RECEIVED
Apr 09 2024
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
Case No. 2018-CP-42-01222

Erin Burns Anderson……..……...…Respondent,

v.

Rudy Lamar Pearson…….....Appellant.

FINAL BRIEF OF RESPONDENT

Bernie W. Ellis
SC Bar No. 64841
BURR & FORMAN, LLP
Post Office Box 447
Greenville, SC 29602
Tel. (864) 271-4940
Fax (864) 271-4015
bellis@burr.com

William A. Darwin, Jr.
SC Bar No. 15109
HOLCOMBE BOMAR, P.A.
101 W. St. John St.
Suite 200
Spartanburg, South Carolina 29306
Tel. (864) 594-5300
Fax. (864) 585-3844
kdarwin@holcombebomar.com

Attorneys for Respondent
Erin Burns Anderson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT PROPERLY GRANT SPECIFIC PERFORMANCE TO RESPONDENT WHEN APPELLANT CLEARLY CAUSED OR CONTRIBUTED TO RESPONDENT'S NOT HAVING OBTAINED FINANCING PRIOR TO THE EXPIRATION DATE IN THE CONTRACT?

2. DID THE TRIAL COURT PROPERLY GRANT SPECIFIC PERFORMANCE TO RESPONDENT BASED UPON EVIDENCE OF ACTIONS AND STATEMENTS MADE AFTER THE EXECUTION OF THE CONTRACT?

3. DID THE TRIAL COURT PROPERLY GRANT SPECIFIC PERFORMANCE TO RESPONDENT IN FINDING THAT APPELLANT WAS ESTOPPED TO DENY HIS PROMISE TO PROVIDE A SURVEY TO RESPONDENT BASED UPON THE ACTIONS OF APPELLANT AFTER THE EXECUTION OF THE CONTRACT?

4. DID THE TRIAL COURT PROPERLY FIND THAT APPELLANT WAS EQUITABLY ESTOPPED TO ASSERT THE STATUTE OF FRAUDS WHERE IN RELIANCE ON THE PROMISE OF APPELLANT, RESPONDENT WOULD HAVE OTHERWISE LOST THE VALUE OF A PREVIOUSLY EXECUTED AND ENFORCEABLE CONTRACT?

5. DID THE TRIAL COURT PROPERLY GRANT SPECIFIC PERFORMANCE WHERE THERE WAS CLEAR EVIDENCE THAT RESPONDENT HAD AGREED TO ALLOW APPELLANT TO CONSTRUCT A RIGHT-OF-WAY OF HIS OWN CHOOSING AS LONG AS IT WAS NOT GREATER THAN TWO ACRES?

STATEMENT OF THE CASE

Respondent, Erin Burns Anderson, filed her complaint on April 18, 2018, seeking specific performance of a contract between herself and Appellant, Rudy Lamar Pearson, for the purchase and sale of real property located in the Town of Wellford, County of Spartanburg, South Carolina. (R. pp. 43-55, R. pp. 56-57). Mr. Pearson timely answered the complaint. (R. pp. 58-59).

On September 26, 2019, Appellant filed his motion for summary judgment. (R. pp. 582-583). On October 29, 2019, Respondent filed her motion for summary judgment. (R. p. 562-579). On November 12, 2019, the case was referred to the master in equity for Spartanburg County, the Honorable Gordon G. Cooper. By order dated March 11, 2020, Judge Cooper granted Appellant's motion for summary judgment, stating that he found for the Defendant without also finding that

Respondent had failed to present a genuine issue of material fact and without addressing the case law in South Carolina holding that a party to a contract may not materially contribute to the other party's non-performance of a contract and then terminate the contract on grounds of non-performance. (R. pp. 37-41). On March 20, 2020, Respondent timely filed her motion to alter or amend. (R. pp. 464-501).

Judge Cooper retired prior to having ruled on Respondent's motion. Therefore, the Honorable Shannon M. Phillips, having been appointed as the master in equity for Spartanburg County, heard Respondent's motion to alter or amend and granted it by order dated May 22, 2022, finding that there were genuine issues of material fact as to whether Defendant's actions had impeded Plaintiff's ability to complete the purchase of the property by the closing date set forth in the contract. (R. pp. 32-36).

Appellant timely moved to alter or amend Judge Phillips's order granting Respondent's motion to alter or amend. (R. pp. 423-451). Judge Phillips denied Appellant's motion on October 28, 2022. (R. pp. 29-31).

This matter was tried before Judge Phillips on August 30, 2023. On October 3, 2023, Judge Phillips issued her order granting specific performance to Respondent. (R. pp. 6-28) (hereinafter, "Order")). On October 9, 2023, Appellant timely filed his motion to alter or amend. (R. pp. 386-405). On December 5, 2023, Judge Phillips issued her order denying Appellant's motion to alter or amend. (R. pp. 4-5). On December 6, 2023, Appellant timely served his notice of appeal. (R. pp. 384-385).

STANDARD OF REVIEW

Respondent agrees with the standard of review set forth by Appellant.

STATEMENT OF FACTS

In this case, the trial court found correctly by the preponderance of the evidence that Appellant, Mr. Pearson, had interfered with Respondent, Dr. Anderson's, performance of the contract between the parties for the purchase and sale of real property, and, therefore, ordered specific performance of that contract. (R. p. 27).

There are very few facts in this case that are in dispute. Appellant and Respondent entered into a contract for Respondent to purchase and for Appellant to sell a 21.99-acre parcel of real property that Appellant owns in Spartanburg County for $400,000.00. (R. p. 323; p. 121, lines 16-22, p. 122, lines 11-17). The contract contained a deadline for closing of September 29, 2017, with an automatic extension of five (5) business days for an unsatisfied contingency through no fault of either party. The contract contained a "time is of the essence" clause. (R. p. 323).

