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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Shannon M. Phillips, Master-In-Equity

Case No. 2018-CP-42-02034
Appellate Case No. 2023-001861

Daniel E. Schall .....Appellant,

v.

Lori M. Sealy, as Personal Representative for the Estate of Claude L. Mullwee a/k/a Claude Lee Mulwee, and the Estate of Deloris Robinson Mulwee .....Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. In this action relating to a real estate contract, did the Master err in finding that the contract had been timely and properly terminated by Seller and in failing to award specific performance to Buyer?

2. Did the Master err in failing to award special damages and attorney's fees and costs to Buyer following Seller's wrongful purported termination of the parties' contract?

STATEMENT OF THE CASE

Daniel Schall ("Schall" or "Buyer") filed this action on June 13, 2018, seeking specific performance and breach of contract damages against Lori Sealy as personal representative for her parents' estates ("Sealy" or "Seller"). (R. at 17-32). The dispute stemmed from a contract for the sale of real property located at 720 Beacon Light Road in Spartanburg County. Sealy answered on August 2, 2018 asserting a general denial as well as equitable defenses. (R. at 33-35). By agreement of the parties, the matter was referred to the Master in Equity for Spartanburg County. (R. at 1-3).[1]

This action was tried before the Master on June 26-27, 2023. At trial, the evidence and testimony focused on whether Sealy was entitled to terminate the sale to Schall pursuant to paragraph 13 of the parties' contract. Paragraph 13 provides. in pertinent part:

> **FIRE OR CASUALTY OR INJURY: In case the Property is damaged wholly or partially by fire or other casualty prior to Closing, Parties will have the right for 5 Business Days after Notice of damage to deliver Notice of Termination to other Party.**

(R. at 276-84, ¶13). At the close of trial, the Master invited the parties to submit supplemental memoranda on this issue. (Memoranda, R. at 256:6-12, 36-44). The parties stipulated that Schall "was ready, willing and able to close on the property." (R. at 107:25-08:2).

After considering the evidence and the memoranda, the Master issued an order on August 23, 2023 finding that Sealy had properly terminated the contract, and, as a result, Schall was not entitled to any relief. (R. at 7-13). This ruling rested on the Master's finding that "the theft of the heirloom vegetation and damage to the lock on the building were sudden and unexpected losses

[1] Following a dismissal and reinstatement pursuant to Rule 40(j), SCRCP, the matter was again referred to the Master. (R. at 4-6).

caused by a third party for which Defendant then had the right to terminate the Contract." (R. at 10).

Schall moved to alter or amend on September 5, 2023, arguing that there had not been a casualty; that there had not been any notification of casualty; that if there was some notification of casualty that the contract had not been terminated timely; and that Schall was entitled to specific performance and damages. (R. at 45-94). The Master heard the motion on October 31, 2023, and issued a short order denying the motion on November 2, 2023. (R. at 14-16). This appeal followed.

FACTS

I. The parties enter a contract for the sale of real property.

The property at issue is 63.65 acres in rural Spartanburg County. (R. at 107:9-19). The real estate listing reflected that there were buildings on the property but that those structures were "included in sale as-is and at no value." (Pl. Ex. 4, R. at 292-94). The listing price was $180,000. (R. at 292-94, 112:20-22)

After seeing the listing, Schall made an offer of $191,146.00, which was accepted by Sealy. (R. at 112:23-113:7). The parties entered into a contract using a standard South Carolina Association of Realtors form. (R. at 276-84). Schall's signature was applied by his power of attorney, Thalia Moffitt, on March 22, 2018. (*Id.*). Sealy signed on March 23, 2018. (*Id.*). Schall entered the contract to purchase the property sight unseen (R. at 129:25-30:3), and Sealy had not been "on that property in decades." (R. at 165:24-66:5).

