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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master in Equity

Appellate Case No. 2023-001897

Erin Burns Anderson, Respondent,

v.

Rudy Lamar Pearson, Appellant.

REPLY BRIEF

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I. THE TRIAL COURT'S ORDER GRANTING RESPONDENT SPECIFIC PERFORMANCE OF A LAND SALE CONTRACT SHOULD BE REVERSED BECAUSE THE CONTRACT EXPIRED, RESPONDENT FAILED TO FULFILL THE REQUIREMENTS OF HER LOAN COMMITMENT, AND THE PARTIES DID NOT AGREE TO EXTEND THE CONTRACT.

The trial court's order granting specific performance should be reversed because A. the contract expired, B. the Respondent failed to fulfill her loan requirements, and C. the Parties did not agree to extend the contract.

A. **The contract expired.** In a written real estate sales contract ("The Contract"), signed by both Parties, Appellant agreed to sell 21.99 acres on Gibbs Road, located in Wellford, South Carolina, to Respondent. (Plaintiff's Exhibit 1). The Contract, by its express terms, expired on September 29, 2017, with a five-business day grace period. (Plaintiff's Exhibit 1). Time was expressly of the essence in The Contract. (Plaintiff's Exhibit 1). For ease of reference, the relevant sections of The Contract are highlighted below. Paragraph 4 of The Contract states:

4. CONVEYANCE/CLOSING/POSSESSION: "Closing" occurs when Seller conveys Property to Buyer and occurs no later than 5 PM on or before September 29, 2017 ("Closing Date") with an automatic extension of 5 business days for an unsatisfied contingency through no fault of either party. Conveyance shall be fee simple made subject to all

Paragraph 1 G. of The Contract states:

(G) "Time" - all time stated shall be South Carolina local time. **Time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance periods.**

(Plaintiff's Exhibit 1). Respondent did not obtain financing by September 29, 2017, or five business days thereafter, as required by The Contract. The Contract was contingent upon Respondent obtaining financing.

7. **FINANCE:** Buyer's obligation under this Contract ☒ is ☐ is not contingent upon obtaining financing of a ☒ 15 year or ☐ 30 year or ☐ other _____ purchase money loan at reasonable prevailing market terms with loan(s) equal in amounts of minimum _____ % and maximum _____ % of the Purchase Price or Appraised Value whichever is lower. ("Financing Contingency"). Financing Contingency expires at Closing ("Financing Period"). Buyer must make timely good faith efforts to apply for and obtain financing while refraining from contrary actions ("Financing Effort"). In a timely

(Plaintiff's Exhibit 1). Respondent did not secure financing, and The Contract expired.

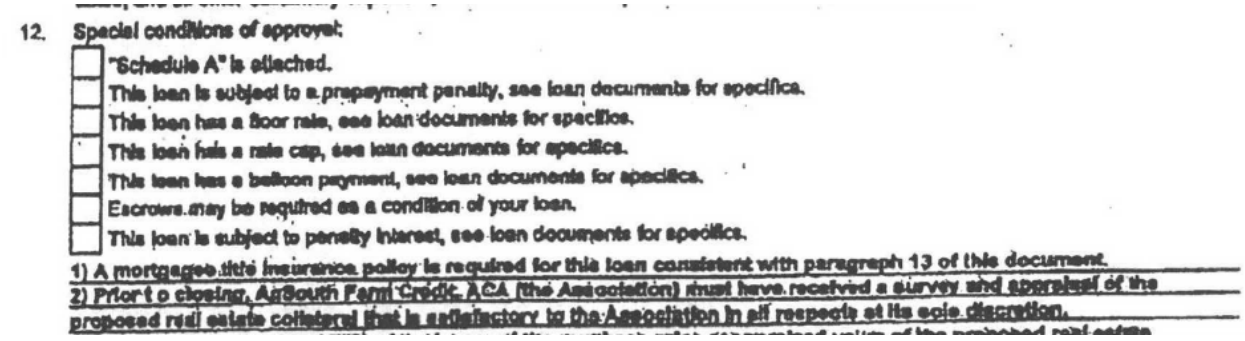
B. **Respondent failed to fulfill her loan requirements to obtain financing.**

Per The Contract, Respondent was responsible to pay $400,000.00 to purchase the land.

2. **PURCHASE PRICE:** $ 400,000.00

Payable by transfer of Good Funds via ☐ Finance or ☒ a combination of Finance and Cash USD or ☐ Cash USD.

