IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Perry M. Buckner, III, Circuit Court Judge

The Honorable Bentley D. Price, Circuit Court Judge

Consolidated Appellate Case No.: 2020-000607

Larry Rahn, ……Respondent,

v.

Barbara Smith, ……Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court's Orders are moot and Respondent's right to specific performance was extinguished with the passage of time.

II. Whether the Circuit Court erred in interpreting that Settlement Agreement 2 contained a condition precedent and finding that it was undisputed that Respondent was ready, willing and able to perform under Settlement Agreement 2.

III. Whether the Circuit Court retained jurisdiction, on a post-appeal Rule 60 motion, to enforce its previous Order decreeing specific performance, by equitably tolling the deadline for specific performance or otherwise, after the lapse of the Order's deadline.

STATEMENT OF THE CASE

This consolidated Appeal arises from two separate Orders, signed by two separate Circuit Court judges, requiring Appellant Barbara Smith to sell her interest in a tract of land located in Colleton County, South Carolina, to Respondent Larry Rahn and other heirs of his father, Marvin Rahn.[1] On March 21, 2019, Larry Rahn filed a Complaint in the Colleton County Court of Common Pleas alleging that under a previous mediation agreement Smith had agreed to sell her interest in a tract of land to him, as well as to his nephew Kenneth Rahn and niece Nancy Crosby. (*See generally* Compl.). The Complaint requested specific performance of the agreement. Attached to the Complaint were two exhibits. The first exhibit comprised two written agreements, designated "Settlement Agreement 1" and "Settlement Agreement 2", as well as two plats depicting the discussed tracts of land. (Compl. Ex. A).

The subject tracts of land are referred to as the "Home Place Tract" and the "Glover Tract." Smith, Larry Rahn, Kenneth Rahn, Nancy Crosby, and another heir, Loretta Harriett, owned the following interests in the subject tracts at the time of the Settlement Agreements: Loretta Harriett 1/4 interest; Larry Rahn 1/4 interest; Barbara Smith 1/4 interest; Kenneth Rahn 1/8 interest; and Nancy Crosby 1/8 interest. (Settlement Agreement 1). Pursuant to Settlement Agreement 1, Larry Rahn, Kenneth Rahn, Smith, and Crosby agreed to deed their interests in the Glover Tract to Harriett in exchange for the relinquishment of her interest in the Home Place Tract. (*Id.*) Therefore, after the requisite deeds were signed, Harriett

[1] Smith and Rahn are siblings.

would become the sole owner of the Glover Tract, with the remaining heirs increasing their respective interests in the Home Place Tract.

Settlement Agreement 2 was drafted as follows:

> In light of mediation, Loretta R. Harriett has relinquished her interest in the "Home Place Tract" property. Due to such, the current ownership of the "Home Place Tract" is 1/3 interest to Larry L. Rahn, 1/3 interest to Barbara R. Smith, 1/6 interest to Kenneth F. Rahn, and 1/6 interest to Nancy R. Crosby.
>
> 1. Barbara R. Smith will deed her interest in this property to Larry L. Rahn, Kenneth F. Rahn, and Nancy R. Crosby for the sum of three hundred and twelve thousand and 00/100 ($312,000.00) dollars. Larry L. Rahn, Kenneth F. Rahn, and Nancy R. Crosby have 24 months to deliver funds to Barbara R. Smith, in exchange for her interest in the land.
>
> 2. Each party is responsible for their own deed and plat preparation, as well as surveying cost or other cost necessary.

(Settlement Agreement 2). The agreements were signed by all parties on November 20, 2015. The parties, including Smith, deeded their interest in the Glover Tract to Harriett in July of 2017. (Compl., Ex. B).

However, Harriett would not sign the requisite deed conveying her interest in the Home Place Tract, and on January 23, 2017, Larry Rahn filed a Complaint in the Colleton County Court of Common Pleas requesting specific performance of the deed relinquishing Harriett's interest in the Home Place Tract. *See Rahn v. Harriett*, Civil Action No. 2017-CP-15-00059. On May 4, 2018, the Circuit Court ordered Harriett to comply with the terms of Settlement Agreement 1 within 15 days of its Order. *Id.* Harriett did not sign the deed until July 11, 2018, which conveyed her interest in the Home Place Tract to the remaining heirs and made her

the sole owner of the Glover Tract.[2] In turn, this created the following interests in the Home Place Tract: Barbara Smith 1/3 interest; Larry Rahn 1/3 interest; Kenneth Rahn 1/6 interest; and Nancy Crosby 1/6 interest.

In the fall of 2018, Larry Rahn, Kenneth Rahn, and Crosby approached Smith about proceeding with Settlement Agreement 2. (Smith Aff. ¶ 22). They had obtained timber bids to procure the funds to fulfill their part of the bargain. (*Id.*). However, Smith took the position that Settlement Agreement 2 had expired and would not accept the agreed upon amount, $312,000.00, in exchange for the conveyance of her interest in the property. (*Id.*; Oct. 9, 2019 Hr'g Tr. 27:24-28:4). Key to Smith's position was her belief that the value of the Home Place Tract had increased since the mediation agreements were signed, and that she would not have negotiated the aforementioned price had she known that her interest in the property would not have been purchased within 24 months of November 20, 2015. (*Id.* at ¶ 23). There is no evidence in the record of the value of the Home Place Tract at the time of Smith's Affidavit.

