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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM MARLBORO COUNTY  
Court of Common Pleas

Michael S. Holt, Circuit Court Judge

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Appellate Case No: 2023-000919

Case No.: 2021-CP-34-00163

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Ronald David Kirby, Jr., .....Appellant,

v.

Todd Provencher, .....Respondent.

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**INITIAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

1. **DID APPELLANT'S FAILURE TO PRODUCE CLEAR TITLE TO THE REAL ESTATE VIOLATE TERMS OF THE REAL ESTATE PURCHASE CONTRACT TO PROVIDE CONVEYANCE OF FEE SIMPLE TITLE?**
2. **IS RESPONDENT ENTITLED TO SUMMARY JUDGMENT SINCE APPELLANT FAILED TO PROVIDE CLEAR TITLE BY CLOSING DATE?**

## STATEMENT OF THE CASE

This action was commenced by a Summons and Complaint on June 8, 2021. The Appellant Kirby filed an Answer on July 1, 2021. Respondent Provencher filed a Motion for Summary Judgment on February 3, 2023. The parties filed Memorandums in Support and in Opposition. A hearing was held on April 20, 2023 before the Honorable Michael S. Holt. Judge Holt heard oral arguments, reviewed the pleadings and submissions, and properly granted Respondent's Motion for Summary Judgment on May 11, 2023. Judge Holt further ordered that the Respondent's failure to provide certified title to the real estate violated the Real Estate Purchase Contract between the parties to provide for the conveyance of fee simple title. Appellant filed a Notice of Appeal on or about June 7, 2023.

## STANDARD OF REVIEW

Summary judgment is appropriate if 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 judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d

485 (2005); BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). 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. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App.2005).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004).

## FACTS

On or about December 8, 2020, the parties entered into a Real Estate Purchase Contract. (Contract, R. p. \_\_\_\_). Buyer Provencher agreed to purchase property from Seller Kirby for the sum of \$45,000.00 (Contract, R. p. \_\_\_\_). In return, Seller Kirby agreed to provide "fee simple title to the Property to the Buyer..." (Contract, ¶ 10, R. p. \_\_\_\_). Respondent paid Appellant \$37,000.00 toward the purchase of the property. (Kirby Dep. p. 37, ll. 8-10 and 24-25, R. p. \_\_\_\_). Appellant Kirby admitted that he did not have title to the real property on the day of closing and there was a cloud on the title as to some lots. (Kirby Dep. p. 16, ll. 17-25 p. 17, ll. 1-9, R. p.

\_\_\_). Buyer Provencher was notified by the attorney's staff that the attorney would not certify title to the property. (Email from Easterling office to Provencher dated February 1, 2021, R. p. \_\_\_). As a result of Appellant Kirby's failure to have clear title to the property, Respondent Provencher did not go forward with the closing. Appellant Kirby has refused to return Buyer Provencher's money. The instant matter followed.

### **ARGUMENT**

I. THE TRIAL COURT PROPERLY FOUND THAT APPELLANT'S FAILURE TO PRODUCE A CLEAR TITLE TO THE REAL ESTATE VIOLATES TERMS OF THE REAL ESTATE PURCHASE AGREEMENT TO PROVIDE CONVEYANCE OF FEE SIMPLE TITLE

Buyer Provencher requested judgment in the amount of Thirty-Seven Thousand 00/100 (\$37,000.00) Dollars as principal, plus interest at the statutory rate from the date of the judgment, plus attorney's fees in the amount of \$5,550.00 and for court costs. Buyer Provencher swore that it was the amount owed. (Affidavit of Debt, R. p. \_\_\_). Seller Kirby submitted deeds purportedly proving he was ready, willing and able on the day of the closing to provide marketable title to the real property at issue.

Buyer Provencher was advised there was a cloud on the title and the lawyer searching the title could not certify title. (Email from Easterling office to Provencher dated February 1, 2021, R. p. \_\_\_). Although possibly dated prior to the proposed closing date (the parties differ as to that date) the deeds submitted were not filed and therefore did not become a part of the recorded title until long after the proposed closing. No lawyer or title searcher looking to confirm Seller Kirby owned the property in question would have been able to establish Seller Kirby owned the property in question. Seller Kirby asserts he was ready, willing and able to provide good

marketable title on the closing date but the information provided by The Easterling Law Firm and the deeds upon which Kirby relies belie that assertion. Seller Kirby's proposed deeds clearly indicate "Title Not Abstracted." (Titles to Real Estate, R. p. \_\_\_\_). Buyer Provencher had every right under the terms of the contract to withdraw from the contract and demand his funds back.