The property that Respondent contracted to purchase is next to her property where her home is located. (R. p. 122, lines 25 - p. 123, lines 17-23); (R. p. 336). Initially, Respondent contacted Katie Graves, a real estate broker in the area, to see if she could get in touch with the owner of the tract to see if they would be interested in selling it. (R. p. 123, lines 24-25, p. 124, lines 1-8). Ms. Graves got in touch with Respondent, Mr. Pearson, and his wife Mr. Pearson who said they would be interested in selling the property. (R. p. 124, lines 7-8). After a short negotiation, using Ms. Graves as the go-between, Mrs. Pearson advised Ms. Graves that Mr. Pearson would sell the property to Respondent, Dr. Anderson, for $400,000.00. (R. p. 337).

Approximately three weeks after having told Respondent that the Pearsons were willing to sell the 21.99 acre tract to Respondent, Ms. Graves notified Respondent via text message that there was also an adjoining approximately 9-acre parcel, of which Appellant was a part owner, and that

Appellant was offering to sell this parcel to Respondent as well (R. p. 127, lines 7-9), (R. p. 337). Ms. Graves also conveyed that the purchase of the 21.99 acres would leave the 9-acre parcel landlocked and that the Appellant had been advised by his attorney to address this matter prior to closing. (R. p. 339), (R. p. 127, lines 9-12, p. 128, lines 23-25).

On July 25, 2017, Katie Graves, Appellant, his wife Mrs. Pearson, their son, and Respondent met in Spartanburg at the office of Century 21, where Ms. Graves worked as a real estate broker. (R. p. 129, lines 2-10). Appellant and Respondent signed the contract for Mr. Pearson to sell and for Dr. Anderson to buy the subject property at the agreed upon price of $400,000.00. (R. p. 129, lines 2-10). Mrs. Pearson read aloud to Mr. Pearson, line-by-line, each page of the entire contract, making sure he understood it. (R. p. 129, lines 13-17). The parties also signed several ancillary documents: (1) Seller's Property Disclosure Statement (signed by Appellant and Respondent) (R. p. 332-333; (2) Compensation Agreement (signed only by Appellant) (R. p. 334); and Transaction Brokerage Agreement (signed only by Respondent and Katie Graves), (R. p. 335). (R. p. 132, lines 21-25, p. 133, lines 1-16, p. 134, lines 1-25, p. 135,11.1-25). The contract also contained a financing contingency in favor of Respondent stating that Buyer's obligation under the contract was contingent upon obtaining financing of a 15-year purchase money loan. (R. p. 323).

If the foregoing had been all that had happened at the closing, with no further mention of the right-of-way, then Respondent could have simply applied for and obtained her financing, and the sale could have closed. However, as a favor to Appellant, Respondent had agreed to allow him to have a right-of-way across the property she was buying to serve the 9-acre lot. (R. p. 134, lines 9-22, p. 135, lines 16-19, p. 136, lines 23-25, p. 137, lines 1-7) This had been discussed prior to the contract's being signed, but it was also discussed at the contract's signing, <u>as well as after</u> the contract's having been signed. (R. p. 135, lines 14-20, p. 136, lines 22-25, p. 340-344, p. 345).

The Transaction Brokerage Agreement contains a General Property Description stating: "20 Acres or contingent on new survey." (R. p. 335). Respondent testified that that language was included to reflect the fact that she was agreeing to give up as much as two acres on the property to allow Appellant to carve out a right-of-way and that the actual acreage would be contingent upon the survey. (R. p. 134, lines 4-20, p. 135, lines 8-19). Respondent further testified that Appellant's wife, Mrs. Pearson, stated that the Pearsons would provide the survey. (R. p. 136, lines 2-4, lines 22-25, p. 137, lines 1-7). In fact, though Mrs. Pearson was in Spartanburg the day of trial, (R. p.113, lines 3-10), she did not attend the trial, and, accordingly, Respondent's testimony that Mrs. Pearson stated that she would provide the survey was not disputed. Based upon the facts presented at trial, the trial court found that Mrs. Pearson acted as Appellant's agent in this transaction. (R. pp. 19-20). Appellant has not challenged that finding on appeal and it is, therefore, the law of the case.[1] *Atlantic Coast Builders and Contractors, LLC*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

Following the signing of the documents, Respondent applied for and was prequalified for a loan from AgSouth Farm Credit, ACA ("AgSouth"). (R. p. 137, lines 18-25, p. 138, lines 1-6); (R. pp. 139, lines 12-18, p. 142, lines 2-13, p. 354, p. 374). Respondent then received her Commitment Letter from AgSouth. (R. p. 142, lines 14-23, p. 143, lines 2-6, p. 144, lines 8-12; (R. p. 355). The Commitment Letter required a mortgage title insurance policy as well as a survey and appraisal acceptable to AgSouth. (R. p. 137, lines 21-25, 138, lines 1-6 p. 141, 24-25, p. 143, lines 12-17, 144, lines 8-12); (R. p. 355-359, 359).

[1]Though the finding that Mrs. Pearson acted as Mr. Pearson's agent in this matter was not challenged on appeal, in an abundance of caution, the facts supporting the trial court's finding that Mrs. Pearson acted as Mr. Pearsons' agent are found at R. pp. 113, 129, 135-137, 228-130, 234-238, 278-280.

Respondent sent an email to Ms. Christiansen dated July 27, 2017 (R. p. 364-66) stating that the Appellant had told her that the Pearsons had met with a surveyor while they were in Spartanburg for the contract signing and expected the survey to be completed within the next two weeks. Respondent testified that the loan officer at AgSouth Farm Credit, Lynne Christiansen, told Respondent that Ms. Christiansen needed the survey that the sellers were preparing. (R. pp. 148 lines 1-815 p. 149 lines 2-4), (R. p. 365). Further, Respondent testified that Appellant had to provide the survey, as opposed to Appellant providing it, because it was Appellant who wanted the right-of-way, and he (or his agent, Mrs. Pearson) knew what was needed for the right-of-way. (R. p. 143 lines 20-25, p. 144, lines 1-7).

Though at trial, Ms. Graves did not recall that Mrs. Pearson had promised to provide a survey at the time the contract was signed, Ms. Graves testified that she had received text messages from Mrs. Pearson after the contract signing stating that the Pearsons would provide a survey to Dr. Anderson to show where the right-of-way would be as well as having spoken to Mrs. Pearson about the matter over the telephone. (R. p. 240, l. 5, -p.-257, l.6), (R. pp. 337-344), (R. p. 345)[2].