After filing his Complaint requesting Smith's performance of Settlement Agreement 2, Rahn filed a Motion for Summary Judgment, asserting that there were no genuine issues of fact as to whether he was entitled to specific performance under the agreement. (Mot. Summ. J.). Inherent in this request are the arguments that (1) Settlement Agreement 2 contained a condition precedent requiring Harriett

[2] While this deed was not made part of the record in this case, it is recorded in Deed Book 2679, page 291, office of the Register of Deeds for Colleton County, and may be found at https://search.colletondeeds.com/view_image.php?file=L2ltZy9zYy9jb2xsZXRvbi8yMDE4LzEwMDEvMjAxODAwNjQ2MS50aWY=&type=pdf. The parties do not dispute that the deed was signed on July 11, 2018.

to convey her interest in the Home Place Tract to Smith, Larry Rahn, Kenneth Rahn, and Nancy Crosby, such that Smith would have a current 1/3 ownership interest in the Tract she could exchange for the agreed upon $312,000.00, and (2) that Rahn could make a prima facie showing of the specific performance elements, while Smith could not produce any evidence creating a factual dispute as to any one of them.

The Circuit Court heard arguments on October 9, 2019. (*See generally* Oct. 9, 2019 Hr'g Tr.). On December 3, 2019, the Circuit Court signed an Order making the following findings and conclusions. First, the Order found that Settlement Agreement 1 and Settlement Agreement 2, when read in concert, contained a condition precedent that Harriett would deed her interest in the Home Place Tract prior to Settlement Agreement 2 taking effect. (Dec. 3, 2019 Order at 2). Second, the Order found that the 24-month deadline for performance was contingent on Smith having a 1/3 current ownership interest which she could convey to Larry Rahn, Kenneth Rahn, and Crosby, and that the 24-month period did not begin to run until Harriett had deeded her interest in the Home Place Tract on July 11, 2018. (*Id.* at 2-4). Lastly, the Order found that Smith's affidavit contained evidence demonstrating that Rahn was ready, willing and able to comply with Settlement Agreement 2 in the fall of 2018, within the 24-month period that commenced on July 11, 2018. (*Id.* at 4).

Based on these findings, the Circuit Court ordered that Smith was to comply with the terms of Settlement Agreement 2 on or before July 11, 2020. (*Id.* at 4-5).

Smith filed a Motion for Reconsideration on December 13, 2019. (Dec. 13, 2019 Mot. for Reconsideration). Smith argued that there was no condition precedent contained within the mediation agreements, that she did not intend for Settlement Agreement 2 to be contingent upon Harriett deeding her interest in the Home Place Tract, and that her affidavit was not evidence that Rahn was ready, willing, and able to comply with the terms of Settlement Agreement 2. (*Id.* at 1-3). Smith's Motion for Reconsideration was denied by the Circuit Court because a copy of the motion was not provided to the Circuit Court as required by Rule 59(g), SCRCP. (March 18, 2020 Order).

On April 14, 2020, Smith appealed the December 13 Order to this Court. (April 14, 2020 Notice of Appeal). Prior to filing her Initial Brief, and after two requests for extensions of time to file her Brief, Smith filed a Motion on October 2, 2020 requesting leave to file a motion pursuant to Rule 60(b)(5), SCRCP with the Circuit Court, and to hold briefing in this Appeal in abeyance. (Mot. for Leave). In the intervening time while Smith's Appeal was pending, the July 11, 2020 time period set forth in the Circuit Court's December 3 Order had expired. On November 20, 2020, this Court granted Smith's request. (Nov. 20, 2020 Order).

On November 30, 2020, Smith filed a Motion for Relief from Judgment pursuant to Rule 60(b), SCRCP with the Circuit Court. (Mot. for Relief). In her motion, Smith argued for the first time that Settlement Agreement 2 was an option contract, which required the delivery of payment in order to obtain the specific performance remedy. (*Id.* at 3). Smith also argued that the December 3 Order was

moot, as the July 11, 2020 time period had expired while this Appeal was pending, and that Rahn had not adequately demonstrated that he was ready, willing and able to perform by delivering payment, again under a theory that Settlement Agreement 2 was an option contract with elevated requirements for specific performance. The Circuit Court heard arguments on March 18, 2021 and denied the motion on April 5, 2021. (*See generally* March 18, 2021 Hr'g Tr.; April 5, 2021 Order).

In its April 5 Order, the Circuit Court found that (1) there was no evidence that Rahn was not ready, willing and able to perform under the terms of Settlement Agreement 2, and (2) the 24-month time period for performance was tolled for equitable considerations. (April 5, 2021 Order). The Circuit Court did not rule upon whether the December 3 Order had become moot with the passage of the 24-month time period. On April 14, 2021, Smith filed a Motion to Alter or Amend the Circuit Court's April 5 Order, arguing that the Circuit Court lacked jurisdiction to amend the December 3 Order, that any tolling of the time for performance was unsupported by evidence, that Rahn had not delivered payment or sought alternate remedies, and that the April 5 Order was an improper *nunc pro tunc* order. (*See generally* Mot. to Alter).

Smith did not argue or ask for clarification as to whether the December 3 Order was moot. On December 14, 2021, the Circuit Court denied Smith's motion and designated that the parties would have until February 1, 2022 to complete performance under the agreement. (Dec. 14, 2021 Order). On December 27, 2021,

Smith appealed the Circuit Court's April 5 Order. (Dec. 27, 2021 Notice of Appeal). On January 27, 2022, Smith filed a Motion for Supersedeas with the Circuit Court, and on February 1, 2022, the Circuit Court granted Smith's Motion, staying the February 1, 2022 deadline during the pendency of the Appeals. (Mot. for Supersedeas; Feb. 1, 2022 Order). On February 11, 2022, this Court consolidated the Appeals.