The contract defines the "Property" to be "any and all parcel of land, appurtenant interests, improvements, landscape, systems, and fixtures[.]"[2] (R. at 276-84, ¶3). The parties agreed that "no

[2] For purposes of this brief, the capitalized term "Property" relates solely to the term as defined in Paragraph 3 of the parties' contract.

personal property will transfer as part of this sale." (*Id.*). Seller was required to "convey possession of a vacant and reasonably clean Property, free of debris[.]" (*Id.*, ¶4).

In addition, Seller agreed not to remove vegetation and not to bring any trash or debris onto the Property between the time of contracting and the closing. (*Id.*, ¶17). Under this provision, Seller agreed that "[a]ll timber, vegetation, dirt, . . ." would remain on the Property, and Buyer alone had the right to terminate if there was a violation of this paragraph. This provision provides in full:

> **17. CONDITION OF PROPERTY:** Seller shall not remove any timber, vegetation, dirt, minerals, or otherwise affect the condition of the property from the Effective Date through Closing. All timber, vegetation, dirt, minerals, or similar shall remain as part of the Property and be conveyed to the Buyer at Closing. The Seller shall not bring any trash, refuse, debris, dirt, fill, medical wastes, hazardous wastes, or other materials onto the Property. Seller shall Deliver Notice of any legal action or condemnation action to the Buyer as soon as possible. If Seller Delivers such Notice, Buyer may unilaterally terminate this Contract by Delivering to the Seller a Notice of Termination. If Seller receives this Delivered Notice of Termination at any time, remaining Earnest Money shall be returned to the Buyer. Should Buyer not Deliver this Notice of Termination, Buyer agrees to purchase and Seller agrees to sell the Property in accordance with Contract.

(*Id.*).

In the event of "fire or casualty or injury," the contract provided:

> **13. FIRE OR CASUALTY OR INJURY:** In case the Property is damaged wholly or partially by fire or other casualty prior to Closing, Parties will have the right for 5 Business Days after Notice of damage to Deliver Notice of Termination to other Party. If Party does not Deliver Notice of Termination, the Parties proceed according to the Contract and Seller is to be responsible to (1) repair all damage, (2) remit to Buyer an amount for repairs, or (3) assign to Buyer the right to all proceeds of insurance and remit any deductible amount applicable to such casualty. If Buyer or Inspections caused the damage, Buyer is responsible for indemnifying Seller for damages. Brokers and Parties should ensure that they are protected by appropriate risk management strategies such as insurance.

(*Id.*, ¶13). Notice under the contract was required to be in writing to the "Notice address/ email/ fax written below." (*Id.*, ¶34). There is no provision for notice via text message.

Buyer waived due diligence. (*Id.*, ¶12). Buyer, however, retained inspection rights and the right to "make reasonable record of the Property" and to "make reasonable visual observations of Property." (*Id.*, ¶8).

In the event of default, the parties agreed as follows:

(A) If Seller defaults in the performance of any of the Seller's obligations under this Contract ("Default"), Buyer may:
(i) Deliver Notice of Default to Seller and terminate Contract and
(ii) Pursue any remedies available to Buyer at law or equity and
(iii) Recover attorneys' fees and all other direct costs of litigation if Seller found in default/breach of Contract.
(B) If Buyer defaults in the performance of any of the Buyer's obligations under this Contract ("Default"), Seller may:
(i) Deliver Notice of Default to Buyer and terminate Contract and
(ii) Pursue any remedies available to Seller at law or equity and
(iii) Recover attorneys' fees and all other direct costs of litigation if Buyer found in default/breach of Contract.
(C) If either/both Parties default, Parties agree to sign an escrow deposit disbursement agreement or release agreement.
(D) Parties may agree in writing to allow a Cure Period for a default. If within the Cure Period, either Party cures the Default and Delivers Notice, Parties shall proceed under the Contract.

(*Id.*, ¶27).

