THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No.: 2022-000470

Levi Grantham, LLC ……Appellant,

v.

Kathy Wright Mitchell, ……..Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This case involves a dispute arising from a real estate purchase agreement between appellant Levi Grantham, LLC, as the purchaser, and respondent Kathy Wright Mitchell, as the seller. (R. pp. 24-32).

Appellant filed a lis pendens on the subject real property located in Charleston County on August 30, 2021, to give notice of its potential claim against respondent arising out of the above contract. (R. pp. 13-14). Appellant then filed its complaint in this action on September 20, 2021. (R. pp. 17-22). The complaint asserted a cause of action against respondent for anticipatory breach of contract and sought specific performance of her obligations under the purchase agreement.

Respondent filed an answer and counterclaim on November 8, 2021 (R. pp. 33-37), asserting that appellant had breached the purchase agreement by failing to fulfill the conditions precedent to closing and causing an unreasonable delay in performance of the contract. Respondent's counterclaim sought a rescission of the purchase agreement as a result Appellants' conduct. Appellant filed a reply to respondent's counterclaim on December 8, 2021. (R. pp. 38-40).

On February 22, 2022, respondent filed and served a motion for summary judgment and a supporting affidavit. (R. pp. 41-52). Appellant submitted its Memorandum in Opposition to respondent's Motion for Summary Judgment (R. pp. 53-63) and an Affidavit of Joshua Craig (R. pp. 65-101) on March 28, 2022. Respondent filed a Memorandum in Support of Summary Judgment (R. pp. 102-110) on March 29, 2022.

A hearing on respondent's motion for summary judgment was held by WebEx before the Honorable Frank R. Addy, Jr. on March 31, 2022 (R. pp. 136-167). Judge Addy issued his order

granting respondent summary judgment on April 1, 2022. (R. pp. 5-8) In the order, the circuit court ruled "The refusal or unwillingness of [Appellant] to close on the Agreement to Buy and Sell Real estate within a reasonable period of time is a substantial and fundamental breach which defeats the purpose of the subject contract. Requiring the [Respondent] to wait more than one year to close on the Agreement, when "time is of the essence," and no date is set for the satisfaction of contingencies, is unreasonable." (R. p. 7). As a result, the circuit court ruled that the purchase agreement would be rescinded if appellant did not close on the contract to purchase the property by April 15, 2022. (R. pp. 7-8). Appellant did not close on the contract by the time allotted by Judge Addy, and has not closed on the sale since that time.

Appellant filed a motion to reconsider the order granting summary judgment on April 11, 2022. (R. pp. 111-117). Respondent filed a memorandum in opposition to appellant's motion to reconsider on April 13, 2022. (R. pp. 118-121). Judge Addy issued a Form 4 Order denying Appellant's Motion for Reconsideration on April 14, 2022. (R. pp. 9-12). Appellant filed its Notice of Appeal with the Court of Appeals on April 18, 2022. (R. p. 122).

STATEMENT OF FACTS

Appellant, Levi Grantham, LLC, is an experienced real estate development company in South Carolina. (R. pp. 65-67). In the Addendum 1 to Agreement to Buy and Sell Real Estate executed on February 11, 2021 (R. p. 32), appellant lists two law firms, one in Charleston and one in Atlanta, in addition to its home office, as being representatives entitled to receive copies of Notices under the contract. Respondent is not a Real Estate professional, though she does have a high school education. (R. p. 43). She inherited the subject property from the estate of her mother by Deed of Distribution dated April 7, 2014. (R. p. 43).

The street address of the subject property is 1584 Folly Rd., Charleston, SC 29412. (R. p. 43). Folly Road is a heavily travelled thoroughfare that branches directly off of U.S. Hwy 17 North. It runs from peninsular Charleston, crosses the Wappoo Cut, through all of James Island and ends at Folly Beach. The property has more than 80 feet of frontage on Folly Road and contains 0.88 acres. The Charleston County GIS map of the property shows its exact location. (R. pp. 43, 108). The appellant and respondent entered into the written contract of sale and Addendum 1 on February 11, 2021, agreeing that for an agreed upon purchase price of $400,000.00 respondent would sell, and appellant would buy the property. (R. pp. 24-32).