ARGUMENT

Smith, in an attempt to conflate the issues and muddle the facts, makes several contentions that are not supported by South Carolina law or the circumstances of this action. First, Smith argues that Settlement Agreement 2 is an option contract that would have required Rahn to deliver payment to Smith prior to the 24-month deadline in order for him to receive the remedy of specific performance. This argument was never made by Smith prior to her post-appeal Rule 60 motion to vacate the Circuit Court's December 3 Order and is not reflective of South Carolina law describing the characteristics of option contracts. Since Settlement Agreement 2 is not an option contract, Rahn was not required to tender the purchase money to Smith prior to the deadline in order to receive specific performance.

Second, Smith argues that the passage of a deadline for specific performance will moot the order granting specific performance if the nonperforming party refuses to comply with the order and appeals. This proposition is also unsupported by South Carolina law, when in fact Rule 70, SCRCP provides that a party may

apply to a trial court to enforce an order granting specific performance after the deadline for performance has expired. While the issues addressed in the Circuit Court's December 3 Order were not stayed by this Appeal, and statutory law additionally provides that any potential execution of the judgment that may have been sought by Rahn was not stayed, the law does not state that a litigant loses his right to specific performance if the opposing party continues to refuse to perform. The law specifically provides that if the time for compliance has passed, the litigant may seek to execute the judgment, hold the other party in contempt, or apply for relief pursuant to Rule 70. Neither the Circuit Court nor this Court are required to "roll back the clock", as argued by Smith, to afford relief to Rahn. If the Circuit Court's Orders are affirmed, Rahn may pursue relief under any of the above-described mechanisms. This is proof positive that the Circuit Court's Orders are not moot, regardless of whether the appeal of an order granting specific performance acts to stay the issues on appeal. Contrary to Smith's contentions, Rule 70 contains no language indicating that it is the "means to prevent an order from becoming moot."

Third, Settlement Agreement 2 does not contemplate the conveyance of future interests or any interest of Smith's that is less than a 1/3 interest, nor does it contemplate that the parties may proceed with Settlement Agreement 2 even if Harriette had not previously conveyed her interest in the Home Place Tract to the other heirs. Fourth, Smith ignores that her affidavit explicitly provides that Rahn and the other heirs had procured the means to perform under the agreement using

timber bids. Lastly, regardless of whether the Circuit Court equitably tolled the deadline in its April 5 Order, or whether it simply denied Smith's Rule 60 motion, the Circuit Court had jurisdiction to make further orders enforcing its previous judgment, and since this is an equitable matter, it appropriately did so under the circumstances. For the following reasons, the Circuit Court's Orders should be affirmed.

I. The Orders are not moot and Rahn's right to have the Orders enforced was not extinguished by the passage of time.

A. Settlement Agreement 2 was not an option contract and time was not of the essence.

Smith desires to construe Settlement Agreement 2 as an option contract in order to argue that it is now moot and unenforceable.[3] By its terms, Settlement Agreement 2 is not an option contract, but is instead a contract setting forth the sale of real estate within a designated time-period. The agreement does not give Rahn the option to purchase the subject property; it requires him to do so.

[3] The undersigned notes that this Court is appellate only and generally does not have authority to decide issues that have not been raised to and ruled upon by a trial court. *See* S.C. Code Ann. § 14-8-200. Smith's mootness argument may therefore only be reviewed by the Court if it was ruled upon by the Circuit Court. While Smith did raise the issue of mootness to the Circuit Court in its post-appeal Rule 60 motion, the Circuit Court's April 5, 2021 Order does not contain a specific ruling as to whether the Orders were moot. When an issue is raised to, but not ruled on, by a trial court, in order to preserve the issue for appellate review it must be properly raised in a Rule 59(e) motion. *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). It is not inherent in the Circuit Court's April 5 Order that it determined mootness regarding the December 3, 2019 Order; the Circuit Court could have equitably tolled the deadline for performance without a determination of whether the December 3, 2019 Order was moot. Since Smith did not raise the issue of mootness to the Circuit Court in her Rule 59(e) motion, the issue is not preserved for the Court's review.

Additionally, the agreement by its terms does not expire with the lapse of the designated deadline, as it does not specify that time is of the essence.[4]

Settlement Agreement 2 is not an option contract because it fails to meet the first requirement of an option contract. Option contracts are "unilateral contracts where the optionor, for a valuable consideration, grants the optionee a right to make a contract of purchase but does not bind the optionee to do so . . . ." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 108, 531 S.E.2d 287, 292 (2000). Settlement Agreement 2 is not a unilateral contract. Settlement Agreement 2 binds both parties to execute the sale of Smith's interest in the subject tract and requires that it should be done within two years. It does not give Rahn the option of buying the subject tract, nor did Rahn pay separate consideration in exchange for such an option. Under no scenario could Settlement Agreement 2 be convincingly portrayed as an option contract. Smith attempts to do so in order to persuade the Court that time was of the essence in the performance of the agreement, such that the agreement and all subsequent orders would now be moot.

Since the agreement is not an option contract, time was not of the essence of the agreement unless it was made so by the terms of the agreement, expressly or by implication. *Bishop v. Tolbert*, 249 S.C. 289, 300, 153 S.E.2d 912, 918 (1967). When a 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. *Hobgood v. Pennington*, 300 S.C. 309,

[4] Rahn raises this argument as an additional sustaining ground for the Circuit Court's Order. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (providing that a respondent may raise on appeal any additional sustaining grounds with a basis in the record on appeal).

314, 387 S.E.2d 690, 693 (Ct. App. 1989). "In equity, strict compliance with time limits contained in a contract will not ordinarily be enforced, except with regard to option contracts." *Faulkner v. Millar*, 319 S.C. 216, 220, 460 S.E.2d 378, 380 (1995). This is true even if the contract contains a deadline. *See Lowcountry Open Land Trust v. Charleston Southern Univ.*, 376 S.C. 399, 404-07, 656 S.E.2d 775, 778-79 (Ct. App. 2008).