With respect to the texts and telephone calls between Mrs. Pearson and Ms. Graves, it is important to note that Respondent's Trial Exhibit 1C established Respondent had a broker/customer relationship with Katie Ms. Graves. (R. p. 335) (R. p. 123, lines 19-25, p.124, lines1-8). Further, as noted above, the trial court found that Mrs. Pearson was the agent of Mr. Pearson. (R. pp. 19-20). The contract provides the contract provides that in paragraph 34, that "Notice to/from a Broker is deemed notice to/from the Party." The trial court correctly found: "Therefore, as a matter of contract, Mrs. Pearson's statements to Ms. Graves are deemed to have

[2] Though it is probably obvious, the references in Respondent's Trial Exhibit 4 to KG and MP are to Katie Graves and Mrs. Pearson. (R. pp. 242, p. 245).

been made directly to Dr. Anderson, and Ms. Graves's repeated requests to Mrs. Pearson are deemed to have been made directly from Dr. Anderson to Mrs. Pearson as the agent of Mr. Pearson." (R. p. 21). This finding was not challenged on appeal.

In the meantime, both parties took steps toward performing the contract. Mr. Pearson proceeded to obtain a survey for the property, which Dr. Anderson needed for her loan. (R. p. 337-344, R. p. 345). The survey was completed by August 16, 2017 and was available to the Pearsons by August 17, 2017. (R. p. 369). However, Mr. Pearson never provided it to Dr. Anderson. (R. p. 215, lines 11-24). As noted above, Respondent applied for financing with AgSouth Farm Credit as set forth in the contract and received a pre-qualification letter and then a loan commitment letter. She paid the earnest money into escrow (R. p. 137, lines 13-25, p. 138, lines 1-6; R. p. 141, lines 24-25, p. 142, lines 2-17, p. 143, lines 12-17, p. 144, lines 8-12 and designated William Wynn of Spartanburg as the closing attorney. (R. p. 156, l. 25, p. 157, lines 1-3).

Again, if the discussion about the right-of-way and the survey had all happened prior to and contemporaneously with the signing of the contract, this would be a different case. However, on August 17, 2017, 23 days after the contract was signed, Respondent texted Katie Graves to ask if Ms. Graves had spoken with the Pearsons about the survey. (R. p. 337-344) (R. p. 151, lines 13-23). Ms. Graves stated that Mrs. Pearson had just called saying the survey is ready and that they were going to have a brother pick it up and record it as soon as possible. (R. p. 337-340, R. p. 151, lines 16-23, R. p. 240, lines 24-25, p. 241, lines 1-15). That testimony was undisputed. Respondent reasonably relied on the availability of the survey. (R. p. 164, lines 1-5). After all, Mr. Pearson had obtained it just as she said she would.

On August 21, 2017, Ms. Graves texted Mrs. Pearson asking if they had the survey yet. On August 28, 2017, Mrs. Pearson asked if the contract deadline was "10/25." Mrs. Graves responded that it was "9/29" but that it could be extended if needed. (R. p. 345).

Mrs. Pearson texted Katie Graves on August 29, 2017: "General description 20 acres are contingent on new survey." Ms. Graves responded on August 31, 2017: "contingent on survey." Mrs. Pearson replied: "I quoted the contract." (R. p. 345).

On August 31, 2017, Ms. Graves texted: "The lender is waiting on the new survey showing the exact acreage on it before they process the loan." On September 11, 2017, Mrs. Pearson texted: "All of the land is not for sale. Please take it down." (R. p. 345).

Mrs. Graves responded: "I don't have it listed. How much are you selling. Just send me the survey and I will send it to the lender." (R. p. 345).

On September 12, 2017, Mrs. Pearson replied: "It is not recorded. We paid for the survey but it is not legal until it is recorded. We are coming down Sunday, plan to file on Monday. The survey has to be right." Mrs. Graves responded: "Okay I think you should be satisfied with the survey before it is recorded, then we can send the survey to the lender." Mrs. Pearson responded: "Right. That was the purpose of giving up an acre. Did you remove the pending from the web?" (R. p. 345).

During this time, from August 17, 2017 forward, Dr. Anderson was regularly texting Katie Graves to ask about the survey. (R. p. 151, lines 13-17, R. p. 157, lines 4-25, p. 158, lines 1-25, p. 159, lines 4-25, p. 160, lines 2-25, p. 161, lines 1-23); (R. pp. 337-344). Mrs. Pearson never said that she or Appellant had changed their minds, or that she was no longer planning to give the survey to Respondent. (R. p. 345). In fact, in her text of September 12, 2017, by texting "Right," Mrs. Pearson appeared to acknowledge that the lender needed the survey, and that it would show the area that respondent was giving up for the right-of way.

Mrs. Pearson did not text Ms. Graves again between September 12, 2017 and September 29, 2017, the closing deadline (without an extension) set forth in the contract. (R. p. 345). Nor did Mr. or Mrs. Pearson provide the survey. (R. pp. 215, lines 11-25, p. 277, lines 20-25). On

October 4, 2017, Ms. Graves again texted Mrs. Pearson saying that the contract needed to be extended. (R. p. 345). On October 23, 2017, Ms. Graves reached out again to Mrs. Pearson after having heard again from Dr. Anderson seeking an update. (R. p. 345). Mrs. Pearson responded: "We are building on the property our self. We no longer want to sell." Later on the same date, Mrs. Pearson texted: "We are no longer offering the 21 acres for sale." (R. p. 345-346).

Spartanburg County records show that the survey showing the new right-of-way was recorded in the office of the Register of Deeds on behalf of Rudy Lamar Pearson on October 10, 2017 (R. p. 369), which was two business days after the conclusion of the 5-business-day automatic extension for the closing of the contract of sale. (R. p. 323). When asked what she thought when she finally did get a copy of the survey, Dr. Anderson testified that she felt "deceived and manipulated" when she saw on that survey that it was completed by August 15, 2017. She testified that she was trying to honor a request that the Pearsons had, and that it "was kind of turned on [her]." (R. p. 163, lines 6-10).