(Plaintiff's Exhibit 1). Respondent was required to pay $100,000 cash and finance $300,000. (Transcript, 85-86). Respondent chose AgSouth to finance the $300,000 loan. (Transcript, 85). AgSouth wrote Respondent a loan commitment letter, which detailed "special conditions of approval" necessary for Respondent to obtain her loan. (Transcript, 85-86, and Plaintiff's Exhibit 6). The relevant provisions of Respondent's loan commitment letter are below.



12. Special conditions of approval:

- ☐ "Schedule A" is attached.
- ☐ This loan is subject to a prepayment penalty, see loan documents for specifics.
- ☐ This loan has a floor rate, see loan documents for specifics.
- ☐ This loan has a rate cap, see loan documents for specifics.
- ☐ This loan has a balloon payment, see loan documents for specifics.
- ☐ Escrows may be required as a condition of your loan.
- ☐ This loan is subject to penalty interest, see loan documents for specifics.

1) A mortgagee title insurance policy is required for this loan consistent with paragraph 13 of this document.
2) Prior to closing, AgSouth Farm Credit, ACA (the Association) must have received a survey and appraisal of the proposed real estate collateral that is satisfactory to the Association in all respects at its sole discretion.

(Plaintiff's Exhibit 6). Per the loan commitment letter, Respondent was responsible to obtain 1) a mortgagee title insurance policy and 2) a survey and appraisal of the proposed real estate collateral. (Plaintiff's Exhibit 6). Respondent failed to complete any of her loan commitment requirements by the closing date. Time was of the essence.

Respondent admitted to failing to secure the mortgagee title insurance policy. (Transcript, 134). Securing the mortgagee title insurance policy is the first condition precedent to for Respondent to obtain her loan. (Plaintiff's Exhibit 6). Respondent's failure to secure the number one requirement of her financing, the mortgagee title insurance, is fatal to this specific performance action because time is of the essence. When time is of the essence, the buyer must perform all requirements of The Contract at the time specified in The Contract. Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287 (2000) (holding "the party seeking to compel specific performance 'must be able to perform at the exact time he requested specific performance, not some 'reasonable time' in the future.'" Ingram, 340 S.C. at 106

n.1.) Contrary to Respondent's argument that Appellant interfered with Respondent's ability to obtain financing, it is undisputed that Respondent failed to obtain a mortgagee title insurance policy, which is entirely unrelated to the disputed survey.

Respondent admitted that she did not secure an appraisal or a survey of the collateral. (Transcript, 144 and 147). Instead, Respondent argues that Appellant, an elderly man, residing in Maryland, interfered with her ability to perform the special conditions of her loan approval by orally discussing a right of way. Respondent argues that she is excused from obtaining a mortgagee title insurance policy, an appraisal, and a survey of the proposed real estate collateral because Appellant needed a right of way to access 9 contiguous acres.

A survey of a right of way obtained by Appellant is not a survey of the proposed real estate collateral required by the finance company, AgSouth. The proposed real estate collateral never changed. The Parties only discussed a right of way over the collateral. Respondent testified that Appellant did not want to reduce the amount of property he had for sale. (Transcript, 154). Respondent testified Appellant only wanted **access** to the 9 acres. (Transcript, 154). Respondent testified that Respondent never heard Appellant discuss reducing the amount of property that he had up for sale. (Transcript, 156-157). Respondent then testified, “maybe it was Mrs. Pearson. I don’t know.” (Transcript, 156-157).

Respondent had the burden to prove that she could not get the mortgagee title insurance policy, the survey of the collateral, and the appraisal. She did not. Respondent offered no evidence to show a nexus between a right of way survey and her failure to get a policy of title insurance, an appraisal, and a survey of the collateral. No witness, lay or expert, testified that Respondent was prevented from contacting a company to survey and appraise the collateral. No evidence was produced to show that the Appellant ever interfered with Respondent's ability to obtain a mortgage title insurance policy, appraisal, or survey. In fact, at trial, Appellant was very feeble and hardly able to walk to the witness chair and answer basic questions. Appellant is physically and mentally unable to interfere with anything. Appellant did not instruct Respondent to wait to complete her loan requirements.