Settlement Agreement 2 did not contain a time is of the essence provision. It only provided that Smith would deed her 1/3 interest in the Home Place Tract to Rahn, and that Rahn would have 24 months to deliver funds to Smith. Since the contract did not provide, explicitly or by implication, that time was of the essence, the parties had a reasonable time to complete performance of the contract. Since Harriett did not relinquish her interest in the Home Place Tract until July 11, 2018, Rahn had 24 months from that date to deliver funds to Smith. Smith appealed prior to the expiration of the deadline. It was entirely reasonable for the Circuit Court to ultimately determine that the parties had until February 1, 2022 to perform Settlement Agreement 2, as under the circumstances a condition precedent was not met until over two years after the agreement was signed, and Smith subsequently appealed the Circuit Court's Order prior to the expiration of the deadline.[5]

B. A judgment ordering specific performance is not moot merely because the judgment's deadline for performance has passed.

Smith would have the Court believe that simply because the deadlines contained in the Circuit Court's December 3, 2019 and December 14, 2021 Orders

[5] The February 1, 2022 deadline was stayed by the Circuit Court in its February 1, 2022 Order granting Smith's request for supersedeas.

have passed that those Orders are now moot. In other words, Smith seeks to convince the Court that any time a circuit court orders specific performance by a certain date, an incalcitrant litigant may refuse to comply with the specific performance order by that date, appeal the order, then on appeal argue that the specific performance order is moot because the deadline has passed. This would clearly be inequitable and create unfair results, and as such, Smith's argument should be rejected by the Court.

Generally, appellate courts may only consider cases presenting a justiciable controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). A justiciable controversy exists when there is a real and substantial controversy that is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract. *Id.* at 431, 468 S.E.2d at 864. A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). If there is no actual controversy, this Court will not decide moot or academic questions. *Id.* (citing *Jones v. Dillon–Marion Human Res. Dev. Comm'n.*, 277 S.C. 533, 535, 291 S.E.2d 195, 196 (1982)*; see also Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981).

From a common-sense standpoint, the passage of a deadline for specific performance does not render a circuit court's order toothless or prevent the circuit

court or this Court from granting effectual relief. While the Circuit Court's December 3, 2019 Order finds that under Settlement Agreement 2 the parties had until July 11, 2020 to comply with its terms, the Order also decrees that the parties were required to comply with these terms by July 11, 2020. Therefore, at the time of the Order, Settlement Agreement 2 had not expired and was subject to specific performance. Just because the deadline passed does not mean that the parties' rights under Settlement Agreement 2 vanished into thin air. This is particularly true because the agreement did not designate that time was of the essence.

Both parties retained the right to enforce Settlement Agreement 2 after July 11, 2020, and these rights continued for as long as the Circuit Court's judgment was valid and could be executed. *See* S.C. Code Ann. § 15-39-30 (providing that executions may issue upon a final judgment at any time within ten years from the date of the original judgment). After the expiration of the deadline, either party could have applied to the Circuit Court to enforce the judgment under Rule 70, SCRCP, or Smith could have petitioned the Circuit Court for a writ of execution. Rule 70 provides that

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party.

Rule 70, SCRCP. Smith's argument that the Orders are no longer live, and that the passage of the deadline rendered the Circuit Court completely devoid of any means to provide effective relief to Rahn, is completely misleading. Nowhere within Rule

70, statutory law, or the Circuit Court's Orders does it require that an applicant request relief prior to the expiration of a specific performance deadline, or that the applicant must pay the other party first to be entitled to performance.

The fact that the deadline expired does not mean that the December 3, 2019, April 5, 2021, and December 14, 2021 Orders are moot; if anything it means that one, or both, of the parties in this action may be in violation of the Orders. The Circuit Court retains authority and jurisdiction to enforce its judgment, and this Court, by either affirming, vacating, or reversing the Orders, has the ability to affect the rights of the parties by either granting relief to Smith or enforcing Rahn's right to the specific performance of Settlement Agreement 2.

A decision by this Court will have a practical legal effect on both parties' rights by either (1) finding that the Circuit Court was not in error in ordering specific performance, (2) finding that the Circuit Court was in error and that Rahn was not entitled to specific performance on summary judgment. The Orders still have a practical legal effect because once the stay on this case is lifted, Rahn may apply to the Circuit Court pursuant to Rule 70, SCRCP to enforce the judgment, or Smith may seek to enforce the judgment under Rule 69, SCRCP.[6] There are no negative words in South Carolina statutes or rules invalidating or nullifying an order for specific performance simply because the deadline provided by the order has passed without compliance by a nonperforming party.

While the issue of whether the passage of a court ordered deadline moots the order containing the deadline is a novel question under South Carolina law, other

[6] Rule 69, SCRCP provides for the enforcement of a judgment for the payment of money.

jurisdictions have dealt with the issue and found that the passage of the deadline does not render the order or an appeal from the order moot if effectual relief can still be provided by the courts despite its passage. *See Feehan v. Marcone*, 331 Conn. 436, 486-90, 204 A.3d 666, 697-700 (Conn. 2019); *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1111 (9th Cir. 1989); *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, (D.C. Cir. 1977).