That is exactly what happened. Respondent's honoring a request from Appellant was "turned on her." Appellant's agent, Mrs. Pearson, delayed sending the survey that she said she would provide, until after the contract expiration date had passed and then used that expiration date to state that the contract had expired. (R. p. 18, p. 23, p. 27).

Though there were discussions about trying to resolve the matter, eventually, Mrs. Pearson concluded the discussions. (R. p. 345). Plaintiff then sued Defendant for specific performance of the contract (R. p. 42-57).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SPECIFIC PERFORMANCE TO RESPONDENT WHEN RESPONDENT'S NOT HAVING PERFORMED THE CONTRACT HAD BEEN CAUSED BY THE ACTIONS OF APPELLANT AFTER THE EXECUTION OF THE CONTRACT.

This case presents a classic situation where equity steps in to prevent a wrong from occurring. The trial court's ruling in this case is fully consistent with the case law of this State, which has established that a party may not terminate a contract based on the other party's lack of performance where the terminating party contributed to that lack of performance. *Champion v. Whaley*, 280 S.C. 116, 121, 311 S.E.2d 404, 407 (Ct. App. 1984) ("It is sufficient for the plaintiff to present evidence that the defendant's prevention 'substantially contributed' to the nonoccurrence of the condition.") *Id.* at 121, 311 S.E.2d at 407 (internal citation omitted); *Faulkner v. Millar*, 319 S.C. 216, 460 S.E.2d 378 (1995).

That is what happened here. Appellant asked Respondent to allow Appellant to have a right-of-way over the property Respondent was purchasing (R. p. 134, lines 9-20), and stated, at the signing of the contract and afterwards, through his agent, Mrs. Pearson, that he would provide a survey of the property that showed the right-of-way. (R. pp. 337-344, 345), (R. p. 135, lines 20-25, p. 136, lines 1-5, 22-25, p. 144, lines 2-7). Appellant obtained a survey, but withheld it from Respondent until the contract expiration date had passed and, thus, did not keep his promise upon which Respondent had relied. (R. 147, lines 23-25, p. 148, lines 1-20, p. 164, lines 1-5). Appellant then tried to use his broken promise to terminate the contract. (R. pp. 345-346). South Carolina law does not permit that.

> 'A court of equity abhors forfeitures, and will not lend its aid to enforce them.' *Jones v. N.Y. Guar. & Indem. Co.,* 101 U.S. 622, 628, 25 L.Ed. 1030 (1879). 'Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice.' *Lane v. N.Y. Life Ins. Co.,* 147 S.C. 333, 374, 145 S.E. 196, 209 (1928). The court has the power in equity to deny or delay forfeiture when fairness demands. *Lewis v. Premium Inv. Corp.,* 351 S.C. 167, 172, 568 S.E.2d 361, 364 (2002).

Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011).

The general rule applicable to this case of specific performance is set forth in *Champion.* In that case, a real estate broker sued for a commission where the sellers' actions interfered with a sale to the buyer whom the broker had procured, by selling the house to another buyer. *Champion* 280 S.C. at 117, 311 S.E.2d at 405. The contract between the broker and the sellers allowed for the broker to earn a commission only if there were a contract of sale between the sellers and a buyer procured by the broker for which the sellers had the right to demand performance. *Id.* at 120, 311 S.E.2d at 406. The sellers' position was that the contract with the buyer procured by the broker had not closed, and that Champion, the broker, had failed to prove that it would have closed even if the sellers had not sold the property to someone else. *Id.* at 118-19, 311 S.E. 2d at 405. The trial court had granted an involuntary nonsuit in favor of the sellers. *Id.*

The Court of Appeals reversed the trial court and granted a new trial, holding, in part:

> [I]f the seller prevents a condition from occurring, then the condition is excused and his obligation to pay becomes unconditional. *Shear v. National Rifle Association of America,* 606 F.2d 1251 (D.C.Cir.1979). This is simply an instance of the general rule that one who prevents a condition of a contract cannot rely on the other party's resulting nonperformance in an action on the contract. *Farrow v. Martin,* 16 S.C.L. (Harp.) 409 (1824); *Young v. Hunter*, 6 N.Y. (2 Selden) 203 (1852); *Fisher v. Drewett,* (1878) 48 L.J.Q.B. 32.

Champion, 280 S.C. at120, 311 S.E.2d at 406. The Court of Appeals further stated:

> It is sufficient for the plaintiff to present evidence that the defendant's prevention "substantially contributed" to the nonoccurrence of the condition. *See, Shear v. National Rifle Association, supra.* Once he has made such proof, the burden shifts to the defendant. If the defendant can show that the condition would not have occurred regardless of the prevention, then the prevention did not contribute materially to its nonoccurrence and the condition is not excused. This is the rule adopted in the Restatement (Second) of Contracts § 245 (1979), and we approve it as the proper rule in this jurisdiction.

Id. at 280 S.C. at 122, 311 S.E.2d at 407.

This sale did not go forward for only one reason: Respondent had kindly agreed to allow Mr. Pearson to carve out a portion of the 21.99-acre tract to provide a right-of-way for another piece of property in which Mr. Pearson had an ownership interest. For Respondent to provide this right-of-way, Appellant had to provide a survey and stated, through his agent that he would provide that survey, showing where the right-of-way would be and how much acreage would be involved. (R. p. 165, lines 15-25, p. 166, lines 1-25, p. 167, lines 1-25, p. 168, lines 1-15, p. 235, lines 2-9). Mrs. Pearson, as Appellant's agent, told Appellant, through Katie Graves, both before and after the contract was signed on July 25, 2017, that Appellant would provide the survey. (R. p. 337-344, R. p. 345) Appellant knew, at least through his agent, that Respondent needed the survey to take to her lender to obtain an appraisal so that her loan could be funded. (R. 345, R. 364). Appellant obtained the survey, but did not make it available to Respondent until the contract expiration date had passed (R. p. 159. lines 4-25, p. 160, lines 1-25, p. 161, lines 1-4, p. 277, lines 6-25), and then declared that the contract was terminated. (R. p. 345-346). Neither Mrs. Pearson nor anyone else disputed these facts at trial.