Seller Kirby asserts the lawyer hired by him to conduct the closing at issue (Ingram not Easterling) was prepared to conduct the closing and confirm clear title. Yet that lawyer, according to Seller Kirby and according to the proposed deeds, does not certify title to real estate in Marlboro County: "Title Not Abstracted." (Kirby Depo at p. 23, R. p. \_\_\_\_; and Titles To Real Estate, R. p. \_\_\_\_). Buyer Provencher is and was entitled to ensure he was receiving clear marketable title. On the date of closing, Seller Kirby could not and still cannot provide evidence he was able to provide same. The deeds Seller Kirby purports prove he could provide clear title say on their face "Title Not Abstracted." Again, the defective deeds were not a part of the real property records for Marlboro County on the day of closing. On that basis alone, Buyer Provencher properly declined to go forward with the closing and is entitled to recover his funds and be awarded attorneys' fees. A purchaser of realty cannot be required to take doubtful title. Gibbs v. G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

Any contention that Seller Kirby has complied with the terms of the Contract is inaccurate. (Contract, R. p. \_\_\_\_). First, the terms of the Contract require Seller Kirby to provide "fee simple title to the Property to the Buyer." (Contract, ¶ 10, R. p. \_\_\_\_). Seller Kirby was unable to provide a marketable title at the time of closing for the reasons previously stated. He may have been ready and willing but pursuant to the attorney's notice, he was not able. (Email from Easterling office to Provencher dated February 1, 2021, R. p. \_\_\_\_).

A marketable title is one free from encumbrances and free from any reasonable doubt to its validity. It is title which a reasonable purchaser, well informed, as to the facts and their legal significance is ready and willing to accept. Scalise Dev., Inc. v. Tidelands Invs., LLC, 392 S.C. 27, 707 S.E.2d 440 (Ct. App. 2011). An action to rescind a contract is in equity. Davis v. Cordell, 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1960). 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. Smith v. First Provident Corp., 245 S.C. 509, 512, 141 S.E.2d 646, 647 (1965); Davis, 237 S.C. at 99, 115 S.E.2d at 654; Martin v. Carolina Water Service, Inc., 280 S.C. 235, 240, 312 S.E.2d 556, 560 (Ct. App. 1984). Rescission is an appropriate remedy for a purchaser whose seller has contracted but is unable to provide marketable title because of defects in the title. Gibbs v. G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

No attorney would certify title to the real property at issue in the written contract and in this suit. Attorney Ingram does not do so according to Kirby testimony (and proposed deeds), and Attorney Easterling could not according to his email. (Email from Easterling office to Provencher dated February 1, 2021, R. p. \_\_\_\_). It was reasonable for Buyer Provencher to rely on an attorney and decline to proceed. As such, Buyer Provencher properly rescinded the contract due to Seller Kirby's inability to provide marketable title.

Buyer Provencher is entitled to rely on the provisions included in the Contract relevant to Seller Kirby's default (failure to provide clear title) (Contract, ¶ 12, R. p. \_\_\_\_), which states that if Seller Kirby defaults, buyer "shall be entitled to any and all remedies provide by law and equity including, but not limited to, specific performance and recovery of amounts spent for mortgage application, appraisal, title search, and tests or inspections.... court costs and attorneys'

fees.” Seller Kirby arranged for all attorneys involved. Seller Kirby was obligated to provide clear title. No deed can convey interest which a grantor does not have even though by its terms a deed may purport to do so. Cummings v. Varn, 307 S.C. 37, 413 S.E.2d 829 (1992). A general warranty deed includes the covenant that the seller is seized in fee, has the right to convey and that the land is free from all encumbrances. Bennett v. Investor Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006). Buyer Provencher was alerted by the lawyer Easterling that Seller Kirby was not seized in fee, might not have the right to convey, and the real property was not free from all encumbrances. (Email from Easterling office to Provencher dated February 1, 2021, R. p. \_\_\_\_).

As such, the court properly found that Appellant’s failure to produce a clear title to the real estate violates such terms of the Real Estate Purchase Contract to provide conveyance of fee simple title.

## II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE BUYER PROVENCHER

Buyer Provencher requested judgment in the amount of Thirty-Seven Thousand 00/100 (\$37,000.00) Dollars as principal, plus interest at the statutory rate from the date of the judgment, plus attorney’s fees in the amount of \$5,550.00 and for court costs. Buyer Provencher has sworn that is the amount owed (Affidavit of Debt, R. p. \_\_\_\_).