C. The issue of specific performance in this case is capable of repetition yet evading review.

Even if the Orders were technically moot, which they are not, the Court may still review the Orders because the issue of Smith's refusal to comply with the specific performance remedy in this case is capable of repetition that would evade the Court's review. The Court may address an issue despite mootness if the issue raised is capable of repetition and would evade appellate review. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26-27, 630 S.E.2d 474, 478 (2006). South Carolina has adopted a less restrictive approach as to when this exception to the mootness doctrine may be invoked. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 432, 468 S.E.2d 861, 864 (1996). An issue may be reviewed even if it is moot if the controversy presents a recurring dilemma that can be clarified by the Court. *Id.*

The controversy presented by these consolidated Appeals is an issue that is capable of repetition but which will evade review. By its nature, the specific performance Order's deadline was going to pass long before this Court could review the issues it implicated. If the Court were to vacate the Orders after determining that the issues presented by these Appeals were moot, Rahn's specific performance

action would remain live in the Circuit Court, and Smith could continue to refuse to conform to future Orders granting summary judgment to Rahn. It is inherent in the nature of this controversy and the subject transaction that any subsequent deadline imposed by the Circuit Court would also be short-term and would certainly pass during any subsequent appeal by Smith. Thus, these Appeals fit within the evading review exception to the mootness doctrine, and the Court is authorized to review the Orders regardless of mootness.

II. The Circuit Court's Order granting specific performance is consistent with the settlement agreements' plain language and is supported by the evidence.

A. Standard of Review

While Rahn's Complaint was framed as one for specific performance, technically this case should be construed as an action to construe a contract, which is an action at law, and an action for specific performance, which is an action in equity. *See Fesmire v. Digh*, 385 S.C. 296, 303-04, 683 S.E.2d 803, 807 (Ct. App. 2009); *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). Therefore, when reviewing the December 3, 2019 Order's findings regarding the construction of Settlement Agreement 2 and whether it contained a condition precedent, the Court should apply the more deferential legal standard of review to the Circuit Court's decision, while it may find facts in accordance with its own view of the evidence regarding the elements of Rahn's specific performance claim. *See Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775-76 (1976). However, even if the Court applies a de novo standard of review to the specific

performance claim, it "does not require this court to disregard the findings at trial or ignore the fact that the [circuit court] was in a better position to assess the credibility of the witnesses" or "relieve the appellant of [the] burden to show that the trial court erred in its findings." *Lollis v. Dutton*, 421 S.C. 467, 478, 807 S.E.2d 723, 728 (Ct. App. 2017).

B. The settlement agreements contained a condition precedent to the sale of the subject property that was not satisfied until Harriette conveyed her interest in the Home Place tract.

A condition precedent to a contract is "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." *Id.* A contract is unambiguous when its meaning is clear and susceptible to only one reasonable interpretation. *See United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992). "If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms." *Id.* The purport of the written agreement is to be gleaned from the contents of the whole instrument. *Id.*

First, Settlement Agreement 2 specifically contemplates that Harriett would have deeded her interest in the Home Place Tract, and that Smith would own a 1/3

interest in the Home Place Tract, prior to Smith deeding such an interest to Rahn and the other heirs:

> In light of mediation, **Loretta R. Harriett has relinquished her interest in the "Home Place Tract" property.** Due to such, **the current ownership of the "Home Place Tract"** is 1/3 interest to Larry L. Rahn, **1/3 interest to Barbara R. Smith** . . . . **Barbara Smith will deed her interest in this property**.

(Mot. Summ. J., Ex. A). It is clear from this language that the parties anticipated that Harriett would deed her interest in the Home Place Tract, and that Smith would have a 1/3 present, not future, interest in the Tract, prior to deeding her interest to Rahn. *See id.* ("The current ownership of the 'Home Place Tract' is . . . 1/3 interest to Barbara R. Smith.").

Smith's position that this language suggests that any condition precedent had already been met by Harriett on November 20, 2015, when viewed in light of the remaining language of Settlement Agreements 1 & 2, is completely nonsensical. Since the language of Settlement Agreement 2 unambiguously sets forth that Harriett would have deeded her interest in the Home Place Tract, and that Smith would have a 1/3 current ownership interest that could be deeded to Rahn prior to Smith deeding her respective interest in the Home Place Tract, the language serves as a condition precedent to Settlement Agreement 2 and its 24-month time limit.

C. <u>The issue of whether the condition precedent was satisfied because Smith could have conveyed a future interest in the Home Place tract is not preserved for review.</u>

Perhaps in recognition of the unpersuasive attributes of her previous argument, Smith pivots to a contention that even if the agreement required Smith

to convey a 1/3 interest to Rahn and the other heirs, she did not need a current 1/3 interest because she could have deeded her 1/4 current interest along with her 1/12 future interest at any time within 24 months of Settlement Agreement 2's execution, thereby satisfying the condition precedent. First, this theory is unconvincing because Settlement Agreement 2 explicitly contemplates that Smith will have a "current ownership" of 1/3 interest in the Home Place Tract at the time of the agreed upon sale and not a future 1/3 interest. Second, Smith's argument is not preserved for review because it has been raised for the first time on appeal.

It is axiomatic that an issue is not preserved if it is raised for the first time on appeal. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). This "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and **arguments**." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added). The record in this case is void of any evidence that Smith raised this argument in opposition to Rahn's Motion for Summary Judgment, either in briefing or oral arguments, or on reconsideration of the Circuit Court's Order. Therefore, the argument is unpreserved, and the Court may disregard it as such.

D. There is evidence in the record that Rahn was ready, willing and able to perform under the settlement agreements and that it was Smith who refused to perform.

The December 3, 2019 Order finds that Rahn was ready, willing and able to comply with the terms of Settlement Agreement 2, and that this was evinced by the affidavit of Barbara Smith, which sets forth that Rahn and the other heirs were able and attempted to negotiate payment under the agreement in the fall of 2018. Smith contends that this is insufficient evidence for the purpose of granting specific performance on a motion for summary judgment. Case law indicates otherwise.

