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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Case No. 2015-CP-10-03038
Court of Appeals Opinion No.: 20 UP 238
Court of Appeals Appellate Tracking No.: 2017-002285
Supreme Court Appellate Tracking No.: 2020-001371

Barry Clarke……Petitioner;

vs.

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

of which Fine Housing, Inc. is the …… ……..Respondent.

PETITIONER'S REPLY BRIEF

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REPLY TO RESPONDENT'S QUESTIONS PRESENTED

On page 1 of its brief, Respondent alleges that the Petitioner has raised "newly stated questions." The Petitioner's arguments specifically address the analysis of the Court of Appeals in the Opinion under review and raise no new question. Rule 242(i) *S. C. Appellate Court Rules* allows the Court to grant *certiorari* either on specific questions or on the entire Opinion under review. In granting *certiorari*, the Court did not specify questions it wants addressed, and thus it is proper for the Petitioner to address Opinion No. 20-Up-238 in its entirety and the Petitioner's organization of his brief into five arguments address the Order under review and do not introduce new legal issues, new questions, or new evidence.

REPLY TO RESPONDENT'S STATEMENT OF CASE

Respondent uses its statement of case to assert two points: First, Respondent concedes the recording statute provided the Respondent with notice of the right of first refusal in the Lease. This is an admission important for two reasons. Because the Respondent was on notice of the right of first refusal, it concedes that the document controls the relationship between the parties. Throughout its brief, Respondent abrogates this admission by arguing that because the right is too vague, it is unenforceable and he is not bound by it. Second, and perhaps more importantly, Respondent's complaints of vagueness are not supported by the record because the record demonstrates that the Lease contains a specific legal description of the property subject to the document and contains all of the elements necessary for enforcement by leaving the price and timing in the control of the Lessor.

Respondent's Statement of Case describes Petitioner's legal arguments as "red herrings" because the Petitioner demonstrates that Fine Housing Inc. is a predatory lender. Because this is a case brought in equity, Respondent's inequitable conduct is a factor to be considered. Plaintiff filed this suit in equity, seeking specific performance. (In his initial brief, the Petitioner discussed the standard of review including the fact that this case involves application of both legal and equitable principles.)

Finally, the Respondent takes away on page 3 what he gives on page 1. After conceding on page 1 that the Respondent "is charged with notice of the provision" (Brief page 1), Respondent disavows the very principle by saying that the Lease on which it has notice does not bind it "to the unwritten intentions of the parties." (Brief at page 3)

However, the intentions of the parties are not oral ("unwritten") but written, and Respondent successfully persuaded the Court of Appeals that the Right of First Refusal was too vague to be enforced, which is addressed below. Every lease is finite and expresses the parties' intentions, and South Carolina law establishes that every contract contains an implied covenant of good faith and fair dealing. *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481 (1966) Whether deciding this case under legal or equitable principles, the Lease contains a right of first refusal, and neither Robinson nor Respondent adhered to it. Moreover, as discussed in Petitioner's Initial Brief and below, in determining the right of first refusal was vague, the Court of Appeals overlooked some obvious terms included in the Lease, such as the Lease's first paragraph includes a precise legal description of the property encumbered. The trial court properly applied well-developed South Carolina contract law to fulfill the Court's duty to enforce the contract as written.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

Only brief response is required to the Respondent's Statement of Facts. On page 5 of its brief, Respondent makes a misleading statement, saying that Mr. DeStaso refused Robin Robinson's request for a loan, but agreed to purchase the property. This is not correct. As the record shows, Robin Robinson deeded her marital home (the Sol Legare Road property) and her business (the Pittsburgh Street property) but reserved the right to rent all of it back for 36 months at an agreed upon rental of $12,750.00 per month, after which DeStaso would re-convey both properties to her for a lump sum payment of $1,150,000. The stated consideration for Robinson's option to re-purchase is $5.00.

