonable restraint on alienation." Appx. p. 494. The Court of Appeals also determined that its decision concerning the Right was dispositive of the other issues raised by Respondent and the issues raised by Petitioner on cross appeal.

Petitioner filed a Petition for Rehearing with the Court of Appeals on August 24, 2020. Appx. pp. 498-506. The Court of Appeals denied that Petition. Appx. p. 496.

On October 15, 2020 Petitioner filed a Petition for Certiorari (Appx. pp. 507-522) and, by Order dated May 28, 2021, the Supreme Court granted that Petition for Certiorari.

STANDARD OF REVIEW

In his statement of the Standard for Review Petitioner argues that, while the Court of Appeals correctly stated the standard of review in its decision, it failed to apply that standard. This is an additional basis for review not identified in the Petition for Certiorari. Petitioner will address the Petitioner's position concerning the standard of review in the Argument portion of this brief.

ARGUMENT

1. <u>The Court of Appeals did not draw any inference from John Robinson's and Robin Robinson's absence from trial.</u>

A central mistake made in Petitioner's arguments is his application of contract law to the controversy with Respondent. Petitioner's claim against Respondent is for the enforcement of an interest claimed in a piece of real property. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997) ("We agree with [the] contention challenging the validity of the right of first refusal. This pre-emptive right is a contingent, nonvested interest…."). Since Respondent was not a party to the Lease that contains the right of first refusal, authorities governing the relationship between contracting parties and contract enforcement are of no consequence to the action against Respondent. Rather, the inquiry is whether the language in the Lease, as it appears in the public record, is sufficient to create an enforceable interest in real estate. As such, the goal of the court in this matter is not to determine what the parties intended. The goal is to judge if the admitted language is sufficient to create an enforceable interest in real estate.

Petitioner amplifies the Court of Appeals' mention of John Robinson and Robin Robinson to support his misplaced contract analysis. In the Decision, the Court of Appeals identified John Robinson and Robin Robinson and their relationship to the matter in a footnote. Appx. p. 490, fn. 1. Next, the Court of Appeals mentioned John Robinson in its statement of the arguments and evidence in the record concerning the method of determining price under the claimed right of first refusal. Appx. p. 493. ("No evidence was offered at trial as to what Group Investment intended for determining the price, and Clarke's attempts to testify about his understanding of what John Robinson intended were denied by the trial court under the Dead Man's Statute."). Finally, in its listing of the reasons why the trial court erred in determining that the Right of First Refusal was enforceable, the Court of Appeals included the statement that "…John Robinson was unavailable to testify as to his intent of the Right of First Refusal, and Robin Robinson defaulted and was not a party to the action." Appx. p. 494.

The mention of the Robinsons in the Decision is nothing more than an account of what is in the record and what is not. Petitioner tried to submit testimony regarding the intent of the parties to the Lease by offering his understanding of the intent of the other party to the Lease. The Court of Appeals merely observed that this effort failed. Then it noted that Petitioner made no further attempt to submit additional testimony on this issue. There is nothing in the Decision to suggest that the Court of Appeals inferred anything from the Robinsons' absence from trial.

The intent of the parties to the Lease is another red herring argument that Petitioner has only advanced post-trial. Respondent has always acknowledged that it has record notice of whatever is in the Lease. In fact, Respondent stipulated to that fact early in this litigation in response to an Admission Request from Petitioner. Appx., p 402. However, every provision of the Lease is not necessarily enforceable just because it has been recorded and Respondent is charged with notice.

The record notice to which Respondent admits extends to facts that could have been ascertained by examination of the Lease, the terms suggested thereby and those that would have been disclosed on reasonable inquiry. *National Bank of Newberry v. Livingston*, 155 S.C. 264, 152 S.E. 410 (1930). It does not extend to the unwritten intent of the parties to the Lease and the interpretation of the Lease made by the trial court.