The contract, which was prepared by the appellant, states in two separate places that "Time is of the Essence" in bold and underlined type (R. p. 26, §§ 13 & 16) and sets an original closing date for 30 days following the expiration of the 90 day Termination Right based on inspection and due diligence. (R. pp. 25-26, §§ 8 & 13). That totaled 120 days from the February 11, 2021 date of the contract. The contract states that the buyer can extend the closing date for an additional 30 days in the event buyer needed additional time to satisfy, through no fault of either party, (unstated) contingencies. (R. p. 28, § 33).

A subsequent paragraph states that if the (stated) contingencies were not met by the original closing date, buyer could extend the closing date by giving Notice to the Seller of its intention to "toll" the agreement until the contingencies were satisfied. (R. p. 28, § 36). This paragraph does not contain a date by which the appellant was to satisfy the (stated) contingencies, and there was no provision in the contract requiring the appellant to pay for the "tolling" or further extensions.

Evidence in the record shows only two communications from the appellant to the respondent. The first is a letter dated June 4, 2021 (R. p. 109), where the buyer notified seller that it was extending the closing date by 30 days to pursue satisfaction of the contingencies. The second on July 9, 2021 (R. p. 110), where the buyer notified the seller that it was "tolling" the sales agreement indefinitely. The July 9, 2021 letter to seller states, "Closing under the Agreement shall occur upon the satisfaction of the contingencies listed in the Agreement." The buyer was attempting to assemble the subject property with other adjoining properties for development. Appellant knew there would be a permitting process and wrote in the two contingencies, along with the "tolling" language into the subject contract that would indefinitely extend the time for closing at the option of the buyer. (R. pp. 66-67).

The respondent admitted that after the July 11, 2021 closing date came and went with no communication from the appellant, she became frustrated with the passage of time and advertised the property for sale herself on Zillow.com, an internet real estate marketing website. (R. pp. 44-45). The respondent received no interest in the property from any potential buyer from the Zillow.com advertisement. When the plaintiff objected to the listing, and commenced this lawsuit, respondent removed the Zillow.com listing and sought legal counsel. (R. p. 45).

Having heard nothing from the appellant, other than receiving a lis pendens, summons and complaint, respondent, on November 4, 2021, had her attorney give notice to the appellant that an

extension to meet the contingencies which began on July 10, 2021 would end 5 months thereafter; that is on December 10, 2021. (R. pp. 45, 48-49). Respondent advised appellant that she was ready, willing and able to meet the terms and conditions of the contract and would sell the property to it at the contract price through December 10, 2021, ten months from the contract date. Appellant was advised that if the contract was not closed by December 10, 2021, or unless other arrangements were made to extend the contract further, respondent would consider the contract to be terminated, and would seek a rescission of the contract or damages at law as may be applicable. (R. pp. 48-49). In the November 4, 2021 letter, respondent advised appellant that an email sent on October 27, 2021 by counsel for respondent to counsel for appellant explained his client's legal position to appellant; that because there was no definitive end to the contingency period, respondent would consider the contract terminated if it were not closed within a reasonable period of time.

On December 7, 2021, counsel for appellant emailed a response to the November 4, 2021 letter with some information regarding appellants permitting requests, but no closing was offered, and no closing took place. There was no response from appellant regarding what it thought would be a reasonable time for closing. (R. p. 45).

There was no communication from appellant to respondent after December 7, 2021. On January 5, 2022, respondent reminded appellant that February 11, 2022 would mark the one-year anniversary of the contract, and the eight-month anniversary of the extension granted to allow appellant time to meet the contingencies. Respondent advised appellant that if the subject contract was not closed by February 11, 2022, respondent would consider the contract to be terminated and would seek a rescission of the contract, or damages at law, as may be applicable. (R. p. 50). Respondent also expressed her willingness to terminate the contract sooner than February 11, 2022, if appellant would agree. There was no response from appellant to the January 5, 2022

letter regarding a closing, and again there was no response from appellant regarding what it thought would be a reasonable time for closing.

On February 2, 2022, respondent advised appellant that she was tendering to it a full return of appellant's $5,000.00 earnest money deposit paid pursuant to the terms and conditions of the subject contract. Respondent advised the escrow agent that she consented to an immediate release of the funds earmarked as its earnest money deposit to appellant if it either consented to, or was ordered to, rescind the subject contract. (R. pp. 46, 51). There was no response from appellant to the February 5, 2022 letter and again there was no response from appellant regarding the status of the contingencies or what it thought would be a reasonable time for closing.