It is Smith, not Rahn, who bears the burden of demonstrating to the Court that the evidence supports contrary factual findings to those of the Circuit Court. And since this Appeal concerns a motion for summary judgment, the Court should affirm the Circuit Court's December 3, 2019 Order if there was no genuine issue of material fact as to whether or not Rahn was ready, willing and able to perform under the agreement. *See USAA Prop. and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (stating that appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP). "[A] non-moving party may not rely on speculation to defeat a motion for summary judgment." *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010). The moving party only needs to establish evidence of the elements of his claim in order to obtain summary judgment if the nonmoving party cannot demonstrate the existence of a triable issue of fact. *Hedge Cap. Invs. Ltd. v. Sustainable Growth Grp. Holdings, LLC*, 952 F. Supp. 2d 1300 (S.D. Fla. 2013).

Thus, in response to the evidence before the Circuit Court demonstrating that Rahn and the other heirs were ready, willing, and able to perform, it was Smith's burden to produce evidence that they were not able to perform, and Smith failed to carry her burden.

> In general, the rules of equity concerning the necessity of an actual tender are not so stringent as those of the law. Frequently a tender would be wholly nugatory. Thus, if the defendant has openly refused to perform, the plaintiff need not make a tender or demand. It is enough that he is ready and willing and offers to perform in his pleading.

Speed v. Speed, 213 S.C. 401, 412, 49 S.E.2d 588, 593 (1948). Here, there is evidence in the record that Rahn and the other heirs were ready and willing to perform.

Smith's affidavit provides that

> In the Fall of 2018, Larry Rahn, Kenneth Rahn, and Nancy R Crosby obtained timber bids through Timber Broker Todd Crosby per attorney Ronnie L. Crosby. I was contacted by Larry L. Rahn and then again by Nancy R. Crosby to sign papers for the sale of timber on the "Home Place Tract" of which I am 1/3 owner but not receive 1/3 of the timber proceeds. **The other owners (Larry L. Rahn, Kenneth Rahn and Nancy R. Crosby) expressed their desire to proceed with the expired Settlement Agreement 2**, **with funds of $312,000 coming from the sale of timber**.

(Smith Aff. ¶ 22) (emphasis added). Additionally, Smith, through her counsel, has conceded she openly refused to perform under Settlement Agreement 2:

> THE COURT: But you tell me that she's refused at this point to accept $312,000?
>
> MR. PARKER: Correct, Your Honor. She believes –
>
> THE COURT: Why?
>
> MR. PARKER: She believes her interest in the property is worth more than $312,000.

(Oct. 9, 2019 Hr'g Tr. 27:24-28:4). Plaintiff has also alleged in his Complaint that "all other parties are ready, willing and able to execute the deed." (Compl. ¶ 11).

Thus, under *Speed* and other authorities, the evidence in the record constitutes a prima facie showing of the ready, willing and able element of Rahn's specific performance claim for the purposes of Rahn's Motion for Summary Judgment. *See Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 101, 311 S.E.2d 91, 94 (Ct. App. 1984) ("It is sufficient if the party seeking specific performance states in his pleading that he is ready, willing, and able to perform his obligations under the contract.") *Shay v. Austin*, 466 F. Supp. 2d 664, 669 (D.S.C. 2006) ("South Carolina does not require Plaintiff to have made actual tender of the funds necessary to close in order to obtain the remedy of specific performance . . . . Plaintiff need only state in his pleading that he is ready, willing, and able to perform his obligations under the Contract."). Despite Smith's contentions, Rahn's tender of the funds is not a required element of his specific performance claim.

Further, even if the allegation in the pleadings and evidence that Smith has refused to accept the agreed upon price were not sufficient grounds for summary judgment, the Smith affidavit contains evidence that Rahn and the other heirs were able to secure the necessary money to comply with the agreement on reasonable notice. Smith's affidavit demonstrates that Rahn had received timber bids and negotiated a price with the broker that was sufficient to cover the agreed upon sale. *See Corzelius v. Oliver*, 148 Tex. 76, 220 S.W.2d 632, 635 (Tex. 1949) (holding that a buyer is obligated to do no more than offer to perform in his pleadings, but a buyer

who put on some evidence of willing funding sources has sufficiently established ability to pay); *Perper v. Edell*, 160 Fla. 477, 485, 35 So.2d 387, 391 (Fla. 1948) ("Financially able means that the proposed purchaser is able to command the necessary money to close the deal on reasonable notice.").

Since there is evidence in the record upon which the Circuit Court could have found that Rahn was ready, willing, and able to pay prior to the deadline, the burden shifted to Smith to demonstrate, through evidence in the record on appeal, that there was a genuine dispute as to whether Rahn and the other heirs were able to procure the necessary funds to perform under the agreement. However, Smith has not only conceded that she was going to refuse to accept the agreed upon sum, but she has also conceded that Rahn had the means to procure the necessary funds to perform. Based on this evidence, it was entirely appropriate for the Circuit Court to conclude that Rahn was ready, willing and able to comply with Settlement Agreement 2, and that this was confirmed by Smith's affidavit. Smith has entirely failed to point to any evidence in the record outside of arguments of her counsel that Rahn could not obtain the necessary funds.

III. The Circuit Court retained jurisdiction to determine that its previous Order had not been discharged, and to enforce the Order, on Smith's Rule 60 motion.