Faulkner v. Millar, 319 S.C. 216, 460 S.E.2d 378 (1995) involved a contract for the sale of real property in which the sale was subject to the buyer's right to complete an inspection of the property within ten days after sellers' acceptance. *Id.* at 218, 460 S.E.2d at 379. After conducting the initial inspection, buyer's attorney notified sellers' attorney that buyer needed more time for a structural engineer to complete the inspection. Sellers' attorney did not respond. After further inspection, buyer attempted to terminate the contract. Sellers refused, stating that the 10 days had passed. Buyer brought an action for specific performance for the return of his $45,000.00 earnest money payment. *Id.* at 218-19, 460 S.E.2d at 379.

The South Carolina Supreme Court held that even if the contract at issue were an option contract (as sellers argued), which would have made time of the essence, the sellers were estopped

to complain about the buyer's untimely performance and affirmed the order of specific performance to return the escrow money. The sellers' failure to object to the buyer's request for more time led the buyer to believe he would have additional time to conduct the inspection and terminate the contract. The Supreme Court held: "Silence, when it has the effect of misleading a party, may operate as equitable estoppel." *Id.* at 221, 460 S.E.2d at 381.

In this case, Mrs. Pearson did not just remain silent when Ms. Graves told her that Respondent needed the survey. Mrs. Pearson stated repeatedly that she would send it, and she knew that Respondent needed it give to her lender. (R. p. 337-344, R. p. 345). This was not a case of silence having the effect of misleading a party. This was a case of affirmative statements misleading a party. Therefore, under *Faulkner*, Mrs. Pearson's knowing that Respondent needed the survey to give to her lender, and Mrs. Pearson stating that she would send it operated as equitable estoppel to prohibit Appellant from terminating the contract when he did.

Appellant is incorrect in arguing that *Faulkner* did not address contracts where time is of the essence. It clearly does:

> Moreover, even were we to find the present contract to create an option, [which operates as a time-is-of-the-essence contract] the Sellers are estopped to complain. We have previously recognized that a seller will not be permitted to declare a forfeiture of the rights of the buyer for nonperformance of any of the vital terms or conditions of the contract where such nonperformance has been with the express or clearly evinced tacit or implied consent of the seller. *General Motors Acceptance Corp. v. Herlong,* 248 S.C. 55, 149 S.E.2d 51 (1966).

Faulkner, 319 S.C. at 221, 460 S.E.2d at 381.

The court's statement in *Faulkner* cuts directly against Appellant's argument that his not living in South Carolina was a hold-up to having the survey reviewed and such that failure to provide the survey on a timely basis should not be held against him. Delaying sending the survey for any reason was, at a minimum, clearly evinced implied consent by the seller for the buyer to

have additional time to complete the transaction. Instead, Appellant used the delay that he created and Respondent's good faith to attempt to defeat Respondent's contract rights.

Appellant also argues that in *Faulkner,* the buyer had requested an extension before the expiration of the contract. Appellant does not show why that fact applies in this case where Appellant had affirmatively promised to provide a survey within the timeframe provided by the contract. Unlike in *Faulkner,* Respondent was not the party that needed more time during the original contract period. Respondent was waiting on Defendant to do something Defendant had promised that he would do. However, even if Appellant's argument had merit, Appellant argues that his living out of state and his need to have a lawyer review the survey created a justifiable delay.

Ms. Graves texted Mrs. Pearson on October 4, 2017, (R. p. 345), well within five (5) business days following the expiration date set forth in the contract, which allowed for an automatic extension of five (5) business days where the contract did not close because of a contingency that was not the fault of either party. (R. p. 25; R. p. 323), Appellant argues that it was not a signed written request for an extension, but cites no authority for the proposition that such a request, even if it were necessary in this case, would have required more formality than a text message.

Further, it is not disputed that the Pearsons did obtain a survey of the entire property showing the right-of-way, that the survey was prepared on August 15, 2017, 22 days after the contract was signed and 40 days before the expiration date in the contract. (R. p. 323, R. p. 369). It was not disputed at trial that the Pearsons could have sent the survey to Dr. Anderson prior to the expiration date on the contract to Dr. Anderson and did not. (R. 11). It is not disputed that Mr. Pearson's agent, Mrs. Pearson, knew that Dr. Anderson needed the survey for her loan to fund. (R. p. 345, p. 369). It is not disputed that the survey was recorded in the Spartanburg County

Register of Deeds office on October 10, 2017, just a few days after the extension period in the contract had passed. (R. p. 369).

On appeal, Appellant did not specifically challenge the trial court's finding that Respondent met the elements of specific performance: that, "(1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract." *Campbell v. Carr*, 361 S.C. 258, 262, 603 S.E.2d 625, 628 (Ct. App. 2004) (internal citation omitted). (R. pp. 12-27).

Appellant argues, however, that in obtaining a loan, Respondent's lender required her to secure a title insurance policy, a survey and an appraisal of the proposed real estate collateral, and that she had obtained none of those. Appellant argues that this case is then like *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000). That argument fails because, as provided in *Champion*, once Plaintiff shows that Defendant "substantially contributed" to the nonoccurrence of a condition the burden of proof shifted to Defendant to prove that the condition could not have occurred in the absence of Defendant's acts or omissions. Thus, it was Defendant/Appellant's burden to prove that even if he provided the survey on a timely basis, Plaintiff/Respondent would not have been able to obtain title insurance (which is usually purchased at the closing), and the lender would not have been able to obtain an appraisal. Appellant further had to prove that the failure of any of those conditions would have prevented Respondent from closing the sale. *Id.* Appellant offered no such evidence at trial. Further, Appellant argues as though Dr. Anderson's loan contingency requirements were contractual duties owed to Appellant. They were not. Respondent was not required to get a title insurance policy, survey and appraisal pursuant to the contract with Appellant. The loan Commitment Letter was for Dr. Anderson's benefit alone. Appellant clearly interfered with Dr. Anderson's ability to obtain that loan.