On February 22, 2022, respondent filed and served her motion for summary judgment and affidavit on appellant. (R. pp. 41-42). Appellant did not contact respondent at all until send its memorandum in opposition to the motion and the affidavit of Joshua Craig on March 28, 2022. (R. p. 53).

Appellant did not serve any discovery request of any kind upon respondent or her counsel between the commencement of this lawsuit and the date the summary judgment was granted by the circuit court. During this period of time appellant was advised in pleadings and in letters that respondent would seek a rescission if the contract didn't close. (R. pp. 45-50). No discovery requests or motions for continuance were served by appellant during the period of time between the filing of the summary judgment motion and the date of the hearing.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP; (providing that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Schmidt v. Courtney, 357 S.C. 310, 317, 592 S.E.2d 326, 331 (Ct. App. 2003) (requiring the non-moving party to "come forward with specific facts showing there is a genuine issue for trial") "[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

ARGUMENT

I. Summary Judgment was properly granted to respondent, as appellant's breach of contract was so fundamental and substantial as to defeat the purpose of the contract.

A. The terms of the contract and the undisputed facts indicate a fundamental and substantial breach by appellant.

The following items are direct quotations from the subject contract dated February 11, 2022, and are important to a full understanding of the facts and the breach of contract[1]:

****

3. **PURCHASE PRICE** shall be $400,000, Four Hundred Thousand and no/100 dollars. (R. p. 24).

4. **METHOD OF PAYMENT**: Purchase price shall be paid as follows: Cash …. (R. p. 24).

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8. **OPTION TO TERMINATE AFTER DUE DILIGENCE**: (A) Seller grants to buyer a 90 day right ("Termination Right") from the date of this agreement during which buyer may do any or all of the following:

> 1. Conduct at Buyer's sole expense whatever due diligence, inspections, examinations, surveys, & testing, if any, Buyer deems appropriate to evaluate the suitability of Property for Buyer's intended use, including, but not limited to, zoning, governmental regulations, environmental concerns, availability of utilities … (hereinafter collectively referred to as "Buyer's Due Diligence"). (R. p. 25).

[1] In order to comply with the Appellate Court Rules, this brief has kept all font sizes in the Purchase Agreement in 12 point or higher. Respondent craves reference to the Purchase Agreement, Item 36 "Contingencies," in the Record on Appeal at R. p. 28 to note the decrease in size of the font used in that section.

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9. **BUILDING PERMIT**: This Agreement ____is _X_ is not contingent upon Buyer's ability to acquire all required licenses and permits from the appropriate governmental authority to build on the Property … .(R. p. 25).

****

13. **CONVEYANCE SHALL BE MADE**: [T]he deed shall be delivered at the stipulated place of closing, and the transaction closed on or before 30 days after the Termination Right expires, no later than 9:00 p.m. **Time is of the essence** …. (R. p. 26).

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33. **EXTENSION AGREEMENT**: If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both [parties agree to extend this agreement for a period not to exceed 30 consecutive days from the original closing date. Closing shall occur within this time extension but in no event shall closing occur later than the above extension date. **Time is of the essence**. (R. p. 28).

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36. **CONTINGENCIES**: These stipulations shall preempt printed matter herein: (attach and reference addendum if necessary) The following conditions shall be satisfied prior to closing under the Agreement:

A. Purchasers receipt of preliminary plat approval from the applicable governmental entity for Purchaser's intended development plan.

B. Access availability from the SCDOT or applicable authority for Purchaser's intended development plan.

If all the conditions set forth in this Paragraph are not satisfied as of closing, the buyer, at its option in addition to applicable remedies, may terminate the Agreement by delivering written notice thereof to Seller, and upon such Termination the Earnest Money shall be returned to the Buyer,

or at the election of Buyer as evidenced by written notice thereof to Seller, the Agreement may be tolled until all such conditions are satisfied. (R. p. 28).