As an initial matter, the Circuit Court's April 5, 2021 Order equitably tolling the deadline for specific performance is not "an illegal *nunc pro tunc* order", as claimed by Smith. "When an order is signed 'nunc pro tunc' as of a specified date, it means that a thing is now done which should have been done on the specified date."

35A C.J.S. *Federal Civil Procedure* § 370 (1960). "*Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should have been done, with a retroactive effect." *Ex parte Strom*, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000). There is no directive contained in the Circuit Court's April 5, 2021 Order which could or should have been done on a previous date.

The April 5, 2021 Order states that the parties' obligations under the previous Order are tolled pending this Appeal. On December 3, 2019, the previous occasion upon which the Circuit Court had the opportunity to direct the parties via an order, the Circuit Court did not and could not have known that Smith would refuse to comply with the Circuit Court's December 3 Order by the time specified within the Order, or that Smith would argue that the Order was moot because she had refused to comply with the deadline. The Circuit Court did not know that Smith would appeal its Order, did not know that Smith would not seek a stay of the execution of the Circuit Court's December 3 Order, and did not know that Smith would refuse to convey the subject property to Rahn in accordance with the Order.

Thus, the Circuit Court could not have included the directives provided by its April 5, 2021 Order in the December 3, 2019 Order because the events necessitating its April 5 Order had yet to transpire. This clearly removes the April 5 Order from being construed as an improper *nunc pro tunc* order in any fashion, as the directives contained within the April 5 Order could not have been implemented prior to this Appeal and Smith's Rule 60 motion. Additionally, the Circuit Court was authorized to issue its April 5, 2021 Order in order to enforce its previous judgment by

equitable principles as well as our Appellate Court Rules and Rules of Civil Procedure.

A. Rule 241, SCACR, and Rule 60, SCRCP authorize a circuit court to make such orders as are necessary to enforce its previous judgments.

Rule 241, SCACR, provides that the circuit court "retains jurisdiction over matters not affected by the appeal **including the authority to enforce any matters not stayed by the appeal**." Rule 241 also provides that judgments directing the execution of conveyances or the sale or delivery of possession of real property are not stayed by an appeal. Therefore, by the language of Rule 241, the Circuit Court retained jurisdiction to enforce all matters concerning its December 3, 2019 Order, including the enforcement of the sale of Smith's interest in the subject property. Smith's Rule 60 motion and the Circuit Court's subsequent Order directly entailed either the enforcement of or relief from its prior Order granting specific performance.

While Smith asserts that the Circuit Court did not have authority to equitably toll the deadline, Rule 60 inherently provides that on a motion for relief from judgment, a circuit court has authority to refuse to relieve a party from a judgment if it finds that it is equitable that the judgment should have a prospective application. Rule 60(b)(5), SCRCP (stating that a trial court may relieve a party from a final order if it is no longer equitable that the judgment should have prospective application). That is exactly what happened in this case. The Circuit Court, in hearing Smith's Rule 60 motion, exercised its authority not only to enforce its prior Order, but also to make an equitable finding that the Order should have

prospective application. In order for the Order to have a prospective application, the Court in its discretion determined that it was necessary to toll the July 11, 2020 deadline such that both parties could await the resolution of this Appeal prior to complying with its prior Order, without the threat of contempt sanctions or further action from the Circuit Court.

B. Tolling was justified under the circumstances of this action.

The Circuit Court was not required to toll its previously imposed deadline in order for Rahn to be entitled to specific performance, even if the deadline had expired. The Circuit Court could have recognized that the December 3, 2019 Order still had a prospective application and was not discharged because the Circuit Court retained authority under Rule 70, SCRCP to enforce the Order even if the deadline had expired, and as a result denied Smith's Rule 60 motion. Regardless, the Circuit Court also had the discretion and authority to equitably toll the deadline, which benefited both parties.

Equitable principles govern the specific performance remedy. "South Carolina courts have long observed that equity looks beneath rigid rules of law to seek substantial justice, and it is well-settled that equity will not require the doing of a futile task." *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 102, 668 S.E.2d 798, 801 (2008). South Carolina courts have broad authority when exercising their equitable powers, as "breadth and flexibility are inherent in equitable remedies." *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 249, 715 S.E.2d 348, 352 (Ct. App. 2011). "Equity regards substance over form." *Blake v. Cannon*, 312 S.C. 135,

138, 439 S.E.2d 302, 304 (Ct. App. 1993). Equity regards as done that which ought to have been done. *Wilkie v. Philadelphia Life Ins. Co.*, 187 S.C. 382, 197 S.E. 375, 381 (1938). "Where, as here, a wrong has been suffered, and no adequate legal remedy exists, it is well within the court's powers to fashion an equitable remedy." *Key Corp. Cap., Inc. v. Cnty. of Beaufort*, 360 S.C. 513, 518, 602 S.E.2d 104, 107 (Ct. App. 2004).

While equitable tolling may typically apply in cases where a litigant misses the statute of limitations due to events beyond his control, it has also been applied in a variety of other contexts. *Hooper v. Ebenezer Senior Servs. and Rehab. Ctr.*, 386 S.C. 108, 116, 687 S.E.2d 29, 32-33 (2009). For example, contrary to Smith's contentions, equitable tolling does not require deception or misrepresentation by a party, and instead serves "to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits." *Id.*

> In our view, the situations described above do not constitute an exclusive list of circumstances that justify the application of equitable tolling. The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

Id. at 116-17, 687 S.E.2d at 33. "Equitable tolling is judicially created; it stems from the judiciary's **inherent power to formulate rules of procedure where justice demands it.**" *Id.* at 115, 687 S.E.2d at 32 (emphasis added). The party seeking to invoke equitable tolling need only establish a "compelling basis" for awarding such relief. *Id.*

In this case, the Circuit Court decreed on December 3, 2019 that specific performance was to be performed on or before July 11, 2020, with Smith to transfer her interest in the Home Place Tract to Rahn and the other heirs of Marvin Rahn in exchange for $312,000.00. This did not occur, primarily because Smith appealed the Order on April 14, 2020 and had previously refused to accept the agreed upon amount. The Circuit Court's April 5, 2021 Order tolled the deadline to preserve the status quo, as it would have been inherently unfair to allow the Circuit Court's prior Order decreeing specific performance to lapse not because of a change of circumstances, but because the deadline was not stayed by Smith after the initiation of this Appeal.