Regardless, Petitioner twists these irrelevant facts into his argument and uses them as an opportunity to question Respondent's character and intentions. He does that here by suggesting that this court make an inference adverse to Respondent that has no basis in the record. Petitioner's Brief, pp. 26-27 ("If the Court of Appeals were to draw a proper inference from [Robin Robinson's] absence, it would be an adverse inference that Fine Housing did not want her near the

Courthouse after it required her to pay back nearly double what she borrowed over 24 months to redeem her property.").

Testimony from either Robinson as to anyone's or any entity's intention behind language in the Lease has no bearing on any issue before the Court. Petitioner's argument is just another vehicle that he uses in his attempt to cast Respondent in a bad light.

2. The Right of First Refusal in the Lease is an unreasonable restraint on alienation.

Petitioner disagrees with the Court of Appeals' characterization of the Right as a restraint on alienation. He argues that the Right is sufficiently specific to pass the standard announced by the Court of Appeals for establishing an enforceable right of first refusal that is not a restraint on alienation. Petitioner also focuses on a transaction between RRJR and Respondent to distract from the deficiencies in the language contained in the Lease. The record does not support Petitioner's argument and this Court should affirm the Court of Appeals' determination that the Right is an unreasonable restraint on alienation.

The Right is a single sentence – "Lessor grants the Lessee the right of first refusal should it wish to sell." It lacks the terms Petitioner suggests are present. It does not contain a description of the property encumbered by the Right, and there is no description of a process under which the seller controls the price through competitive bidding. A judicially determined reasonable time standard does not meet the requirement that an enforceable right of first refusal must contain specific provisions to place potential purchasers on notice of the procedures for exercising the right.

The Court of Appeals relied on *Webb v. Reames to* identify the real estate interest at issue as a "pre-emptive right" and "a contingent nonvested interest in that the grantee … might never choose to sell the property". *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App.

1997). The Court of Appeals did not rely on *Webb* because it was factually similar to the case at bar, as Petitioner suggests. It relied on *Webb* solely for the purpose of naming the Right so that its enforceability could be assessed.

Once it named the Right, the Court of Appeals provided that pre-emptive rights are subject to the rules against restraints on alienation and acknowledged that, in some circumstances, rights of first refusal may not be a restraint on alienation. Appx., p. 491; 61 Am. Jr. 2d *Perpetuities and Restraints on Alienation* §§ 109, 110 (2002). Under common law, restraints on alienation of property were disfavored. *Crosswell Enters. v. Arnold*, 309 S.C. 276, 422 S.E.2d 157 (Ct. App. 1992). Unreasonable restraints on alienation violate public policy and are not enforceable. *McCravey v. Otts*, 90 S.C. 447, 74 S.E. 142 (1912); *Wise v. Poston*, 281 S.C. 574, 316 S.E.2d 412 (Ct. App. 1984).

Analyzing the Right under the standards set out in Restatement (Third) of Property (Servitudes) § 3.4 cmt. f (2000), the Court of Appeals determined that the Right lacked the level of specificity required and, therefore, created a restraint on alienation. The Court of Appeals found that the one-line Right did not identify the property to which it applied, did not provide a method for determining the price at which the Right could be exercised, and lacked the identification of any procedures for exercising the right.

In the face of this scrutiny Petitioner argues that the Court of Appeals failed to assume or write-in language that would make the Right enforceable. The Right does not identify the Subject Property as being its object. However, Petitioner suggests that a legal description of the Subject Property attached to the Lease directs that the Right extends to the property set out in the legal description, without regard to the fact that the only references to the legal description in the Lease are to identify the portion of the Subject Property leased by Petitioner. Appx., pp. 355, 357.

Petitioner's position is that he understood that the Right gave him the opportunity to competitively bid against any other party interested, ignoring the possibility of any other scenario for determining price, including the argument that he advanced in his pleadings – that he could purchase the property for one dollar more than Respondent paid. The lack of any direction on how to exercise the Right, including the timing of the exercise, leaves Petitioner to arguing inapplicable legal precepts used to resolve disputes between parties to an ambiguous contract.