The below map demonstrates the difference between the right of way and the entire collateral. (Plaintiff's Exhibit 2). The entire 21.99 acres of collateral includes a very small, immaterial .64-.65 acre right of way and the remaining 21.34 acres of land including the waterfront. (Plaintiff's Exhibit 2 and 8). Appellant's counsel presents a zoomed in view of Plaintiff's Exhibit 2 with white lines drawn to demonstrate the difference between the right of way and the overall collateral. (Plaintiff's Exhibit 2). There is a clear difference between a meager .64 acre right of way and 21 plus acres of waterfront property. Respondent's argument that this right

of way is material is flawed by common sense. Respondent failed to prove that the miniscule access right of way had anything to do with the appraised value of the remainder of the property. The below map clearly indicates Respondent's argument is a red herring. The immaterial right of way is on the opposite end of the very valuable waterfront. Respondent simply didn't do what she was supposed to in time to get her financing and blames her failure on an elderly couple.

Respondent's communication with Lynne Christiansen demonstrates that Respondent knew there was a difference between surveying the right of way and

surveying the entire collateral. (Plaintiff's Exhibit 7). Dr. Anderson's (Respondent's) communication to Lynne Christiansen, Loan Officer, is below:

> The sellers did not have a survey from 2015. The realtor was mistaken. I believe the last one that exists is the one you showed me in your office. They met with a surveyor when they were down here who will be working on carving out enough of a piece for the adjoining 9 acres that they still own to have road access. So the overall acreage will be slightly less than 21.99. I am not sure if they will need to do an entire new survery when they do this (I would think they would need to????). They said this will be done within the next 2 weeks.

(Plaintiff Exhibit 7). There was no writing, signed by Appellant, that Appellant would relieve Respondent of her loan requirement to survey the entire collateral.

Respondent relies upon Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (S.C. App. 1984) as authority in the present case. It is not applicable. In Champion, the Court held that seller prevented the original buyer's agent from obtaining his commission by **selling the same property to another buyer** and **allowing said other buyer to occupy the property**. Champion, 280 S.C. at 120-122; 311 S.E.2d at 406-407. That is not what happened here. In this case, Respondent tries to shift her burden to get her financing onto Appellant. The first flaw with Respondent's argument is that the right of way did not take away from the collateral. (Plaintiff's Exhibit 8). The right of way traversed over the collateral. (Plaintiff's Exhibit 8). Respondent testified that she never heard Appellant discuss taking away from the property. (Transcript, 156-157). Respondent speculated that it could be Appellant's wife, but Respondent did not know. (Transcript 156-157). Respondent testified that

Appellant did not want to reduce the amount of property that he had for sale. (Transcript, 156-157.) Respondent testified that Appellant just wanted **access**. (Transcript, 156-157). The survey of the right of way, completed by Appellant, included the right of way as part of the overall collateral. (Plaintiff's Exhibit 8). Both the right of way and the overall collateral are PT. Tract 1. (Plaintiff's Exhibit 8). The 9 acres is Tract 2. (Plaintiff's Exhibit 8).

(Plaintiff's Exhibit 8).

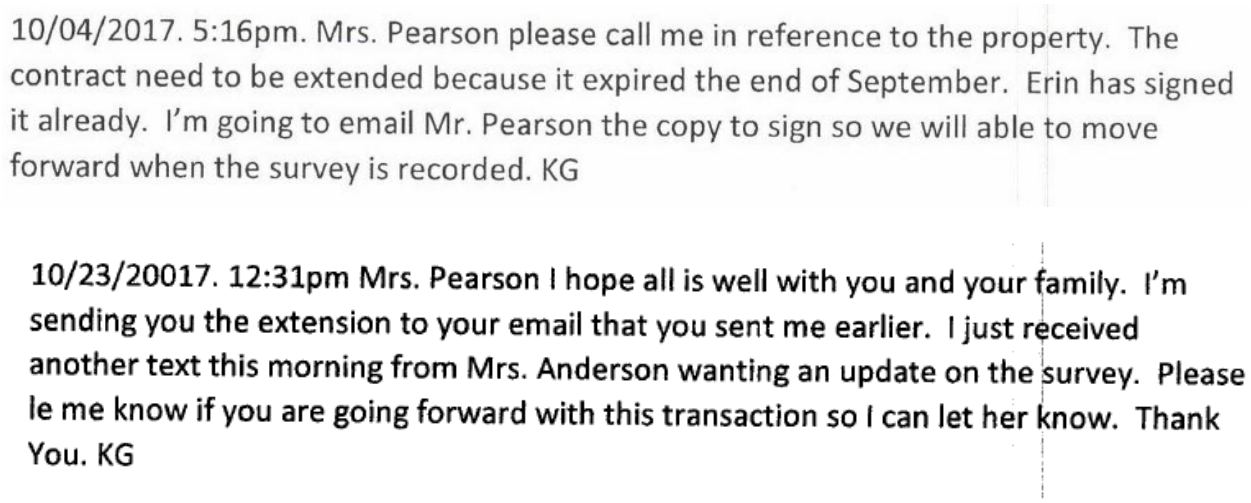
Secondly, there was no evidence that Respondent could not have obtained her own survey of the collateral, appraisal of the collateral, and mortgagee title insurance