II. Seller wrongfully attempts to terminate the contract.

The closing was to occur no later than May 23, 2018. (*Id.*). In the interim, Schall had the opportunity to inspect the Property as provided in the contract. (R. at 276-84, ¶8, 114:24-15:1). In doing so, Moffitt, as Schall's power of attorney, noticed some changes to the vegetation and various forms of trash and debris. (R. at 113:13-14:10). Among other things, the parties became aware of a large number of discarded tires located on the Property. (R. at 299-302, 118:25-19:4). Schall notified Sealy of the debris on April 5 and asked that it be removed as required by the contract. (R. at 690-92, 149:23-50:20).

On April 22, Buyer's agent sent Seller's agent an email that read, "The Buyers are concerned that plants and/or vegetation are being removed from the property without their knowledge. Are you able to see if /why Seller are doing so? Other than debris, Buyers would really like for the property to be left alone. Thanks in advance!" (R. at 90-91, 682). The next day, Buyer's agent sent a follow up email, reading in pertinent part:

> It is clear that someone has been there and has removed several plants and vegetation from around the property. Below are just some of the photos of what was once there and has been removed.
>
> Their cleanup guy quoted them at around $3,000 to have all of the debris removed from the previous location specified. They have also requested that the remaining trash in the home [be] removed as well. It looks like someone went and just

> scattered the trash around the floor. The lock on the side building looks like it has been damaged some more.

(*Id.*). The April 23 email included photographs showing that the vegetation was, in fact, still there. (R. at 90-91). The photographs also showed that the lock in question was a padlock and not a fixture of the Property. (*Id.*). Schall never referenced any "casualty" to the Property. (R. at 116:16-22).

On April 28, Seller purported to terminate the Contract pursuant to paragraph 13 by sending a "Notice of Termination and Release of Agreement for 720 Beacon Light Road/ Spartanburg" ("Notice of Termination") based on "buyer's email to seller on Monday April 23rd where buyer notified seller of casualties to the property via email." (R. at 295-98). The attempted Notice of Termination was transmitted to Buyer on a standard South Carolina Association of Realtors form. (*Id.*) Schall did not issue any sort of communication that suggested he believed the contract had been terminated or that he assented to any purported termination.

On May 23, Moffitt appeared for Schall at the closing with a check for the down payment and financing for the remainder of the purchase price. (R. at 117:9-22). Schall testified at trial that he remained ready, willing, and able to purchase the Property as set forth in the contract. (R. at 127:20-25).

STANDARD OF REVIEW

Schall brought this action seeking legal[3] and equitable[4] relief. "When a suit involves both legal and equitable issues, each cause of action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 180, 708 S.E.2d 787, 792 (Ct. App. 2011). "In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its view of the preponderance of the evidence." *Goldman v. RBC, Inc.,* 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006). "However, this broad scope of review does not require the appellate court to disregard the findings made below." *Id.* "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Temple v. Tec–Fab, Inc.,* 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009). "Therefore, the trial court's findings will not be disturbed unless they are found to be without evidence that reasonably supports those findings." *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 484, 709 S.E.2d 71, 74 (Ct. App. 2011).

With respect to the construction of the contract and the definition of casualty, construction of an unambiguous contract is a matter of law for the court. *Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996); *Rental Unif. Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674,

[3] "A breach of contract action is an action at law." *Madden v. Bent Palm Invs., LLC*, 386 S.C. 459, 464, 688 S.E.2d 597, 599 (Ct. App. 2010).

[4] "[O]ur appellate courts have traditionally viewed the main purpose of a cause of action seeking specific performance as the pursuit of equitable relief and thus have found such a claim to be equitable in nature." *Lollis v. Dutton*, 421 S.C. 467, 479, 807 S.E.2d 723, 729 (Ct. App. 2017) (citing *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 290–91 (2000) (applying the equitable standard of review to the findings of fact in a specific performance action)); *Lowcountry Open Land Tr. v. Charleston S. Univ.*, 376 S.C. 399, 406, 656 S.E.2d 775, 779 (Ct. App. 2008) (holding that an action for specific performance lies in equity)).