Petitioner also submits that "[Respondent] cannot complain about a document it never participated in drafting or saw being a "restraint." Petitioner's Brief, p. 32. He contends Respondent took title to the Subject Property and is on record notice of the Lease. Respondent agrees that it had record notice of everything in the Lease. However, Respondent challenges Petitioner's suggestion that it took title subject to the parties' unexpressed intent. *See, National Bank of Newberry*, 155 S.C. at 284, 152 S.E. at 417-419. Accordingly, Respondent believes Petitioner's authorities regarding contract interpretation are inapposite. [17]

The scrutiny to be applied is similar to analyzing the effects of a missed mortgage or a missed mechanic's lien, as suggested by the trial court and argued by Petitioner. Appx. pp. 14-15; Petitioner's Brief, p. 35. However, such an analysis does not involve assuming that every recorded mortgage and every recorded mechanic's lien is valid. Certainly, a recorded mechanic's lien that is not timely followed by an action to foreclose it is not a valid lien on the property described in the lien. S.C. Code Ann. § 29-5-120(A) (2013). Similarly, a recorded mortgage lien is not effective unless it contains all the requirements of a mortgage. Without question, a mortgage that

[17] Petitioner presents the referenced argument throughout his brief. The authorities he recites are found in different parts of his brief. *See, e.g.*, *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996), Petitioner's Brief, p. 21. *Sirrine v. C.E. Graham Trust Fund*, 136 S.C. 448, 134 S.E. 415 (1926), Petitioner's Brief, p. 22. *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 452 (1987); *Rodarte v. University of South Carolina*, 419 S.C. 592, 799 S.E.2d 912 (2017), Petitioner's Brief p. 23. *Bell v. Progressive Direct Insurance Company*, 407 S.C. 565, 757 S.E.2d 399 (2014), Petitioner's Brief, p. 25. *Hobgood v. Pennington*, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1989). *Brady v. Brady*, 222 S.C. 242, 72 S.E.2d 193 (1952), Petitioner's Brief, p. 37.

contained only the signature of one of several owners of the encumbered real estate would not be enforceable against all interests in that property. To enforce a recorded interest in real estate, a court must look beyond the simple fact that it has been filed. That is what the Court of Appeals did here.

In his attempt to explain why the Right should be enforceable, Petitioner inserts more red herring arguments. He suggests bad motives on the part of Respondent in its negotiation of the purchase of the Subject Property from RRJR, even going so far as to assert Respondent exploited RRJR member Robin Robinson (Petitioner's Brief, pp. 28, 29, 32,), and characterizing Respondent as a "predatory lender" (Petitioner's Brief, p. 28), even though the Respondent did not lend money to the Petitioner. Respondent purchased the Subject Property from RRJR and purchased the Residence from Robin Robinson. There is no evidence in the record that Respondent loaned money to anyone. It is clear that Petitioner believes that his characterization of Respondent as an "unworthy litigant" (Petitioner's Brief, p. 21) disqualifies Respondent from any relief in this matter, but his argument ignores three important facts. First, the lower court made no findings or conclusions concerning Respondent's conduct in its negotiations with RRJR. Second, Petitioner omits the fact that RRJR's counsel solicited the transaction with Respondent and participated in the closing. Finally, Petitioner never explains why the transaction between RRJR and Respondent in 2013 should be considered when determining the validity of the Right allegedly created in the Lease that was executed in 1999 between Petitioner and Group. These arguments have no relevance to the matter before this Court.

Accordingly, even though the Lease is recorded, the Court of Appeals properly determined that the Right contained in the Lease lacks the required specificity and creates an unreasonable

restraint on alienation. Petitioner has offered no reason to abandon the Court of Appeals' conclusion.

