

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
KEY WEST DIVISION

CASE NO. 13-10011-CIV-KING

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

BARRY J. GRAHAM,  
FRED DAVIS CLARK, JR., A/K/A DAVE CLARK,  
CRISTAL R. COLEMAN, A/K/A CRISTAL CLARK,  
DAVID W. SCHWARZ, and  
RICKY LYNN STOKES,

Defendants.

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**ORDER GRANTING MOTION TO DISMISS**

**THIS CAUSE** comes before the Court upon Defendants Fred Davis Clark, Jr. and Cristal Clark's ("the Clarks") Motion to Dismiss Plaintiff's Amended Complaint (DE #28) filed May 8, 2013. Therein, the Clarks assert that Plaintiff, the Securities and Exchange Commission ("the SEC"), has failed to state a claim against them upon which relief may be granted. Specifically, the Clarks argue that the SEC has failed to plead sufficient facts to show that the real estate transactions at the center of the above-styled action constitute investment contracts under the Securities Act. The Motion has been fully briefed.<sup>1</sup>

In order for the SEC to bring a claim against Defendants for violation of the Securities Act, the SEC must allege enough facts to establish that the subject transactions are investment contracts. Under the Eleventh Circuit's interpretation of the three-prong test set forth by the U.S. Supreme Court in *SEC v. W.J. Howey Co.* (328 U.S. 293 (1946)), the Plaintiff must show that

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<sup>1</sup> Plaintiff filed its Response (DE #37) on May 28, 2013, and the Clarks filed their Reply (DE #39) on June 7, 2013.

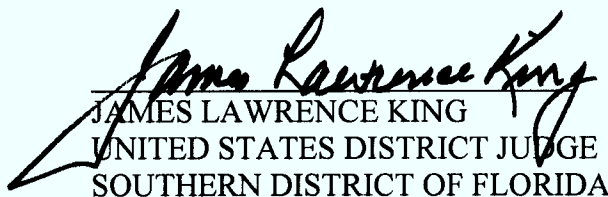
there was an investment, that it was a common enterprise, and that the buyer lacked control over the profitability of the investment.<sup>2</sup> See *Alunni v. Development Resources Group, LLC*, 445 Fed. Appx. 288 (11th Cir. 2011); see also *Bamert v. Pulte Home corp.*, 445 Fed. Appx. 256 (11th Cir. 2011). At the heart of the control prong is an analysis of the purchase agreement. See *Bamert*, 445 Fed. Appx. at 262–63; see also *Alunni*, 445 Fed. Appx. at 298. Plaintiff has neither filed a copy of the purchase agreement on the record, nor included adequate factual allegations in the Amended Complaint concerning the contents of the purchase agreement. Therefore, the Court finds that the Amended Complaint presents insufficient facts to support Plaintiff's claims.

Accordingly, the Court being otherwise fully advised, the following is hereby

**ORDERED, ADJUDGED AND DECREED:**

1. Defendants Fred Davis Clark, Jr. and Cristal Clark's Motion to Dismiss Plaintiff's Amended Complaint (**DE #28**) be, and the same is hereby, **GRANTED**.
2. Plaintiff's Amended Complaint (**DE #4**) be, and the same is hereby, **DISMISSED without prejudice** to re-file a Second Amended Complaint.
3. Plaintiff shall file the amended complaint within **twenty (20) days** of this Order.

**DONE AND ORDERED** in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 10<sup>th</sup> day of July, 2013.

  
JAMES LAWRENCE KING  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF FLORIDA

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<sup>2</sup> The Court acknowledges Plaintiff's argument that this Court's analysis ought to focus on *Slayter v. DC 701, LLC, et al.*, a 2008 unpublished decision of the Middle District of Florida involving some of the same Defendants as this case and, in part, addressing the very question in front of the Court today. 2008 WL 2695645, No. 8:07-cv-1903-T-24-EAJ (M.D. Fla. July 3, 2008). However, the *Slayter* court necessarily based its legal analysis and application of the *Howey* test on pre-*Alunni* and pre-*Bamert* jurisprudence. Therefore, the Court relies on the 2011 cases to make its findings today.

cc:

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