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Following the 90-day Buyers Due Diligence period which ended on May 11, 2021, appellant wrote to respondent stating that the contingencies remain unsatisfied and cannot be resolved by June 11, 2021. (R. p. 109). The appellant exercised its right under the contract to extend the closing for an additional 30 days pursuant to Paragraph 33. This letter from appellant does not advise respondent of its position that paragraph 33 has been preempted by paragraph 36.; that time is no longer of the essence; that the contract may be "tolled" in the future; and that there may be no closing for years.

On July 9, 2021, just two days before a July 11, 2021 closing date, appellant wrote another letter to respondent stating that the contingencies remain unsatisfied, and that it is exercising its right to "toll" the agreement. (R. p. 110). This letter from appellant does not advise respondent of its position that time is no longer of the essence or that there may be no closing for years.

Hearing nothing more from the appellant about the sale, a proposed closing or the status

of the contingencies, respondent became frustrated with the appellant and listed the subject property for sale on Zillow.com.[2]

According to the respondent's counsel's letter dated November 4, 2021 to appellant's counsel, respondent advised appellant that the listing had been removed from Zillow.com, that South Carolina law inferred a reasonable period of time to close a real estate transaction when none is stated in the contract of sale; that respondent was ready, willing and able to sell the property to the appellant in accordance with the terms of the contract; and that respondent was willing to extend the closing from July 11, 2021 to December 10, 2021. (R. pp. 48-49). Just days before December 10, 2021, respondent's attorney received a response from appellant's counsel with some information regarding appellant's attempts to meet the contingencies, but offering no proposed closing date. Hearing nothing more from appellant thereafter, another letter was sent to appellant's counsel dated January 5, 2022 containing respondent's agreement to an unsolicited extension of time to close until February 11, 2022- the one-year anniversary of the contract. (R. p. 50). Since the time of the commencement of this action, the only communication respondent received from the appellant regarding the appellant's efforts to satisfy the contingencies was appellant's counsel's early December 2021 communication. There is no evidence in the record indicating that appellant responded to the January 5, 2022 letter.

By letter dated February 2, 2022 respondent advised appellant and the escrow agent that

[2] Zillow.com is a website that calls itself "[T]he leading real estate marketplace. Search millions of for-sale andrental listings, compare Zestimate® home values and connect with local professionals. Zillow publishes Zestimate home valuations for 104 million homes across the country, and uses state of the art statistical and machine learning models that can examine hundreds of data points for each individual home. Zestimate is not an appraisal and cannot be used in place of an appraisal."

she was tendering a full return of appellant's earnest money deposit if appellant either consented to, or was ordered to rescind the contract. Respondent remained ready willing and able to close on February 11, 2022. (R. p. 51). There is no evidence in the record indicating that appellant responded to the February 2, 2022 letter.

February 11, 2022 came and went without any communication from appellant. 240 days had passed since the original closing date. Both before and after the brief period during which respondent listed the property on Zillow.com, respondent expressed her willingness to comply with the terms of the contract with appellant and reasonably extend the time of closing. Without receiving any meaningful communication from appellant, respondent was well within her rights to bring her summary judgment motion alleging that appellant breached the contract by failing to close, and that its breach was fundamental and substantial.

The subject contract was prepared by appellant. (R. p. 29). The language in a contract is to be strictly construed against the party who prepared the contract, and most liberally in favor of the other party to the contract. *Anderson's South Carolina Requests to Charge* – Civil § 19-7, 2016 Rev. 2nd Ed. The contract, as prepared by appellant contained the "tolling" language in paragraph 36 (R. p. 28), which appellant contends should keep the contract viable for years, without respondent receiving any remuneration for the extensions or for reimbursement for her real estate taxes or insurance in the interim; without any regard to real estate price fluctuations; and most importantly without any defined end to the tolling period. This is true in spite of time being of the essence appearing twice in the contract in bold and underlined font. Only 1.25% of the purchase price was put down as earnest money by appellant and was to hold the property off of the market for an indeterminate period of time.

In South Carolina, the court will apply a reasonableness standard, and will infer that the

contract should be completed within a reasonable period of time where a contract does not express a time deadline, and the contract otherwise states that "time is of the essence." Davis v. Cordell, 237 S.C. 88, 115 S. E. 2d 649 (1960). Having advised appellant that a reasonableness standard should apply to the fulfillment of the contingencies, based on appellant's lack of contact with respondent, based on appellant's failure to keep respondent updated as to the status of the contingencies and based on respondent's demands for closing (R. pp. 48-52), it was reasonable, and based on the language of the contract, the only inference that could be reached by the circuit court was that appellant had committed a fundamental and substantial breach of the contract. It is elementary that a failure to timely perform a contract constitutes a breach of that contract.