3. The Right set out in the Lease is not clear as to the real estate it encumbers.

Petitioner believes the real property to which the Right extends is clear because of the legal description of the Subject Property attached to the Lease. Petitioner also believes that Respondent lacks standing to challenge the specificity of the language and should be precluded from challenging the Right by its conduct. The record and the law do not support Petitioner's positions.

The demised premises under the Lease are one half (1/2) of the parking spaces located on the Subject Property. Petitioner agrees that it did not lease the other parking spaces or the improvements on the Subject Property. Appx. p. 312, l. 21 to p. 314, l. 21. However, Petitioner argues that the Right extended to more than just the property he leased; he contends it extended to all of the Subject Property, including the unleased parking spaces and all improvements.

The one-line Right does not contain a reference to any property. Petitioner suggests that the parties' intent controls (Petitioner's Brief, p. 36) and that the attachment of the legal description of the Subject Property makes it clear that all of the Subject Property is subject to the Right, not just the demised premises.

The legal description of the Subject Property is attached to the Lease as Exhibit A. Appx. p. 368. That legal description references a survey offered by the Petitioner as a trial exhibit (the "Survey"). Appx., p. 368. By including the legal description of the Subject Property in the Lease the parties merely identified the location of the leased parking spaces. Section 2.1 of the Lease identifies the demised premises as "unimproved property to be used as a parking lot by both [Group] and [Petitioner]." Appx., p. 356. The use of the demised premises is set out in Section 7.1 of the Lease and includes the statement "The [Petitioner] and [Group] shall be entitled to use

one half (1/2) of the spaces contained in the parking lot [which encumbers all of the property described in Exhibit A]." Appx. p. 357.

The Survey shows the location of buildings on the Subject Property. The presence of improvements on the Subject Property contradicts Petitioner's argument that the Right extends to all of the Subject Property. Section 7.1 suggests that the "parking lot" "encumbers all of the property described in Exhibit A" despite the fact that the Survey clearly shows improvements on the Subject Property. Further, Section 2.1 states the "premises is unimproved property." These two provisions of the Lease clearly indicate that the parties did not believe the real property at issue contained any improvements.

For purposes of the arguments advanced by Respondent, it is not necessary to make a determination of which real property is encumbered by the Right. The point Respondent raises is that the Lease is not specific as to the real estate encumbered by the Right, which is fatal to its enforceability.

Without citing authority, Petitioner argues that Respondent cannot "complain about vagueness in a document it was never a party to or which it never examined." Petitioner's Brief, p. 37. Petitioner seeks to enforce a recorded interest in real estate against Respondent. Respondent has standing to challenge the validity of the interest because it has a personal stake in this litigation and because it is the owner of record of the real property that is the subject of this suit. *All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 209, 595 S.E.2d 253 (Ct. App. 2004).

All else failing, Petitioner resorts to more irrelevant arguments, again suggesting that this Court consider his characterization of Respondent's conduct in its dealings with RRJR as a reason for reconsidering the Court of Appeals' conclusions concerning the Right. In addition to accusing

Respondent of exploitation, Petitioner asserts Respondent provided Mr. Sloan with inaccurate information and did not allow Mr. Sloan the appropriate time to review title to the Subject Property. The facts are clear that Mr. Swope contacted Mr. Sloan about the engagement and any representation as to what the anticipated real estate closing would entail was made by Mr. Swope. There is nothing in the record to suggest that Mr. Sloan ever told anyone that he did not have time to close the transaction and, as suggested by Mr. DeStaso, Mr. Sloan could have refused to represent Respondent in the transaction. Appx. p. 224, ll. 6-17. The only reason Respondent addresses these extraneous arguments is to correct the record. They have no bearing on this Court's review of the Decision.

The question addressed by the Court of Appeals concerned the clarity of the language identifying the real property that is subject to the Right. There is nothing in the language of the Right itself that identifies any property. The remaining language of the Lease does not provide the clarity needed to identify the property intended to be encumbered by the Right. The Court of Appeals was correct in its conclusion that the language of the Lease did not specifically state if it applied to the leased parking spaces or the entire tract.