While S.C. Code Ann. §§ 18-9-160 & -170, and Rule 70, SCRCP, provide that the party entitled to specific performance may apply to the court to compel obedience with an order, or that the party being directed to perform may stay the execution of a judgment, nowhere do the statutes and rules state that the party entitled to specific performance must preemptively apply to the court to stay the performance deadline or else entirely lose his right to recovery. In fact, Rule 70, SCRCP, specifically contemplates that the party entitled to specific performance may be granted relief in the event that the other party "fails to comply within the time specified", i.e., after the deadline has already expired. Rule 70, SCRCP.

If anything, the Circuit Court's tolling of the deadline ultimately protected Smith and her interests. Since Rule 70 provides that a plaintiff may continue to seek to compel specific performance once a deadline has expired, and S.C. Code

Ann. §§ 18-9-160 & -170 provide that a plaintiff's attempts to execute on a judgment awarding specific performance are only stayed upon application to the Circuit Court, if the Circuit Court had not equitably tolled the deadline, Rahn could have sought relief from the Circuit Court, either under Rule 70 or through contempt proceedings, at any time after July 11, 2020. It is surprising that Smith now seeks to argue that the Circuit Court could not toll the deadline, when in doing so the primary benefit of the tolling has been realized by Smith.

In this case it would have been egregiously unfair and an affront to the Circuit Court's authority for Smith to have been ordered to comply with the agreement, only then to permit her to escape from the Order's directives by virtue of the fact that she continued to refuse to comply with the Circuit Court's deadline. The most equitable solution was for the Circuit Court, in the interest of clarity, to toll the deadline for performance until the parties had the opportunity to have the issues reviewed by this Court. The Circuit Court did so on April 5, 2021. While the Circuit Court did decree a new deadline for performance on December 14, 2021, it also stayed the deadline on February 1, 2022 by way of the Circuit Court's Order granting supersedeas. Therefore, by way of the Circuit Court's Orders, neither party is in contempt, and both parties may still comply with the Circuit Court's Order decreeing specific performance, or either party may choose to not comply and await this Court's decision. Either way, equitable tolling in this instance served the interests of both parties, maintained the status quo on appeal, and was by far the

most practical solution for both parties in a scenario that was entirely created by Smith's refusal to comply with the Circuit Court's initial Order.

In the alternative, even if the Circuit Court should not have tolled the deadline, which would only work against Smith's interests, it would not have any significant impact on the Circuit Court's April 5, 2021 Order. The April 5, 2021 Order denied Smith's Rule 60 motion, regardless of whether the July 11, 2020 deadline was stayed. In doing so, the Circuit Court necessarily found that its judgment had not been satisfied or discharged, and that it was equitable that the judgment should have a prospective application. Under Rule 70, SCRCP, this prospective application would exist regardless of whether the July 11, 2020 deadline had expired or not. Either way, there were sufficient facts in the record to support that under the circumstances, equitable tolling would serve to protect the status quo and serve the interests of both parties while this Appeal is pending, and as such, the Court should affirm the Circuit Court's April 5, 2021 Order.

CONCLUSION

The record in this case clearly indicates that in the light most favorable to Smith, the 24-month time period prescribed by Settlement Agreement 2 did not begin to run until July 11, 2018, and that within the following 24-month period Rahn had the means to procure the necessary funds as required by the agreement. Further, the Circuit Court retained jurisdiction to enforce its initial Order on Smith's Rule 60 motion, even if the deadline for specific performance had expired during the pendency of this Appeal. And even if the Circuit Court's tolling of the

deadline was unnecessary to preserve the initial Order, the Circuit Court was within its discretion to toll the deadline out of an abundance of caution to preserve the status quo. For the foregoing reasons, the Circuit Court's December 13, 2019, April 5, 2021, and February 1, 2022 Orders should be affirmed.

PARKER LAW GROUP, LLP

By:_____

January 13, 2023
Hampton, South Carolina

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ATTORNEYS FOR THE RESPONDENT

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Bentley D. Price, Circuit Court Judge

Consolidated Appellate Case No.: 2020-000607

Larry Rahn ……..…….....Respondent,

-v-

Barbara Smith ……Appellant.

PROOF OF SERVICE

The undersigned certifies that a copy of Respondent's Initial Brief has been served upon the following counsel of record by emailing a copy of the same this 13th day of January 2023.

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January 13, 2023
Hampton, South Carolina

John E. Parker, Jr.

January 13, 2023

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SC Court of Appeals

Via Email Only: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, SC 29211-1629

Re: Larry Rahn v. Barbara Smith
Appellate Case No.: 2020-000607

Dear Ms. Kitchings:

Please find enclosed for filing Initial Brief of Respondent and Respondent's Designation of Matter to Be Included in the Record on Appeal and Proof of Service in the above reference matter. By copy of this letter, I am serving copies on all counsel of record by email only.

With kind regards, I am

Sincerely,

John E. Parker Jr.

JAY/cc
Enclosures as stated
Cc: Tomas J. Rode, Esq. (Via Email Only)
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