The circuit court was correct in finding that a breach of contract occurred and that the breach warranted a rescission of the contract by summary judgment. "The general rule is that for a breach of contract to warrant rescission, the breach must be so fundamental and substantial as to defeat the purpose of the contract." Gibbs v. G.K.H., Inc., 311 S.C. 103,105,427 S.E.2d 701, 702 (Ct.App.1993); "[A] rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." Rogers v. Salisbury Brick Corp., 299 S.C. 141, 143-44, 382 S.E.2d 915, 917 (1989). See also Ellie, Inc. v. Maccichi, 358 S.C. 785, 94 S.E.2d 485 (Ct. App. 2004).

The respondent clearly and unequivocally notified appellant of her intent to terminate and rescind the contract as pled in her answer and counterclaim, first on November 4, 2021, again on January 5, 2022, again on February 4, 2022 and again when the motion for summary judgment was served on February 22, 2022. Notwithstanding the notice to appellant, it continued to delay its performance. The appellant and respondent could be put back to a

status quo, by a return of appellant's earnest money deposit. First Equity Investment Corp. v. United Service Corp. of Anderson, 299 S.C. 491, 386 S.E.2d 245 (1989). As of the date of the motion hearing, respondent had tendered the return of the deposit and had authorized the escrow agent to give the deposit back to the appellant. (R. pp. 51-52). There had been no whole or part performance on either parties' part of the subject contract as of the date of the motion hearing. Zan, LLC v. Ripley Cove, LLC, 406 S.C. 404, 414-15, 751 S.E.2d 664, 669-70 (Ct. App. 2014) (finding that rescission is appropriate only where both parties could be restored to the status quo).

B. Appellant's delay in closing the purchase agreement was not reasonable as a matter of law, as the facts presented at the summary judgment motion hearing were undisputed and susceptible of only one reasonable inference.

There is no evidence in the record indicating that the respondent was advised that the contingency period would be 1-3 years. (R. p. 67). At the motion hearing, after the respondent had presented clear language from the contract, and undisputed evidence regarding the conduct of the parties thereafter, appellant alleged, then and now, that to extend the terms of the contract indefinitely is reasonable. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial". Rule 56 (e) SCRCP. To survive the motion for summary judgment, on the basis that its conduct was reasonable, which conduct the circuit court judge found to be wholly "unreasonable," the appellant was obligated to come forward with evidence proving that its conduct was "reasonable." Respondent

submits that there is no evidence in the record showing that 1) an indefinite extension of time was granted, in the contact where 'time was of the essence; 2) no evidence that appellant and/or respondent knew the length of time the indefinite "tolling" of the contract entailed; 3) no evidence that respondent knew she was to carry all of the expenses of the real property without payment during the extension period; and 4) there is no evidence that appellant, with its superior knowledge of the circumstances, advised respondent that the contingency period could extend for years.

Whether an amount of time to do or not do a particular act is a reasonable amount of time is a question of law when the facts are undisputed and susceptible of only one reasonable inference. Crawford v. Southern Ry. Co., 101 S.C. 522, 86 S.E. 19 (1915) (whether notice was given within a reasonable time is a question of law when the facts are undisputed and susceptible of only one reasonable inference.) In this case, and in the summary judgment motion, appellant's affidavit in opposition to respondent's motion for summary judgment clearly shows that appellant has vast experience in real estate development. (R. pp. 65-69). The affidavit speaks at length about the various processes a developer must go through to get approvals for a development. The affidavit also speaks of how another parcel in the proposed development is divided by a boundary line between the City of Charleston and the County of Charleston. But nowhere in appellant's affidavit is it mentioned that this information, which is well within the ken of real estate developers, was ever told to respondent. The record is devoid of any evidence showing that appellant told respondent its development plans, or the amount of time appellant believed it would take to satisfy the contingencies. Proof of respondent's lack of knowledge can be seen in her willingness to allow appellant extensions, for free, up to only one year from the contract date. The fact is, there is no evidence showing that appellant and

respondent has the same level of information when entering into the contract. And only one reasonable inference could be drawn by the circuit court, and that is that they were not on equal footing. If the parties were on equal footing, perhaps the appellant would have reminded the respondent of that fact in a response to respondent's request to close the transaction. Appellant instead made no meaningful responses to respondent's requests.