The preponderance of the evidence is that both parties understood that the survey Appellant would provide would be of the entire property showing where a right-of-way would be. (R. p. 337, R. p. 345). That the survey that was recorded is of the entire property (R. p. 369) also shows that the parties understood that the survey would be of the entire property. Further, even if the survey were to be only sufficient to show the right-of-way, Respondent still needed that to know what she was buying (R. p. 134, lines 9-22, p. 135, lines 8-19), and Appellant knew it. (R. p. 4). The bank needed the survey to order the appraisal (R. p. 155, lines 14-17, R. p. 364)

Appellant relies heavily on the email from Respondent to Lynn Christiansen dated July 27, 2017 in which Respondent stated, in part, "I am not sure if they will need to do an entire new survey when they do this (I would think they would need to ?????)" (R. p. 364). Appellant argues that that statement means that Respondent was not sure whether the survey the Pearsons would prepare would be if the entire property. However, Appellant did not ask Respondent what that statement meant at trial, and did not bring this issue up until he submitted his proposed order to the court following the trial.

Therefore, even if that argument can be made now, Appellant's argument as to its meaning is speculative. The remainder of the email indicates that there was a pre-existing survey. It is more likely that Respondent was wondering if the new survey would just update the prior survey. Either way, Respondent and the lender needed the new survey that the Mr. Pearson's agent said the Pearsons were preparing. (R. p. 155, lines 14-25; R. p. 364).

II. THE TRIAL COURT PROPERLY GRANTED SPECIFIC PERFORMANCE TO RESPONDENT BASED UPON EVIDENCE OF ACTIONS AND STATEMENTS MADE AFTER THE EXECUTION OF THE CONTRACT.

Appellant is correct that discussions about the right-of-way and the survey began before the contract was signed; however, the promise to provide the survey to establish the right-of-way upon which Respondent reasonably relied, <u>also occurred after the contract had been signed</u>.

Therefore, the parol evidence rule, the doctrine of merger, and the non-reliance clause do not apply to Mrs. Pearson's repeated promises, on behalf of Mr. Pearson, made after the contract was signed to provide a survey Respondent needed in order for Respondent to honor her agreement to allow a right-of-way across the property she was buying. (R. p. 164, lines 8-15) (R. p. 337-343, R. p. 345). *See, Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990) (stating that the parol evidence rule applies to prevent the introduction of extrinsic evidence of agreements or understandings prior to or contemporaneous with the execution of an unambiguous written instrument to contradict, vary or explain the written instrument).

It was undisputed at trial that Dr. Anderson and Mr. Pearson had a valid written and signed contract for the purchase and sale of real property. (R. pp. 323-331). It was further undisputed that Dr. Anderson was happy with the contract as set forth in the document and had no desire to modify it. (R. p. 216, lines 3-6). It was Mr. Pearson who asked for the right of way and who stated, through his agent, that he would provide the survey showing where the right-of-way would be. (R. p. 135, lines 20-25), (R. p. 345).

The preponderance of the evidence was that if, after the contract had been signed, Mrs. Pearson had stated in a timely fashion that Mr. Pearson had decided not to provide a survey after all, and that there would be no right-of-way, Dr. Anderson would have been fine with that outcome, and she could have proceeded to closing. (R. p. 216, lines 3-6). *Champion* 280 S.C. at 121-22, 311 S.E.2d at 407 (holding that a defendant may not rely on a lack of evidence that all the conditions of a contract would have been met where the defendant's actions substantially contributed to the uncertainty.) However, as set forth in the emails between Respondent and Katie Graves, and between Katie Graves and Mrs. Pearson, sent after the contract was signed, Mrs. Pearson was advised by texts and by telephone that Respondent need the survey showing the right-

of-way to provide to Respondent's lender so that Respondent could obtaining funding for her loan, and Mrs. Pearson said they had the survey and would send it. (R. pp. 337-343, 345).

Appellant makes the argument that neither the contract nor the loan commitment letter required Appellant to complete any of Respondent's finance contingencies. No one has argued to the contrary. Respondent argued at trial, and argues here that Appellant's promise to provide a survey and then failing to keep that promise meant that Appellant could not rely on the expiration date of the contract to terminate it.

The flaw in all of Appellant's reasoning is that he is the one who asked for the right-of-way to accommodate his needs. (R. p. 198, lines 1-15). Respondent did not. Respondent was happy to close the contract according to its terms. (R. p. 216, lines 3-6). But for the request of Appellant to allow him to have a right of way and his request to provide the survey, including after the contract had been signed, to show where the right of way would be, all of the evidence is that contract would have timely closed. (*Id.*). The trial court correctly found that under the facts of this case, the parol evidence rule, the doctrine of merger and the non-reliance clause did not apply in this case. (R. p. 13; R. p. 4).

III. THE TRIAL COURT PROPERLY GRANTED SPECIFIC PERFORMANCE TO RESPONDENT IN FINDING THAT APPELLANT WAS ESTOPPED TO DENY HIS PROMISE TO PROVIDE A SURVEY TO RESPONDENT BASED UPON THE STATEMENTS AND ACTIONS OF APPELLANT AFTER THE EXECUTION OF THE CONTRACT,

Appellant argues that the Statute of Frauds prevents consideration of discussions about Appellant's promise to provide a survey because the contract was for the sale of land, and thus, the contract could only be modified by a writing satisfying the Statute of Frauds. The problem with Appellant's argument is that in cases involving the sale of real estate, the courts of this state have not allowed a party to declare a contract expired based upon that party's own actions even where there was no writing modifying the contract.

Thus, in *Faulkner,* the Supreme Court held: "Silence, when it has the effect of misleading a party, may operate as equitable estoppel." *Id.* at 221, 460 S.E.2d at 381.