The amount owed to Buyer Provencher is verified and liquidated (Affidavit of Debt, R. p. \_\_\_\_). Seller Kirby filed an Answer stating Buyer Provencher failed to satisfy the conditions precedent in the Contract between the parties. Seller Kirby admits he has refused to return Buyer

Kirby's deposit. (Kirby Dep., pp. 15-16, R. p. \_\_\_\_). Standard written discovery was conducted in that Buyer Provencher served Seller Kirby with Standard Interrogatories and Requests for Production and Buyer Kirby responded and visa versa. The Deposition of Seller Kirby was held on December 22, 2021, and he testified as follows:

1. Kirby concedes he did not have clear title:

Q. He's telling me Easterling's office told him you didn't have clear title.

A. He knew everything going on. Everything. He knew - -

...

A. ... Easterling did a title search and they said they did not feel comfortable with doing the Sandhills Rec lots five and six because they were incorporated some kind of way in that rec club and they didn't feel good giving title to it because there was no named whoever over - - you know, person that could make decisions to sell it. ...

(Kirby Dep. p. 16, ll. 12-15, p. 17, ll. 3-9, R. p. \_\_\_\_).

2. He admits that he did not have title to the real property on the day of closing:

A. He knew - - when I went down there, I told him from day one that I was buying two of those properties from the McAlpines. He knew it from day one. He knew I didn't own it. I told him when I - - when I sold him the property, lots five and six, I'm in the process of buying. So if you buy this, I can give you four, which I currently own, five, six and my son will sign off on seven and eight. It was already worked out.

(Kirby Dep. p. 16, ll. 17-25, R. p. \_\_\_\_).

3. Kirby admitted there was a cloud on "the Sandhills lots" and the attorney advised of same:

A. - - they said they did not feel comfortable with doing the Sandhills

Rec lots five and six because they were incorporated some kind of way in that rec club and they didn't feel good giving title to it because there was no named whoever over - - you know, person that could make decisions to sell it.

(Kirby Dep. p. 17, ll. 3-9, R. p. \_\_\_\_).

4. Kirby admits the closing attorney would not certify clear title:

A. They had a problem with giving him title because of the - - because of the Sandhill Rec organization being incorporated and they didn't feel comfortable with no named person authorized to sign off on it. So they declined doing it. So - -

(Kirby Dep. p. 40-41, ll. 22-2, R. p. \_\_\_\_).

5. The Real Estate Contract, at issues requires Seller to provide Buyer with marketable title (Ex. A to Kirby Dep., para. 10, R. p. \_\_\_\_). Specifically, the Contract states "Seller will transfer fee simple title to the Property to Buyer ...".

6. Seller Kirby admitted that he signed the Real Estate Purchase Contract:

Q. All right. You signed the contract.

A. Yep.

(Kirby Dep. p. 45, ll. 17-18, R. p. \_\_\_\_).

7. Seller Kirby agrees the written contract should govern the relationship between the parties:

Q. Doesn't this contract govern the relationship between the two of you?

A. It should.

(Kirby Dep. p. 45, ll. 23-25, R. p. \_\_\_\_).

8. Kirby admits he read the contract:
- A. ... It's all in the contract. ...
- (Kirby Dep. p. 29, l. 24, R. p. \_\_\_\_).
9. Kirby admits he received \$37,000.00:
- Q. And it says buyer has made the following deposit of 37,000 dollars, correct?
- A. Yes, sir, it does - -
- ...
- Q. How much?
- A. I want to say it was 30,000 dollars.
- (Kirby Dep. p. 37, ll. 8-10 and 24-25, R. p. \_\_\_\_).
10. Kirby's property lawyer, Ingram, does not abstract title in Marlboro County:
- Q. Who won't - - who won't check title?
- A. Yeah, well, he - - he wasn't requested to.
- Q. Okay.
- ...
- Q. And - - and Ingram doesn't do that?
- A. Yep. He - - he does not in Marlboro County.
- (Kirby Dep. p. 22, ll. 2-5 pp. 23, ll. 4-6, R. p. \_\_\_\_).

Seller Kirby submitted deeds purportedly proving he was ready, willing and able on the day of the closing to provide fee simple title to the real property at issue and on their face they do

not nor was title clear according to Attorney Easterling. On the date of the closing, Seller Kirby did not have marketable title to all of the real property. As such, the Court properly granted summary judgment in favor of the Buyer Provencher.

### CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Circuit Court.

Respectfully submitted,

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