The question of the reasonable amount of time to cut standing timber, in a case where no time limit appeared in the contract was considered in Gray v. Marion County Lumber Co., 102 86 S.E. 640 (1915), which discusses Minshew v. Atlantic Coast Lumber Corp. 98 S. C. 8, 81 S. E. 1027 (1904).

> "In (Minshew's Case) it was held, inter alia, that the grant being silent as to when the cutting should begin, the law implied it should begin within a reasonable time; that no general rule could be laid down as to what would be a reasonable time in all cases, but that must be determined upon the facts and circumstances of each case which were known to both parties at the time of making the contract; that facts or circumstances known to only one of the parties should not be considered in determining the issue, because they could not reasonably be supposed to have been within the contemplation of the other …."

Gray, at 86 S. E. 641. Note that the Gray court did not include the language that reasonableness is "a question of fact." Respondent submits that the language was not included in the Gray decision because the court found that facts or circumstances known to only one of the parties "should not be considered in determining the issue." Id. In reviewing the present case, this court can find

that because appellant had superior knowledge of real estate development and the great lengths of time required to meet governmental design and permitting requirements, those facts and circumstances being known to only one party need not be considered. That makes the facts in this case undisputed and susceptible of only one inference, and the issue of the reasonableness of time to close this transaction a question of law.

II. The circuit court was correct in granting summary judgment, as time was of the essence with regard to the subject of the unambiguous purchase agreement.

That "time was of the essence" with regard to the subject purchase agreement was clearly stated in bold, underlined print twice in the contract in paragraphs 13 and 33. (R. pp. 26, 28). The language contained in paragraph 36: "**CONTINGENCIES**: These stipulations shall preempt printed matter herein …." does not operate to preempt a fundamental part of the contract.

Paragraph 36 (R. p. 28) does not create an ambiguity in the contract, and must be read in conjunction with the purchase agreement as a whole; that the obligation of the appellant to close on the sale must occur within a reasonable time. To read paragraph 36 otherwise, and to consider that appellant would have an indeterminate amount of time to satisfy the contingencies, or not close at all if the contingencies could not be met, would transform the entire purchase agreement, entitled "Agreement to Buy and Sell Real Estate" from a contract into an option to purchase. An option to purchase gives the seller no enforceable rights and is not a sale. The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 195, 617 S.E.2d 125, 133 (Ct. App. 2005).

A contract to buy and sell real estate creates a mutual obligation on the part of one party

to sell and the other to purchase the property. An option to purchase merely gives the buyer the right to purchase the property at a fixed price, within a fixed time, without imposing any obligation to do so. Hutto v. Wiggins, 175 S.C. 202, 205, 178 S.E. 869, 871 (1935). There is simply nothing to suggest that the parties in this case meant anything other than "sell or transfer" when they used those terms in the purchase agreement. The obligations as a whole in the subject contract are mutual. Respondent had to have the legal right to compel a sale within a reasonable amount of time. Giving credence to appellant's contention that an ambiguity existed, would result in the appellant having the right to purchase the property at a fixed price, with respondent having no right to compel a sale at all under the contract if appellant chose not to satisfy the contingencies.

The Purchase Agreement was prepared by appellant. Ambiguous language in a contract should be construed liberally and interpreted strongly in favor of the non-drafting party. Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (1981). "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 262, 569 S.E.2d 349, 358 (2002), *vacated on other grounds,* 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). A contract is read as a whole document so that "one may not, by pointing out a single sentence or clause, create an ambiguity." Schulmeyer v. State FarmFire and Cas. Co., 353 S.C. 491, 579 S.E.2d 132 (2003), *citing* Yarborough v. Phoenix Mut. LifeIns. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975); See also Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585,

591-93, 658 S.E.2d 530, 542-43 (Ct. App. 2008) (reversing the Master's finding that the contract was ambiguous and finding it to be unambiguous and capable of only one reasonable interpretation).