4. The Right in the Lease does not provide a method to determine the price at which the right may be exercised.

Petitioner's fourth new question for review assigns error to the Court of Appeals' reasoning based on the argument that the Right does not need to set a method for determining price. Rather, Petitioner argues, the reality of the marketplace directs that the owner of the property encumbered by the Right determines the price, because "they can sell their property for any price they choose." Petitioner's Brief, p. 38. The only authority Petitioner recites to support this position is a single case, and he misstates the holding of that case. The majority of Petitioner's argument on this point

retreats to his position that the Respondent lacks standing to question the language of the Lease and his belief that the Respondent's practices disqualify him from the benefit of the Court of Appeals' Decision.

Petitioner cites to *Webb* as authority for the rule that "if the Right of First Refusal fixes the acquisition price, then it becomes a restraint on alienation. While *Webb* involved a right of first refusal that set the price at which the owner of the right could repurchase identified property, the right was declared to be invalid because it violated the rule against perpetuities. The *Webb* Court made no determination as to the validity of the price set in the right of first refusal.[18]

Petitioner's assault on the propriety of Respondent's transaction with RRJR accelerates in this argument but is still without explanation as to why the transaction between RRJR and the Respondent has any bearing on the validity of an interest in real estate conveyed to the Petitioner by Group almost 15 years earlier. Petitioner boldly states that the issue is not the specificity of the language creating the Right; it "is the fact that [Respondent] perceived financial advantage in waiting to the last minute to exploit Robin Robinson and proceeded recklessly in a transaction without allowing sufficient time to act on the Right of First Refusal turned up in the title search on December 2nd 2013." Petitioner's Brief, p. 38. In fact, Petitioner believes that the Court of Appeals should have ignored the issue relating to the lack of specificity in the language creating the Right because Petitioner believes Respondent is a predatory lender. Petitioner's Brief, p. 39.

Petitioner's attack on Respondent's reputation reaches its crescendo with his suggestion that two cases from the State of New York involving the father of a shareholder of Respondent somehow define Respondent's disposition and motivation. The cases from 2008 and 2009 involved a determination that certain loans violated New York's usury laws. Petitioner offers

[18] Petitioner repeats this misstatement of *Webb* in his fifth argument that the Right is not required to have detailed instructions on how it is to be exercised. Petitioner's Brief, p.41.

nothing to explain the relevancy of these decisions other than the familial relationship between a shareholder of Respondent and the New York lender. Petitioner clearly seeks to improperly impugn Respondent's conduct and call into question, without justification, the motivation for Respondent's transaction with RRJR.

Again, the nature of the transaction between RRJR and Respondent has no bearing on the validity of the Right. If the language creating the Right contained adequate specificity, Respondent acknowledges that it would be enforceable, regardless of what transpired between Respondent and RRJR and Robin Robinson.

Similarly, Petitioner's repeated standing argument gains no traction here. Petitioner not only repeats his suggestion that Respondent cannot challenge the enforceability of the Right because it was not a party to the Lease, he adds that Petitioner lacks standing to challenge the "vagueness of a document when the undisputed fact is that no one notified [Petitioner] of Robinson's[19] intent to 'sell.'" Petitioner's Brief, p. 40. For the reasons previously articulated, Respondent has standing to challenge the validity of a document that purports to create an interest in real property owned by Respondent.