In this case, there was a lot more than silence misleading Respondent. Appellant requested that Respondent grant a right-of-way and repeatedly promised after the contract had been signed to send a survey showing where the right-of-way would be. (R. p. 337-343, R. p. 345). Respondent plainly relied on Appellant's promise to provide the survey. (R. p. 164, lines 1-5). Appellant then waited to record the survey after the expiration date in the contract and declared the contract to be expired. (R. p. 345-346, R. p. 369), (R. p. 174, lines 6-25, p. 258, lines 5-13, p. 259, lines 1-11). Under *Faulkner*, Appellant is estopped to deny his promise, and specific performance is appropriate.

IV. THE TRIAL COURT PROPERLY FOUND THAT APPELLANT WAS EQUITABLY ESTOPPED TO ASSERT THE STATUTE OF FRAUDS WHERE, IN RELIANCE ON THE PROMISE OF APPELLANT, RESPONDENT WOULD HAVE OTHERWISE LOST THE VALUE OF A PREVIOUSLY EXECUTED AND ENFORCEABLE CONTRACT.

Appellant argues that equitable estoppel does not apply here to defeat his Statute of Frauds defense because Respondent must show that she lost more than "an expected benefit under the contract," citing *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).

This argument falls short in the fact that Dr. Anderson had something of value that she gave up at the request of Appellant: the right to buy 21.99 acres with no right-of-way pursuant to a written contract. (R. p. 323-331), (R. p. 216, lines 3-6). By virtue of Mr. Pearson's request, Respondent gave up her contractual right to own or control two acres of that property. She absolutely did substantially change her position in reliance on Mr. Pearson's promise to provide a survey showing where the right-of-way would be. (R. p. 164, lines 1-19). Further, even if the

Statute of Frauds could be used to invalidate Mr. Pearson's promises to provide the survey, Mr. Pearson still interfered with Dr. Anderson's performance of the contract.

In *Collins Music*, the plaintiff simply wanted to keep making money from gaming machines supplied to a lounge owner. There was no written contract between plaintiff and defendant, and plaintiff had no evidence of a change in position based upon an oral promise of the lounge owner to keep using the machines. Id. at 583, 316 S.E.2d at 420. That case has no application to the facts of this case.

In *Atlantic Wholesale,* the court held that a seller's purchase of silver to sell to a buyer was a sufficient change of position to estop the buyer from relying on the Statute of Frauds to defeat seller's contract claim against the buyer based upon his oral agreement to buy that silver where the seller would have otherwise had to sell at a reduced price. *Atlantic Wholesale,* 283 S.C. at 41, 320 S.E.2d at 724. That is what equitable estoppel does: it prevents someone from losing something of value because they relied upon a statement of another party.

Thus, in *Florence Printing Co. v. Parnell*, 178 S.C. 119, 182 S.E.313 (1935), cited in *Atlantic Wholesale,* the South Carolina Supreme Court held that, assuming that a written agreement for the purchase of stock fell within the Statute of Frauds, an oral promise by the seller that he would not insist on enforcing the time of performance stated in the contract estopped him from attempting to use the Statute of Frauds to do so. *Id.*, 182 S.E. at 313 (cited with approval in *Springob v. University of South Carolina,* 407 S.C. 490, 498, 757 S.E.2d 384, 388 (2014).

In *Faulkner*, discussed above, the plaintiff was in the same situation as Plaintiff/Respondent in this case. He had a contract that he could enforce according to its terms. Allowing the defendant to rely on the expiration of the contract when his attorney had failed to respond to plaintiff's attorneys' request for more time would have defeated plaintiff's rights under the contract only.

Faulkner was relied upon in *Low Country Open Trust v. Charleston Southern University*, 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008), for the proposition that:

> "[A] seller will not be permitted to declare a forfeiture of the rights of the buyer for nonperformance of any of the vital terms or conditions of the contract where such nonperformance has been with the express or clearly evinced tacit or implied consent of the seller." *Id.* at 408, 656 S.E.2d at 780 *Faulkner,* 319 S.C. at 221, 460 S.E.2d at 381. Accordingly, we find the University's communications and actions after January 31, 2005, demonstrate the tacit or implied consent of the University to Buyer's nonperformance.

Atlantic Wholesale and *Collins* stand for the proposition that detrimental reliance or a change of position cannot cause a contract to come into being when no contract existed and where the only loss to the plaintiff was the loss of a benefit under that hoped-for contract. In *Florence Printing* and in *Faulkner,* however, the plaintiffs had contracts within the Statute of Frauds[3] that they had not enforced or complied with in accordance with the terms thereof in reliance on either a statement or the silence of the opposing party. In *Florence Printing* and in *Faulkner,* the courts enforced the contracts to prevent the plaintiffs from losing the value of the contracts they had by having relying on the statements or the silence of the opposing party. That is what the trial court did in this case. Appellant's argument, therefore, fails.

V. THE TRIAL COURT PROPERLY GRANTED SPECIFIC PERFORMANCE WHERE THERE WAS CLEAR EVIDENCE THAT RESPONDENT HAD AGREED TO ALLOW APPELLANT TO CONSTRUCT A RIGHT-OF-WAY OF HIS OWN CHOOSING AS LONG AS IT WAS NOT GREATER THAN TWO ACRES.

With his final argument, Appellant again is essentially arguing that his own actions should deprive Respondent of her rights under the contract by arguing that there was not a meeting of the minds as to what the right-of-way would be. To have a valid and enforceable contract, '"there

[3] Or, as in *Florence Printing,* assumed to be within the Statute of Frauds.

must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement."' *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009)(internal citation omitted).

As noted above, the contract between the parties was for Dr. Anderson to purchase the real property at 355 Gibbs Road, Wellford, South Carolina 29385, Tax Map no. 5.08-00-017.00, from Mr. Pearson for $400,000.00. (R. p. 323-331). Dr. Anderson and Katie Graves both testified that Mrs. Pearson, as agent for Mr. Pearson, asked for and Dr. Anderson agreed for a right-of-way to be placed on the property to serve the adjoining approximately 9 acres next to the property in which Mr. Pearson was a part owner. (R. p. 134, lines 9-22, p. 189, lines 3-25, p. 190, lines 1-23, p. 235, lines 16-25, p. 236, lines 1-20). This testimony was not disputed.