policy despite a lack of a right of way survey. Not having the survey of the right of way did not prevent Respondent from obtaining a survey of the collateral because the right of way remained part of the collateral. The right of way survey showed both tract 1 (the subject property) and tract 2 (the contiguous 9 acres). A survey of the collateral would only need to show tract 1 (the subject property). No one from an appraisal company, a survey company, a title insurance company, or the finance company testified at the trial that a right of way survey was needed to obtain financing. The right of way survey was simply to provide access to the nine contiguous acres. This could have been accomplished after closing. Respondent simply didn't do her part to close.

Respondent would not have obtained the loan anyway because she never secured a mortgage title insurance policy or an appraisal. No expert testified that a right of way survey was necessary to issue a mortgage title insurance policy or an appraisal. As such, the lack of a right of way survey did not interfere with Respondent fulfilling her requirements to get her loan.

C. **Respondent did not request an extension of The Contract prior to expiration.** Respondent did not contact Appellant to ask for an extension prior to expiration of The Contract. After The Contract expired, Respondent requested an extension of The Contract through Katie Graves. (Plaintiff's Exhibit 4). Katie Graves, Respondent's agent, did not send the written extension request to Appellant

until October 23, 2017, beyond the closing date of September 27, 2017 and the five-business day grace period:



10/04/2017. 5:16pm. Mrs. Pearson please call me in reference to the property. The contract need to be extended because it expired the end of September. Erin has signed it already. I'm going to email Mr. Pearson the copy to sign so we will able to move forward when the survey is recorded. KG

10/23/20017. 12:31pm Mrs. Pearson I hope all is well with you and your family. I'm sending you the extension to your email that you sent me earlier. I just received another text this morning from Mrs. Anderson wanting an update on the survey. Please le me know if you are going forward with this transaction so I can let her know. Thank You. KG

(Plaintiff's Exhibit 4). Appellant did not execute an extension of The Contract. Appellant is not required to extend The Contract. The Contract expired and no extension was granted.

II. THE TRIAL COURT'S ORDER GRANTING RESPONDENT SPECIFIC PERFORMANCE OF A LAND SALE CONTRACT SHOULD BE REVERSED BECAUSE THE ORAL MODIFICATION OF LAND SALE CONTRACT WAS NONCOMPLIANT WITH THE STATUTE OF FRAUDS.

South Carolina's Statute of Frauds, S.C. Code Ann. 32-3-10 clearly and unequivocally states, "No action shall be brought whereby . . . . (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them, . . . Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be **in writing** and **signed by the**

party to be charged therewith or some person thereunto by him lawfully authorized." The Statute of Frauds divests the trial court of jurisdiction to adjudicate **oral modifications** to contracts for the sale of land. Oral modifications to land sale contracts must also be reduced to writing and signed by the Party against whom enforcement of the modification is sought. It is undisputed that the discussions regarding the right of way were not reduced to writing **and** signed by Appellant. It also is undisputed that there was no writing signed by Appellant that Appellant would agree to extend The Contract or change the time is of the essence clause.

South Carolina case law confirms that actions to enforce **oral modifications** to contracts for the sale of land are also prohibited by the Statute of Frauds. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) (holding that a contract required to be in writing by the Statute of Frauds cannot be orally modified.) See also, Windham v. Honeycutt**,** 279 S.C. 109, 302 S.E.2d 856 (1983) (holding evidence of oral modification of the real estate contract as violative of the Statute of Frauds.) The alleged oral modification to The Contract regarding the right of way survey is noncompliant with the Statute of Frauds because the oral modification was not in writing **and** signed by Appellant.