The record of this case demonstrates that the Right lacked any provision for determining the price at which Petitioner could exercise the Right. Petitioner claims that when he discovered the sale of the Subject Property by RRJR to Respondent, he attempted to exercise the Right by paying Respondent $650,000.00. Petitioner's Brief, pp. 16, 17, 30. Before filing the Complaint if this action, Petitioner claimed he was entitled to exercise the Right by paying Respondent $150,001.00. Appx., p. 480. In its Order of Judgment, the trial court determined that Petitioner

[19] Petitioner treats RRJR and Robin Robinson interchangeably throughout his Brief. Robin Robinson did not own the Subject Property; RRJR did. Therefore, if any notice were required, it would have been notice of RRJR's intent to sell.

should be entitled to exercise the Right by paying the Respondent $350,000.00. Appx. p. 26. The Petitioner argues at one point that upon the exercise of the Right a bidding war among potential purchasers and Petitioner commences (Petitioner's Brief, pp. 30, 31), and then argues the Right gives the owner of the Subject Property the ability to sell at any price they choose. Petitioner's Brief, p. 38. Certainly an agreement with sufficiently specific language for determining the price at which Petitioner could exercise the Right would not leave room for these varied interpretations.

The Right as set out in the Lease does not describe how to determine the price at which Petitioner may exercise the Right. As such, the Right lacks specificity and the Court of Appeals was correct in finding it to be an unenforceable restraint on alienation.

5. The Right in the Lease does not contain any direction or information as to how it is to be exercised.

Petitioner suggests that the Right does not need to contain any direction or information as to how it is to be exercised because that is what the parties intended. "[T]he method of notice is nothing more than the seller notifying the holder of the right of her (sic) intent to sell." Petitioner's Brief, p. 41. Nothing is offered to support this position or distinguish the authorities recited by the Court of Appeals.

The facts developed in this case demonstrate why the Court of Appeals is correct in its determination that, to be enforceable, the Right should identify a process for its execution, including the timing of the exercise of the Right. Without more than a vague suggestion that the seller will notify Petitioner of its intent to sell, a cloud on title may be cast by potential delay in the exercise of the Right or other uncertainties that could be easily resolved with appropriate constraints on the Right.

When Group conveyed the Subject Property to RRJR, Petitioner did not exercise the Right. He explained the decision not to exercise the Right was based on his understanding that the transfer from Group to RRJR was just a name change. Appx., p. 33, ¶7; p. 306, ll. 7 -20; p. 327, l. 23 to p. 328, l. 11. There is nothing in the Right that excludes such transactions.

The Right is also devoid of any provision that identifies when or how Petitioner should be notified of events triggering the Right, and there is nothing that directs how or when Petitioner should respond to a notification. The facts in the record reflect that Petitioner used the Right as a weapon to keep his options open, without regard to any time constraints or process. Petitioner learned of the transfer from RRJR to Respondent shortly before March 21, 2014, the date he called Respondent's attorney, Mr. Sloan, and notified him of the Lease containing the Right. According to Mr. Sloan, Petitioner did not state he wished to exercise the Right, a fact that Mr. Sloan confirmed with Petitioner's counsel, Mr. Goldstein. From that telephone call forward, Petitioner did not mention the Right until more than one (1) year later when Mr. Goldstein raised it in his letter to Respondent's counsel on April 13, 2015, tendering $150,001.00 as an exercise of the Right. During that year, the Right was not discussed in contract negotiations managed by Petitioner and his counsel and was not mentioned in two versions of a contract that Petitioner's counsel presented to Respondent to purchase the Subject Property for $650,000.00. There were two letters from Petitioner's counsel to Respondent paying the annual rent payment due under the Lease during that year delay. Neither letter mentioned the Right.

The trial court determined that the Right contains an implied condition of timeliness and that sixty (60) days was a reasonable time for performance. Appx. p. 26, Conclusion of Law, ¶10. Petitioner's year delay did not meet that time table.

Stated provisions on the process for exercising the Right would have avoided the confusion and uncertainty presented in this litigation as to how the Right is exercised and when the Right must be exercised. With the facts before it, the Court of Appeals could only decide that the Right lacked the specificity required to be enforceable.

6. The Court of Appeals applied the correct standard of review.

Petitioner argues that the Court of Appeals failed to apply the standard of review it identified in the Decision. Petitioner contends the scrutiny provided by the Court of Appeals was improper in that it "analyzed the case as a matter of law" instead of providing the standard of review that it identified – as a matter in equity. Petitioner's Brief, p. 20. This argument fails because the decision under review concerns a conclusion of law made by the trial court.