(Appendix Vol. 1, pages 380 and 394 [tr. Pages 46-47, Exhibits 10 and 11]) The Court can apply whatever language it chooses to characterize this transaction, but it was not a straight sale; it was a bond for title, which is a modified mortgage. This fact is never addressed in Respondent's brief even though the existence of this fact shifts the foundation of Respondent's entire argument. Even though Respondent held title, Robinson had the irrevocable right to redeem the property provided she made the payments and paid a lump sum of 1.15 million dollars in 3 years. The record shows further the title holder was put in contest 79 days after Robinson signed the documents when she filed a lawsuit on February 19, 2014, against Respondent (Appendix page 403 [Exhibit 14]), alleging for four causes of action, seeking to unwind the transaction and restore to her the ownership of her property, or as she put it in her complaint: "rescinding the entire agreement between the parties, including but not limited to ordering or otherwise causing to be recorded deeds transferring record title to the properties in Exhibit 'A' and Exhibit 'B' back to their respective prior owners. . ." Appendix page 403 [Exhibit 14] Respondent simplifies the timeline by omitting these facts.

The last part of the Respondent's Statement of Facts that requires a brief response is the Respondent's statement on page 7. Here, Respondent concedes to the Court that Respondent's Closing Attorney, William Sloan, attempted to get more time for them to examine the title: "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." (Brief at page 7) This statement is surprising for two reasons. First, it is true. Second, it obliterates the generous portion of footnote criticisms taking the Petitioner to

task for “red herrings.” One of these alleged “red herrings” is the very statement Respondent concedes on page 7 of its brief; to wit, that William Sloan was set up to fail because Respondent initially misled him about what it was asking him to do and then demanded that he prepare for a “closing” in an impossibly short time. Respondent contends on page 8 of its brief that it was Swope, not Respondent, that misled William Sloan about the nature of the transaction—whether it was a sale or refinance—but this assertion ignores the undisputed fact that Respondent hired Sloan on November 26th and that a bond-for-title is a hybrid transaction vesting in Robinson the irrevocable right to redeem the property if she pays the rent. This is not a sale as Respondent characterizes in his brief. Until Robinson defaulted on the agreement, it was nothing more than a mortgage with additional collateral. The Respondent and Robinson were solely responsible for the confusing nature and timing of the transaction, and Respondent’s post-transaction efforts to attack the sufficiency of the right of first refusal are nothing more than *post hoc* efforts to work around the recording statute and disadvantage the Petitioner, the one innocent party in the triangle. Respondent’s conduct is hardly a “red herring” because it was the author of its own dilemma and seeks to shift the responsibility for its decisions onto Petitioner. In a case in equity, the Respondent’s conduct is not a “red herring.” Respondent goes so far as to assert in its brief that Fine Housing “did not lend money to the Petitioner.” (Brief at page 20) Petitioner never asserted that Respondent lent him money, but it certainly lent money to Robinson, and it took its collateral subject to Petitioner’s recorded Lease.

Respondent refuses to acknowledge how these indisputable facts occurred only

because of Respondent's conduct. In an equitable case, the Respondent is the very definition of the "bad guy" who deserves to lose. See Roger Young and Stephen Spitz (2003), "SUEM—Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose," *South Carolina Law Review* (Vol. 55, Issue 1, Article 7) Even though this Law Review article warns against being cited as authority in litigation, it suggests the principles cited therein are "predictive" of case outcomes. The article discusses South Carolina courts applying maxims of equity to cases, and applying that analysis to the facts of this case illuminates how the trial court correctly applied well-developed South Carolina contract law to the facts to arrive at a just, equitable, result. Professor Spitz's and Judge Young's discussion of the principles of equity apply here because the trial court listened to the testimony, examined the evidence, and fashioned a remedy it found equitable by arriving at a purchase price it thought would make both parties whole.

In contrast, Respondent takes great pains to assert that the Respondent's conduct in this case is irrelevant, but in applying an equitable remedy of specific performance, the relative conduct of the parties is relevant. The conduct of the Respondent in creating the transactional complication from which it wishes to extricate itself has a direct bearing on both the trial court's evaluation of credibility and the application of a remedy.