The Transaction Brokerage Agreement (R. p. 335) sets forth the property description as "20 acres or contingent on new survey." Dr. Anderson's undisputed testimony was that she asked that the description be included in that document to clarify that she and Mr. Pearson had agreed that when the sale closed, Mr. Pearson could keep up to 2 acres of the property at 355 Gibbs Road as a right-of-way to serve the neighboring 9-acre lot. (R. p. 134, lines 9-22). In her texts to Ms. Graves, Mrs. Pearson twice referred to this provision. On August 29, 2017 Mrs. Pearson text stated "General Description 20 acres [or] contingent on survey." On August 31, 2017, Ms. Graves replied "contingent on survey." Mrs. Pearson then responded: "I quoted the contract." (R. p. 345).

The evidence is clear that Mr. Pearson requested and that Dr. Anderson agreed that the property being sold, which was clearly described, could be reduced by up to 2 acres for a right-of-way to serve the neighboring lot to be reflected on a survey prepared by or on behalf of Defendant. (R. p. 15-18). Appellant argues that Mrs. Pearson's text on September 12, 2017 stating "That was the purpose of giving up an acre[]" (R. p. 345) shows that there was not a meeting of the minds as to whether the right-of-way would be one or two acres.

However, Dr. Anderson testified that she was not concerned about the size of the right-of-way, including whether Mr. Pearson decided not to create one at all, as long as it was not more than 2 acres. (R. p. 134, lines 9-22). The trial court found that that position was consistent with the description in the Transaction Brokerage Agreement which both Dr. Anderson and Mrs. Pearson understood to be a part of the contract. (R. p. 16, R. p. 335, p. 134, lines 1-22 , p. 345).

Defendant argued at trial that there was not a meeting of the minds as to what the right-of-way would be, such as a footpath or a road, paved or unpaved, large enough to allow a car to pass through it. As the trial court found, those arguments do not create an ambiguity that defeats the contract. (R. p. 16). Dr. Anderson agreed that Mr. Pearson could do whatever he wanted as long as it did not take more than 2 acres from what she was purchasing. (R. p. 134, lines 17-20).

Defendant also argues that Dr. Anderson believed that the right-of-way would be carved out and would not be included in what she was purchasing, and, therefore, there was not a meeting of the minds as to the right-of-way. This argument fails for the same reason as the arguments set forth above. Dr. Anderson gave Mr. Pearson complete freedom to create a right-of-way. Whether it was an actual reduction in the acreage she was purchasing or only a dominant easement with her maintaining ownership of the servient easement was left up to Mr. Pearson. (R. p. 134, lines 13-17). Further, the trial court correctly found that the survey that Mr. Pearson filed showing the right-of-way sufficiently showed that the parties expected the right-of-way to be carved out. (R. pp. 16-17).

Appellant is essentially arguing that because he did not keep his promise to provide a survey on a timely basis to Dr. Anderson so that her lender could provide an appraisal, it was not clear that the parties had agreed on what the right -of-way would be. If the failure to finalize the size, location and nature of the right-of-way did create an ambiguity in the contract, that was totally in the control of Mr. Pearson who had the survey well in advance of the closing deadline and did

not provide it to Dr. Anderson as he, through Mrs. Pearson, had promised to do. *Champion,* 280 S.C. at 121-22, 311 S.E.2d at 407 (a "defendant cannot take advantage of the uncertainty created by his own wrongdoing.").

If Mr. Pearson had delivered the survey, there would have been no argument as to any ambiguity. Therefore, he cannot argue that Dr. Anderson might not have agreed to what the survey showed, even if she had been entitled to do that.

In fact, Dr. Anderson testified that while this case was pending, Mr. Pearson, through his counsel at the time, asked if the right-of-way shown on the survey could be removed from the lis pendens so that it could be sold with the 9-acre tract. Dr. Anderson agreed, and the right-of-way was sold with the 9-acre tract. (R. p. 166, lines 24-25, p. 167, lines 1-7, p. 168, lines 10-15, R. pp. 370-373). Therefore, the property before the Court that Dr. Anderson wants to purchase as a result of this action is not in question.

CONCLUSION

It is the law in South Carolina that a seller cannot terminate a contract based upon a buyer's non-performance if the seller contributed to the buyer's non-performance. It is also the law that that if a seller misleads a buyer into believing that the seller will do something (such as grant an extension of time), the seller is estopped to assert otherwise.

The trial court correctly found that Appellant-seller misled Respondent-Buyer into believing that Appellant would provide a survey to Respondent so that Respondent could supply that survey to her lender to obtain her financing necessary to close the sale. The trial court correctly found the existence of a valid contract between the parties, that was partly carried into execution by one party with the approbation of the other, and that Plaintiff remains ready, willing and able to perform the Contract. (R. p. 27). The trial court further found that the contract was equitable

between the parties. (R. p. 27). Therefore, the trial court property ordered specific performance of the contract.

For the foregoing reasons and for any reasons appearing in the record in this case, Respondent prays that the judgment be affirmed.

April 9, 2024

Respectfully submitted,

BURR & FORMAN, LLP

s/Bernie W. Ellis

Bernie W. Ellis
S.C. Bar No. 64841
104 South Main Street
Suite 700
Greenville, South Carolina 29605
Tel. 864-271-4940
Fax. 864-271-4015
bellis@burr.com

William A. Darwin, Jr.
S.C. Bar No. 15109
Holcombe Bomar, P.A.
101 W. St. John St.
Suite 200
Spartanburg, South Carolina 29306
Tel. (864) 594-5300
Fax. (864) 585-3844
kdarwin@holcombebomar.com
Attorneys for Respondent
Erin Burns Anderson

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
Case No. 2018-CP-42-01222

Erin Burns Anderson……..……...…Respondent,

v.

Rudy Lamar Pearson……...…….....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCAR.

April 9, 2024

s/ Bernie W. Ellis
Bernie W. Ellis
SC Bar No. 64841
BURR & FORMAN, LLP
Post Office Box 447
Greenville, SC 29602
Tel. (864) 271-4940
Fax (864) 271-4015
bellis@burr.com

Attorney for Respondent
Erin Burns Anderson