676, 301 S.E.2d 142, 143-44 (1983). "This Court reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

ARGUMENT

I. The Master erred in finding that there was a casualty triggering the right to termination under paragraph 13 of the parties' contract.

Generally, contract language must be construed according to its plain meaning. *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 220, 452 S.E.2d 628, 631 (Ct. App. 1994). If the language is clear and unambiguous, it determines the rights and obligations of the parties as a matter of law and no additional evidence will be considered. *Id*. However, "the subject matter and purpose of the contract are to be considered in ascertaining the intention of the parties and the meaning of the terms they have used . . . [T]he dry words of the contract should, if possible, be so interpreted as to subserve, not subvert, such intention." *Dibble v. Dibble*, 248 S.C. 165, 181, 149 S.E.2d 355, 364 (1966). "Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." *Parker v. Byrd*, 309 S.C. 189, 193, 420 S.E.2d 850, 853 (1992). Moreover, contracts must be interpreted as a whole "so as to give effect to all of their provisions." *Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997).

Here, the sentence the Court is called to construe reads, "[i]n case the Property is damaged wholly or partially by fire or other casualty prior to Closing, Parties will have the right for 5 Business Days after Notice of damage to deliver Notice of Termination to other Party." (R. at 276-84, ¶13). Property is a defined term meaning "any and all parcel of land, appurtenant interests, improvements, landscape, systems, and fixtures[.]" (*Id.*, ¶3). Personal property is excluded. (*Id.*).

There is no document in the record titled "Notice of damage." There is no allegation of fire. The Master identified two items as casualties to the Property that occurred following the formation of the contract: (1) "theft" of vegetation, and (2) damage to a lock on the building. (R. at 9). These are the same items identified by Seller's real estate agent as the basis for the purported termination. (R. at 201:22-02:12). The email sent by Buyer's agent on April 23, and referenced in Seller's attempted termination notice, does not use the words casualty or loss and only uses a form of the word "damage" once: "The lock on the side building looks like it has been damaged some more." (R. at 90-91, 682).[5] Buyer testified that he did not intend his questions about the lock and the vegetation to be a "Notice of damage," but rather to create a "reasonable record of the Property" as contemplated in paragraph 8 of the contract. (R. at 114:14-15:1).

The record, however, establishes that there was no theft of vegetation, but rather that a few flowers completed their bloom cycle and died back as would be expected in the March-May period. (R. at 170:22-71:6, 90-91). The photographs attached to the April 23 email plainly show that the plants in question had not been removed. (R. at 90-91). Sealy's testimony confirms what is shown in the photographs. (R. at 171:6 ("They had not been removed they were still there.")). Moreover, vegetation on the Property is elsewhere addressed in paragraph 17 of the parties' contract. (R. at 276-84, ¶17). Given that language, it is clear that the intent was that vegetation issues would be handled pursuant to paragraph 17.

[5] Given the notice provision found in paragraph 34 of the contract, the Master's orders err to the extent they can be construed to state that "Notice" was provided via text message. (R. at 276-84, ¶34).

With respect to the padlock, it was an already damaged piece of personal property that would not have conveyed as part of the sale. (R. at 90-91, 165:7-11). Seller confirmed that she did not view the lock as a casualty. (R. at 169:1-3).

Given the evidence in the record, there was no loss or theft of vegetation and the padlock was not Property for purposes of the contract. Thus, the events relied upon by Seller for termination, the same events identified by the Master, cannot have constituted a casualty for purposes of the contract.