The only other correction necessary to the Respondent's Statement of Facts is the Respondent's blurring the timeline. The record shows that the transaction occurred on December 2, 2013. (Appendix page 373 [Exhibit 4]) 79 days later, Robin Robinson filed suit on February 19, 2014 to rescind the transaction. (Appendix page 403 [Exhibit 14])

Respondent and Robin Robinson resolved that suit on January 9, 2015. (Appendix page 413 [Exhibit 15]) After previous attempts to negotiate the right of first refusal beginning in April 2014, just weeks after Petitioner first discovered "something is up with the club," Petitioner sent a formal demand for exercise of the right of first refusal on April 13, 2015, 3 months after Robinson withdrew her rescission claims as only then title became vested in Respondent without a cloud. (Appendix page 480 [Exhibit 6])

This timeline is important because the record demonstrates the first notice Petitioner had about the property possibly changing hands was the visit from "the two Terry's" in March 2014. (Appendix, page 307) See also Request for Admission at page 402. The Petitioner immediately called the Respondent and attempted to resolve the dispute by offering a large sum to Respondent to avoid the litigation that ultimately followed. Despite being offered $650,000.00 to avoid litigation, when Petitioner followed up, the Respondent said he "forgot" that Petitioner offered him $650,000.00. (Appendix page 308, line 20—309, line 14) Shortly thereafter, Petitioner's attorney, Ashley Andrews, conveyed an offer of settlement to Respondent on May 14, 2014 (Appendix page 460 [Exhibit 1])

Thus, in keeping with the principles of equity in South Carolina, the Petitioner acted with alacrity even though the Respondent never provided notice to Petitioner that he claimed an interest in the property.

REPLY ARGUMENTS

Reply to Argument 1—Robin Robinson's absence from trial is immaterial except to the extent that her absence supports the Petitioner's contention that Respondent is a predatory lender and unworthy of equitable relief.

In Argument 1, the Respondent makes contradictory assertions: on page 15 of its brief it says because the Respondent was not a party to the creation of the Lease, "authorities governing the relationship between contracting parties and contract enforcement are of no consequence to the action against Respondent." (Brief at page15) However, on the very next page, in direct contradiction of this statement, Respondent writes: "Respondent has always acknowledged that it has record notice of whatever is in the Lease." (Brief at page 16) Every provision of the Lease is necessarily enforceable unless it is unlawful for some reason. For example, parties can enter into a contract to commit a fraud, but no court will enforce it. The Court of Appeals reversed the trial court's grant of specific performance because it found "the Lease did not specifically set forth whether the Right of First 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 exercise the Right of First Refusal." (Appendix at page 494, Opinion at page 6) The Court of Appeals made a finding on vagueness, which is addressed below, but it is both factually and legally incorrect to assert that the Respondent is not bound by the terms of the recorded document, something even the Respondent concedes. See § 30-7-10, S. C. Code, ann.

Reply to Argument 2—The Right of First Refusal is not a Restraint on Alienation

The Court of Appeals found that the right of first refusal is a "restraint on alienation" because it found it too vague. "We, therefore, find the lack of specificity in the language of the Right of First Refusal creates an unreasonable restraint on alienation." (Appendix page 494, Opinion at page 7) This conclusion is not supported by the record or by law.

First, the Court of Appeals overlooked that the recorded lease contains an exact legal description of the entire parcel. (Appendix at page 366) The first paragraph of the Lease describes the property subject to the Lease as "generally described in Exhibit "A" attached." Appendix page 355. For reasons it never identifies, the Court of Appeals put emphasis on the fact that John Robinson was not available to testify, but Robin Robinson was, and she signed the Lease, not her husband. See Appendix at page 364. More importantly, the price at which the right of first refusal could be exercised remained in the sole discretion of the Robinsons, so the right of first refusal did not constrain them in any way. When cases in South Carolina, such as *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997), found restraints on alienation, they have done so because the right of first refusal dictated the price and the terms of sale. **The right of first refusal currently before the Court is the opposite of a restraint because it leaves price and timing in the complete control of the seller.** Thus the Court of Appeals' conclusion is demonstrably erroneous.

When Respondent writes on page 18 of its brief: "Unreasonable restraints on alienation violate public policy and are not enforceable," Petitioner agrees, but here it is obvious that the Robinsons controlled every aspect of the right of first refusal, and therefore it is impossible to identify any basis for the document constraining them in any way, and thus the Court of Appeals erred in finding a right of first refusal solely controlled by the Robinsons to be an "unreasonable" constraint.