Appellant counsel made a motion in limine to exclude any evidence of the alleged oral modification to The Contract regarding a right of way survey as the modification was not in writing and signed by Appellant. (Motion in Limine,

Transcript, 15-17). Appellant counsel also objected to the introduction of text messages and conversations regarding the right of way survey as the modification was not reduced to writing and signed by Appellant. (Transcript, 69-72). Regardless of Appellant counsel's motion in limine to exclude the evidence and Appellant counsel's objections, the trial court allowed in evidence of text messages and conversations in violation of the Statute of Frauds. (Transcript, 27, 72). This is reversible error. According to Windham v. Honeycutt**,** 279 S.C. 109, 302 S.E.2d 856 (1983), it is reversible error to allow evidence of oral modifications violative of the Statute of Frauds. As such the order of the trial court should be reversed.

III. THE TRIAL COURT'S ORDER FINDING THAT THE APPELLANTS ARE ESTOPPED TO DENY A PROMISE TO PROVIDE A RIGHT OF WAY SURVEY MUST BE REVERSED BECAUSE RESPONDENT FAILED TO PROVE SUBSTANTIAL DETRIMENTAL RELIANCE AS SHE SUSTAINED NO DIRECT OUT OF POCKET LOSSES.

Appellant is not equitably estopped from arguing the Statute of Frauds because, pursuant to South Carolina case law, Dr. Anderson failed to prove that she had a financial out of pocket loss, other than a benefit of The Contract. Atlantic Wholesale Co., Inc. v. Solondz, 283 S.C. 36, 320 S.E.2d 720 (Ct. App. 1984) and Collins Music Co., Inc. v. James C. Cook, III, 281 S.C. 580, 316 S.E.2d 418 (Ct. App. 1984). As an exception to the Statute of Frauds, Respondent argued that

Respondent's case is dependent largely on the doctrine of equitable estoppel. (Transcript, 18-26). However, Respondent failed to prove a key element to the doctrine of equitable estoppel: **substantial, detrimental change of position.** Pursuant to Atlantic Wholesale Co., Inc. v. Solondz, 283 S.C. 36, 320 S.E.2d 720 (Ct. App. 1984) and Collins v. Cook, 281 S.C. 580, 316 S.E.2d 418 (Ct. App. 1984), to prove **substantial, detrimental change of position,** Respondent must show that she has out of pocket, financial loss, other than a mere benefit to the Contract. In Collins v. Cook, the Court of Appeals held "in order to overcome the statutory requirement of a writing, however, the party asserting the estoppel must show that he has suffered a substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position. It is not sufficient to show merely that he has lost an expected benefit under the contract." 316 S.E.2d 418, 420, 281 S.C. 580, 583 (S.C. App. 1984). Losing only the benefit of the bargain is not enough to prove estoppel. Id. at 583. The Court required direct out of pocket costs or losses from incidental reliance on the contract. Id. In the present case, Respondent failed to prove any direct out of pocket financial loss.

No evidence was produced to demonstrate that Respondent lost anything other than a benefit to the contract. That is undisputed. Respondent's security deposit is sitting in the unclaimed property of the State Treasury awaiting her claim. Dr.

Anderson lost nothing more than a benefit to The Contract. That is not sufficient to support a claim of equitable estoppel and the trial court's order should therefore be reversed.

CONCLUSION

Requiring specific performance of an expired contract for the sale of land, based on a vague, immaterial, alleged oral modification, not written into The Contract and not signed by Appellant, and therefore noncompliant with the Statute of Frauds, sets a very dangerous precedent, especially when the Parties remain in the same financial position as they did before The Contract. As such, the Decision and Order of the lower court should be reversed.

Respectfully submitted,

s/ J. Andrew Smith
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PROOF OF SERVICE

I certify that I have served the Reply Brief on Respondent, Erin Burns Anderson, by depositing a copy of it in the United States Mail, postage prepaid, on March 12, 2024, addressed to her attorneys of record, Bernie W. Ellis, Burr & Forman, LLP, P. O. Box 447, Greenville, SC 29602 and William B. Darwin, Jr., Holcombe Bomar, PA, P.O. Box 1897, Spartanburg, SC 29304, and by sending an electronic copy to their respective email addresses as listed on Attorney Information System (AIS), bellis@burr.com and kdarwin@holcombebomar.com.

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