Since the term "casualty" is not defined in the contract, the term must be given its plain, ordinary, popular dictionary meaning. *Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co.*, 378 S.C. 623, 628, 663 S.E.2d. 492, 495 (2008); *Walde v. Ass'n Ins. Co.*, 401 S.C. 431, 444-45, 737 S.E.2d 631, 637-38 (Ct. App. 2012) (considering dictionary definitions to determine meaning of an undefined term in insurance policy). In this context, Merriam-Webster applies the following definition, "serious or fatal accident **: DISASTER** losses from fire, storm, or other *casualty.*" https://www.merriam-webster.com/dictionary/casualty (visited 3/19/2024). Black's law dictionary defines "casualty loss" as "for tax purposes, the total or partial destruction of an asset resulting from an unexpected or unusual event, such as an automobile accident or a tornado." LOSS, Black's Law Dictionary (11th ed. 2019).

According to guidance from the Internal Revenue Service, a "casualty loss can result from the damage, destruction, or loss of your property from any sudden, unexpected, or unusual event such as a flood, hurricane, fire, earthquake, or volcanic eruption. A casualty doesn't include normal wear and tear or progressive deterioration." *See* IRS Topic No 515, Casualty, Disaster and Theft Losses, https://www.irs.gov/taxtopics/tc515 (visited 3/19/2024). In *Keenan v. Bowers*, 91 F.Supp. 771 (D.S.C. 1950), the United States District Court for the District of South Carolina was asked to

determine if the loss of diamond rings accidentally flushed down a toilet amounted to a loss caused by a casualty under the Internal Revenue Code. Holding that such an event was not a casualty, the court wrote:

> The word 'casualty' has been defined as follows: 'An accident or casualty, according to common understanding, proceeds from an unknown cause or is an unusual effect of a known cause. Either may be properly said to occur by chance and unexpectedly.' 'Casualty' has also been defined as 'an event due to some sudden, unexpected, or unusual cause,' and embraces losses arising through the action of natural forces and which occur suddenly, unexpectedly, and without design on the part of the one who suffers the loss.'

Id. at 773-74 (internal citations omitted); *Buist v. U.S.*, 164 F.Supp. 218, 220 (E.D.S.C. 1958) (applying the definition of "other casualty" contained in the Internal Revenue Code, which states losses can only be deducted if they "arise from fire, storm, shipwreck, or other casualty, or from theft").

Seller did not believe either the plants or the further damages to the padlock were casualties. (R. at 170:22-71:24). When asked, "So is it your testimony that a few plants and an already broken lock would constitute a casualty loss?" Seller responded, "No sir." (R. at 169:1-3). Nor did Buyer believe these were damage that would trigger paragraph 13. (R. at 116:19-20, 117:7-8). Buyer testified that he was merely inspecting the Property and making a record of condition pursuant to paragraph 8 of the contract. (R. at 114:14-15:1).

The truth of the matter is that Buyer insisted that the Property be delivered free of debris as required by the contract, and Seller did not realize at the time of contracting how much trash and debris had been dumped on the Property and what it would take to comply with her contractual obligation. Despite the fact that this trash had been there for years, it is this trash and debris that Seller contends constituted a "casualty" entitling her to terminate the sale under paragraph 13. (R. at 171:15-24). Even so, Seller admitted at trial that she was required to convey the Property "free

and clear of debris" and that the debris had been on the Property for many years. (R. at 181:15-17, 184:17-19). When faced with the removal of hundreds of tires and other debris and Buyer's unwillingness to enter into an addendum with respect to this debris, Seller was looking for any excuse to terminate the contract. (R. at 69:5-11, 71:12-25, 83:22-85:10, 683-87).

Quite simply, the Master erred in finding that there was any casualty implicated in the April 23, 2018 email referenced in the Notice of Termination. There was no "Notice of damage." There was no theft of vegetation. The plants are still there as shown in the photographs attached to the April 23 email and as testified by Sealy. Furthermore, the padlock was not Property for purposes of the transaction, and it was already damaged when the parties entered the contract. There was no "sudden, unexpected, or unusual event." As a result, the Master erred in finding that there was a casualty and that Seller's Notice of Termination was proper. Therefore, the Master erred in failing to award Schall his requested relief.