Reply to Argument 3—The Lease Clearly defines the Demised Property

When Respondent asserts (and the Court of Appeals accepted) that the Right does

not identify the Subject Property as being its object, the record refutes it. This erroneous assertion and conclusion is possible only because both overlook the first paragraph of the Lease, "Demises," and the attached, precise legal description that paragraph incorporates. South Carolina law requires that contracts be read as a whole. See *Ecclesiastes Production Ministries* quoted below. Section 7.1, entitled "Use," merely defines what portion of the demised premises the Petitioner can **use** during the life of the Lease. There is nothing contradictory or even ambiguous about the two terms, and to find otherwise, the Respondent and the Court of Appeals have to torture the language of the Lease to arrive at a forced construction that the parties did not know what they were leasing. As the trial court found, the function of the Court is to enforce the contract as written and apply common understanding of words used in their plain and ordinary meaning, and the trial court handled this issue as follows:

> The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. *Thomas-McCain, Inc. v. Siter,* 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); *see also Barnacle Broad., Inc. v. Baker Broad., Inc.,* 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct.App.2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used."). "Documents will be interpreted so as to give effect to all of their provisions, if practical." *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime,* 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct.App.1997) (citing 17A Am.Jur.2d *Contracts* § 385 (1991)). In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.,* 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); *Bruce v. Blalock,* 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962); *Mattox v. Cassady,* 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986).
>
> In *Brady v. Brady,* 222 S.C. 242, 72 S.E.2d 193 (1952) the South Carolina Supreme Court asseverated:
>
> It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning.

Agreements should be liberally construed so as to give them effect and carry out the intention of the parties. In arriving at the intention of the parties to a lease, the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties at the time, are to be regarded, and the lease construed as a whole. Different provisions dealing with the same subject matter are to be read together. *Id.* at 246-47, 72 S.E.2d at 195.

(Appendix Vol. 1, pages 17-18 [Order pages 16-17])

Ecclesiastes Production Ministries v. Outparcel Associates, L.L.C., 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007)

In *Ecclesiastes*, the Court of Appeals reversed a grant of directed verdict over a release involving a bond-for-title. Here, as set forth above, the Lease, signed by Barry Clarke and Robin Robinson, carefully included a legal description of the entire parcel. Section 7.1 merely defined Petitioner's **use** of the property during the life of the lease, but it is clear that the right of first refusal included the "demised premises," and the Court of Appeals erred in concluding otherwise.

Reply to Argument 4—The Price is controlled by the Seller

The Respondent's argument here falls back into familiar terrain and takes two forms: the first that the transaction between RRJR and Respondent has no bearing on the validity of the right (Brief at page 25) and the Right of First Refusal "lacks any provision for determining the price at which Petitioner could exercise the Right." (Brief at page 25)

As to the first, both the application of § 30-7-10 and the nature of Respondent's transaction with Robin Robinson have substantial bearing on the validity of the right because the record demonstrates first that the operation § 30-7-10 binds the Respondent to the Lease, and second, the equities do not favor Respondent. The record demonstrates Respondent conducted itself as an overreaching creditor taking advantage of Robin Robinson, and Respondent's overreach creates a pattern of "hard" conduct. See

Hamlet, Act 3, sc. iv: "Let it work, for 'tis the sport to have the engineer hoist with his own petard and 't shall go hard. . ." The heir to Shakespeare's "it shall go hard" is found in Spitz and Young's SUEM, which, they admit, does not compel a result, but is predictive of an **equitable** outcome. Having created the conditions that rushed the transaction to gain an advantage, the Respondent can hardly complain now that a document he never examined is too vague to be enforceable especially where the Court of Appeals overlooked the description of the property contained in the Lease and how the right of first refusal is drafted to allow the Robinson's ultimate control.

Second, and more important, *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997) provides the roadmap for both the Court and for practitioners drafting rights of first refusals. The Court struck down the right of first refusal in *Webb* because the means of determining price was controlled by the buyer (leaving aside the Rule Against Perpetuities problem), and the Court of Appeals found that to be a restraint. Here, the right of first refusal is careful not only to avoid the rule against perpetuities, but also to make sure that the selling price remained in the hands of the seller, in other words, the opposite of a restraint on alienation. Because the selling price remained in the sole control of the seller, it is impossible for the right of first refusal to be a restraint.