If the appellant knew that the permitting process would take 1-3 years, why would it include the paragraphs requiring a closing 30 days after a 90 day inspection period, or a 30 day extension after that? Both paragraphs include "time is of the essence." Why would appellant state that time was of the essence in bold and underlined print twice in the contract only to "preempt" those provisions with type in the smallest font possible? Appellant should not be able to create an ambiguity in the contract simply by pointing out the printed word "preempt" in paragraph 36. (R. p. 28).

The courts of this state are bound to interpret the agreement by looking at the entire agreement from beginning to end: precedent explains that when construing a contract, "all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity." Yarborough at S.C. 592, 225 S.E.2d at 348. "[P]resumably, all portions of a contract are inserted for a purpose and the contract must be read as a whole, giving appropriate weight to all provisions." Id. We assume the parties intended a meaningful contract of sale, not a nonsensical or absurd one, so we read agreements in a way that "will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so." Id. at S.C. 593, 225 S.E.2d at 349. It is more than reasonable to consider the subject agreement as an unambiguous contract of sale and not an option to purchase. No ambiguity is raised by appellant that can defeat the ruling of the circuit court that summary judgment is appropriate as a matter of law.

III. The circuit court did not err in granting summary judgment before the appellant conducted discovery.

The circuit court did not err in granting respondent summary judgment because 1) appellant had the opportunity to conduct discovery; 2) appellant advanced no reason to the court, by affidavit or otherwise, as to why its opportunity to conduct discovery was insufficient; and 3) discovery would be unlikely to uncover additional, relevant evidence. Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003).

Appellant filed its summons and complaint on September 20, 2021. (R. p. 17). Respondent's answer and counterclaim was served on November 8, 2021. (R. p. 33). Respondent's motion for Summary Judgment was served on February 22, 2022 (R. p. 41) and heard on March 31, 2022. (R. p. 5). Interrogatories and a Request for Production could have been served any time after the commencement of the action, and depositions could have been noticed any time after 30 days after the service of the summons and complaint, but they were not. See Rules 33 (a), Rule 34 (b) and Rule 30 (a) (1) SCRCP.

Appellant has advanced no good reason why 4 months or more was insufficient time under the facts of this case to develop testimony or documentation in opposition to the motion for summary judgment. Appellant made no formal motion for a continuance or pointed out in any specific manner how it would be prejudiced by its inability to conduct discovery. Middleborough Horiz. Property Regime Council of Co–Owners v. Montedison S.p.A., 320 S.C. 470, 479–80, 465 S.E.2d 765, 771 (Ct.App.1995).

When raising the issue of prematurity, the non-moving party in a motion for summary judgment must demonstrate that discovery would uncover additional, relevant evidence. Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991). The evidence must also show that the non-moving party had acted with

reasonable diligence. Id. at 113, 410 S.E.2d at 544. The nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a "fishing expedition. Id. at 112, 410 S.E.2d at 544.

Rule 56(f) SCRCP requires affidavit(s) to be filed by the non-moving party that he "cannot for reasons stated present by affidavit facts essential to justify his opposition." Only then can the court consider refusing the motion for summary judgment or continue the motion hearing. "Thus, Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery." Schmidt v. Courtney, at S.C. 320, S.E.2d 332, quoting Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001).

CONCLUSION

The circuit court's grant of summary judgment under these facts and circumstances was appropriate and should be affirmed. The undisputed facts presented in respondent's motion for summary judgment show that appellant's breach of the terms of the subject contract was so fundamental and substantial as to defeat the purpose of the contract. Appellant's delay of more than one year in closing the real estate transaction was unreasonable as a matter of law. The parties' purchase agreement was an unambiguous contract to buy and sell real estate, governed by the "time is of the essence" clauses. Because the purchase agreement is not ambiguous, it was appropriate for the circuit court to grant summary judgment as a matter of law. Appellant has failed to show by affidavit or otherwise that it acted with reasonable diligence in seeking discovery or that additional discovery would be necessary to develop relevant opposition to the motion for summary judgment.

Respectfully Submitted,

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February 17, 2023

Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No.: 2022-000470

Levi Grantham, LLC ……..Appellant,

v.

Kathy Wright Mitchell, ……Respondent.

CERTIFICATE OF RESPONDENT'S COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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17th day of February, 2023
Charleston, South Carolina