II. If there was a casualty, Seller did not provide timely notice of termination. As a result, the Master erred in finding that the contract was timely terminated.

Assuming that there was "Notice of damage" triggering a right to terminate under paragraph 13, Seller did not provide timely Notice of Termination under the plain language of the contract. *See, e.g., Holden*, 317 S.C. at 220, 452 S.E.2d at 631 (explaining contract language must be construed according to its plain meaning and when that language is clear and unambiguous, the language determines the rights and obligations of the parties as a matter of law and no additional evidence will be considered).

Indeed, paragraph 13 simply and clearly states that to properly terminate the contract due to "fire or other casualty," Seller: (1) only had the "right" to do so "for 5 Business Days" after

receipt of "Notice of damage," and (2) had to exercise that "right" within those five business days by "deliver[ing] Notice of Termination" to Buyer. (R. at 276-84, ¶13).

The record reflects that the issue of the debris was presented no later than April 5. (R. at 276-84, 690-92). Seller tried to dodge her obligation to deliver the Property free of debris by offering Buyer $500 in lieu of cleaning the Property on April 16. (R. at 92-94, 668-80). The record further shows that Buyer raised his questions about the lock and the vegetation with his agent as of April 19. (*Id.*). Buyer, through his agent, later raised questions about the vegetation on April 22. (R. at 90-91, 682). Seller did not purport to terminate until April 28, more than five business days after Buyer communicated with Seller regarding either of these subjects. (R. at 295-98). Because Seller's Notice of Termination came more than five business days after the notice of the debris and the question regarding the vegetation, even if the Court determines that there was a casualty, the Notice of Termination was not timely under the plain and unambiguous language of the contract. The after-the-fact communications between various family members, Buyer, and the agents referenced by the Master do not change this analysis.[6]

[6] Schall encourages the Court to consider the corrected version of Defendant's Exhibit 3, which was attached to his motion to reconsider. (R. at 45-94). A review of that exhibit clarifies specifically what was said by Buyer with respect to the vegetation and the lock, all of which occurred after the April 23 email. Jennifer Schall is not a party to the contract. To the extent the Master attributed Jennifer Schall's messages to Daniel Schall, this was error.

III. The Master erred in failing to award Schall the requested relief of specific performance and damages.

As set forth above, the Master erred in finding that Sealy properly terminated the parties' contract. As a result, the Master also erred in ordering that the earnest money be returned to Schall, and that all matters raised "are now resolved, and this matter is hereby ended and stricken from the calendar." To the contrary, the record establishes that Schall was entitled to specific performance, special damages, and attorney's fees.

A. Schall was entitled to specific performance.

A court "should only grant specific performance if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *Clardy v. Bodolosky*, 383 S.C. 418, 426, 679 S.E.2d 527, 531 (Ct. App. 2009). It is settled that specific performance is a necessary and equitable remedy in cases involving the sale of real property. *Shirey v. Bishop*, 431 S.C. 412, 422, 848 S.E.2d 325, 330 (Ct. App. 2020). "When land is the subject matter of an agreement[,] the jurisdiction of equity to enforce specific performance is undisputed[ ] and does not depend on the inadequacy of the legal remedy in the particular case." *Adams v. Willis*, 225 S.C. 518, 526, 83 S.E.2d 171, 175 (1954); *see also Belin v. Stikeleather*, 232 S.C. 116, 123, 101 S.E.2d 185, 188 (1957) ("It is elementary that the jurisdiction of equity to grant specific performance of an agreement of this kind does not depend upon the inadequacy of the legal remedy in the particular case."); *Amick v. Hagler*, 286 S.C. 481, 485, 334 S.E.2d 525, 527 (Ct. App. 1985) ("[S]pecific performance of a contract to sell real property will be ordered whe[n] the contract 'is fair and was entered into openly and aboveboard.'" (quoting *Adams*, 225 S.C. at 528, 83 S.E.2d at 176)).