Petitioner conflates the appellate distinctions between cases at law and those in equity with the distinction between questions of fact and questions of law. Both affect the standard of review on appeal, but they are separate considerations.

The first step in the analysis is for the appellate court to determine if its review is of a question of law or a question of fact. An appellate court "'reviews all questions of law de novo.'" *Lolles v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017), quoting *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). Here, it is a conclusion of law reached by the trial court that is under review - "[t]he [Petitioner] has established by a preponderance of the evidence that he has a valid right of first refusal that identifies the property with sufficient particularity to be enforced." Appx., p. 25, Conclusions of Law, ¶3. The Court of Appeals was correct to consider that determination de novo. See, *Hammond v. Lindsay*, 277 S.C.

182, 184, 284 S.E. 2d 581,582 (1981) ("The constructions of a clear and unambiguous deed in respect to the property conveyed is a question of law for the court.")[20]

If the Court of Appeals' task was to review the facts determined by the trial court to support that conclusion of law, then its standard for review of those facts is controlled by the nature of the underlying action as being either at law or in equity. "In an action at law, the circuit court's factual findings "will not be disturbed upon appeal unless found to be without evidence [that] reasonably supports the [circuit court's] findings." *Townes Assocs. Ltd. V. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Wachovia Bank, Nat. Ass'n. v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

The main purpose of a lawsuit is the determining factor in the effort to distinguish actions at law from action in equity. *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771 (2010). The language of the complaint and the prayer for relief are the determining factors of the main purpose of the lawsuit. *Id*, 387 S.C. at 16, 690 S.E.2d at 773. Petitioner's Complaint identified its single cause of action to be "Breach of Lease-Right of First Refusal" (Appx., p. 32), but the body of the complaint and the prayer for relief make it clear that Petitioner's main purpose was to require Respondent to specifically perform on the Right of First Refusal provision of the Lease. The Petitioner's prayer requests the relief "[c]ompelling the [Respondent] to execute a deed in recordable form in exchange for the purchase price plus an additional amount as required by Article V of the parties' Lease" or alternatively "[a]uthorizing the Clerk of Court to execute a deed

[20] Petitioner cites the same language from *Hammond* in support of his argument that Respondent's defense was legal rather than equitable. Petitioner's Brief, pp. 22, 23. *Hammond* addresses the distinction between questions of fact for the trier of fact and questions of law for the court, not the difference between actions at law and actions in equity. Similarly, Petitioner's application of *Rodarte v. University of South Carolina*, 419 S.C. 592, 799 S.E.2d 912 (2017) (Petitioner's Brief, p. 23) appears to be misplaced for the same reasons.

in the event [Respondent] refuses to do so as required by Article V of the parties' Lease in exchange for the purchase price as required by Article V of the parties' Lease.". Appx. p 35. Therefore, the main purpose of the lawsuit is specific performance of a contract. An action for specific performance of a real estate contract is in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 805 (1970).

However, this second step in the analysis is not necessary. The determination under review is a conclusion of law made by the Court of Appeals. As such, the de novo review by the Court of Appeals was appropriate.

CONCLUSION

The question before the Court is whether the language in a real estate lease is enforceable against subsequent purchasers of that real estate as a right of first refusal. Petitioner's reference to the Recording Statute is a red-herring diversion because Respondent acknowledges record notice of the Lease. The fairness or character of the transaction through which the subsequent purchaser acquired title is not at issue and should not be the focus of this Court's review. Jurisprudence addressing the interpretation of an ambiguous contract is not in play because Petitioner is not seeking to enforce the right against the other party to the Lease; it is trying to enforce the right against a subsequent purchaser that was not a party to the Lease.

The language of the Right contained in the Lease does not contain the detail required to be an enforceable interest in real estate. The Decision should be affirmed.

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