Reply to Argument 5—The Right to Exercise the Right of First Refusal Must be Exercised in a Timely Manner

The Respondent's argument here devours itself. On the one hand it admits that no one notified Petitioner of Robinson's intent to "sell" and provide him with a deadline to respond. On the other hand, the Respondent argues that the Petitioner exercised his right too late. Which is it? The Respondent stipulated that he never notified Petitioner,

and no one from RRJR notified him. (Appendix page 402 [Exhibit 13]) The first indication Clarke had that "something is up with the club" came from the March 2014 visit from the "two Terry's." (Appendix page 307, l.6—page 307, l20) He immediately contacted DeStaso by telephone, who ignored him (Appendix page 308, l.24—page 309, l.13), and Ashley Andrews made a proposal for resolving the dispute in April, 2014 (Appendix page 420 [Exhibit 16]). Respondent studiously avoids any mention of the Robinson lawsuit filed February 19, 2014 (Appendix page 403) in which she alleged fraud and sought rescission of the transaction. That lawsuit was not resolved until January 9, 2015 (Appendix page 413 [Exhibit 15]), and immediately upon learning that the suit ended, Petitioner made a formal demand for performance on April 13, 2015. (Appendix page 480 [Exhibit 6]) The trial court found, based on these undisputed facts, that there was no evidence of waiver, laches, or equitable estoppel. (Appendix pages 20-23), and the Court of Appeals never addressed them: "We need not address these issues because our determination that Clarke's Right of First Refusal was not enforceable is dispositive of the appeal." (Appendix page 494)

Thus, the only question before the trial court and the Court of Appeals was whether the Petitioner exercised his right timely. The record demonstrates he was on the phone with Respondent days after hearing "something is up with the club," and when that failed to achieve a resolution, he made a demand immediately after Robinson withdrew her suit seeking rescission. Therefore, Respondent's assertion that Petitioner never "raised it [until] his letter to respondent's counsel on April 13, 2015," is without evidentiary support. As the trial court found, the time to exercise any contractual right in any contract is always

in a reasonable time. As the trial court noted: "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." *Hobgood v. Pennington*, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1989) (Appendix page 19) The Court of Appeals' Opinion under review is therefore controlled by an error of law.

Reply to Argument 6—The Standard of Review is from an Appeal in an Equitable Action

The standard of review is adequately briefed by both parties. The Respondent makes only two brief points in reply: first, that this case asks the Court to enforce a contractual term which is an action at law. However, the relief requested is an equitable remedy, so as set forth in Petitioner's initial brief, the questions presented are "mixed." Petitioner agrees with the Court of Appeal's characterization of the trial judge being in a better position to judge the credibility of the witnesses. (Appendix page 491, Opinion at page 3)

Conclusion

The Respondent maintains a bi-polar interpretation of the South Carolina Recording Statute. While conceding that the Respondent is on notice of the Right of First Refusal, it insists the terms are not enforceable against it because the Petitioner "is trying to enforce the right against a subsequent purchaser that was not a party to the Lease." (Brief at page 30) This legal position is self-refuting—no subsequent purchaser is ever a party to the underlying lease. Moreover, Respondent's legal position nullifies the Recording Statute, which it admitted on page 1 applies. The entire purpose of the

Recording Statute is to require the subsequent purchaser to step into the shoes of the seller, and if he acts without exercising the requisite diligence to examine the title, the consequence of that failure falls on him, not the innocent party who lived up to the terms of the agreement. The trial court had the opportunity to listen to the witnesses and evaluate their credibility, and it came up with an equitable judgment designed to treat both sides equally. The trial court's decision conforms not only to well established contract law, but also to the SUEM principle cited above. Respondent acted at its own peril because it saw an advantage to do so and having taken advantage of Robinson, now seeks to take advantage of Petitioner. The Petitioner's identification of Respondent's overreaching are not red herrings but relevant inquires in evaluating an equitable case. The trial court applied well settled principles of South Carolina law to enforce the contract as written, and the Court of Appeals made demonstrable mistakes in reversing the trial court. For these reasons, the Petitioner requests that the Supreme Court reverse the Court of Appeals and remand the case to the trial court to compel conveyance of the subject property for the equitable amount found to be due.

Respectfully submitted,

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