To prove entitlement to specific performance, a party must show: "(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." *Ingram,* 340 S.C. at 106, 531 S.E.2d at 291.

Here, Schall meets all three elements: (1) there is a valid, written contract (R. at 276-84); (2) Schall had undertaken to obtain financing and otherwise took action in anticipation of the closing (R. at 117:9-22) and Moffitt appeared at the closing ready to proceed on Schall's behalf (*Id.*); and (3) Schall remains ready, willing, and able to perform his obligations under the contract (R. at 107:25-08:2, 27:20-23).

The record confirms that Schall's conduct with regard to the contract and purchase of the Property was fair, equitable, and entitles him to specific performance. Accordingly, the Master erred in failing to order specific performance of the contract. *See, e.g., Adams*, 255 S.C. at 527-28, 83 S.E.2d at 175-76 (emphasizing that specific performance of a real estate contract "must be governed by the rules of law and equity and [the court] will enforce a contract which is fair and was entered into open and aboveboard" and ordered "with regard to the facts and circumstances of the particular case"); *see also Ingram*, 340 S.C. at 107, 531 S.E.2d at 291 (noting that specific performance of a real estate contract should be ordered when equity favors it, but explaining a party seeking specific performance can be estopped from doing so if their conduct with respect to the transaction was inequitable).

B. In addition, Schall is entitled to special damages and attorney's fees and costs.

Sealy breached the parties' contract when she failed to convey the Property reasonably free of debris by the closing deadline.[7] Under the contract, in the event of breach, Schall is entitled to "any remedies available to Buyer at law or in equity." Schall has sought specific performance, but

[7] This is in addition to her other breaches of the contract, including failure to allow Schall to inspect as required by paragraph 8 of the contract. (R. at 87-88, 688-89).

he is also entitled to "special damages." *Spencer v. Nat'l Union Bank of Rock Hill*, 189 S.C. 197, 200 S.E. 721, 723 (1939). At trial, Schall presented evidence that should he be allowed to close on the Property as of the date of the trial, he would be required to get a survey (estimated at $8,000-$10,000) and appraisal (estimated at $1,000), which would not have been required in 2018, and the financing would be at a higher rate (8.90% instead of 7.375%, resulting in an additional $25,821 over the life of the loan). (R. at 387, 125:7-27:5).[8] In addition, he paid the attorney's fee of $670.00 for the non-closing on May 23, 2018. (R. at 681). This Court should either award special damages based on the evidence in the record or remand the issue of "special damages" for determination by the Master.

In addition, Schall is entitled to "[r]ecover attorney's fees and all other direct costs of litigation" under the contract as a result of Sealy's failure to close. (R. at 276-84, ¶27). *See generally Shirey*, 431 S.C. at 436, 848 S.E.2d at 338 (holding attorney's fees may be awarded pursuant to contract in specific performance actions). At the trial, Schall testified that his fees to date had been $10,273.01 and counsel offered to provide a fee affidavit "if we get to that point." (R. at 127:16-19). Schall asks that this matter be remanded for the Master for a determination of an appropriate award of attorney's fees and costs.

CONCLUSION

There was no casualty here. Instead, Sealy sought to terminate the contract upon the realization of what would be involved in delivering the Property free of debris as required by the parties' contract. The Master erred in finding otherwise. As a result, this Court should reverse the

[8] The interest rate quoted in Plaintiff's Exhibit 12 is "subject to change daily." (R. at 387). The variability of interest rates may weigh in favor of remanding the issue of the amount of special damages for determination by the Master.

Master's order, should find that the contract was not properly terminated, should find that Schall is entitled to specific performance, and should find that he is entitled to an award of special damages and attorney's fees and costs. The Court may order an award of special damages based on the record or, alternatively, remand this issue for determination by the Master. Schall asks that the issue of the amount of the attorney's fees and costs be remanded to the Master.

Respectfully submitted,

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