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STATE OF SOUTH CAROLINA	) **IN THE COURT OF COMMON PLEAS**
COUNTY OF SPARTANBURG	) **CASE NO.: 2018-CP-42-01222**
Erin Burns Anderson, Plaintiff,	)
v.	) **ORDER**
Rudy Lamar Pearson, Defendant.	)

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INTRODUCTION

This case was referred to the undersigned Master in Equity for Spartanburg County by order dated November 12, 2019. This matter came before this Court for trial on August 30, 2023. Plaintiff was represented by Bernie W. Ellis and William B. Darwin, Jr. Defendant was represented by J. Andrew Smith and Clifford Bush, III.

In this case, Plaintiff seeks an order of specific performance of a contract for the purchase and sale of real property located at 355 Gibbs Road in the city of Wellford, Spartanburg County, South Carolina. Having heard the testimony and having considered the documentary evidence presented as well as the applicable case law and the arguments of counsel, the Court finds as follows:

FACTS

Plaintiff, Erin Burns Anderson, owns a 3.87-acre tract of land on which her home is located in Wellford, South Carolina. In 2017, she wished to purchase the neighboring 21.99-acre tract and contacted a real estate agent, Katie Graves, to ask if the owner, Rudy Lamar Pearson, would be interested in selling it. Katie Graves stated that her "client" would sell it for $580,000.00, but that

Dr. Anderson[1] could make a counter offer. After receiving an offer of $400,000.00 from Dr. Anderson, Rudy Lamar Pearson's wife, Elnora Truesdale Pearson, responded to Ms. Graves that they felt that $400,000.00 was a fair price. Thus, Mr. Pearson agreed to sell the tract for $400,000.00 to Dr. Anderson.

On July 9, 2017, before the contract of sale between Dr. Anderson and Mr. Pearson was signed, Ms. Graves notified Dr. Anderson via text message that there was an adjoining approximately 9-acre parcel [of which Mr. Pearson was a part owner] and that the Pearsons were offering to sell this parcel to Dr. Anderson as well; however, Dr. Anderson declined this offer. Ms. Graves also conveyed that the purchase of the 21.99 acres would then leave the 9-acre parcel landlocked and that the Pearsons had been advised by their attorney to address this matter prior to closing. Dr. Anderson testified that at that time, she orally agreed to allow Mr. Pearson to carve out a right-of-way from the 21.99-acre parcel to serve as a right-of-way for the 9-acre parcel so long as it did not exceed 2 acres.

On July 25, 2017, Katie Graves, Mr. and Mrs. Pearson and their son, and Erin Burns Anderson all met in Spartanburg at the office of Century 21, where Ms. Graves worked as a real estate broker. Mr. Pearson and Dr. Anderson signed a contract for Mr. Pearson to sell and for Dr. Anderson to buy the subject property at the agreed upon price of $400,000.00. The parties also signed several ancillary documents: (1) Seller's Property Disclosure Statement (signed by Mr. Pearson and Dr. Anderson); (2) Compensation Agreement (signed only by Mr. Pearson); and Transaction Brokerage Agreement (signed only by Dr. Anderson and Katie Graves).

[1] Plaintiff is a physician practicing in Spartanburg County, and, therefore, is usually referred to herein as Dr. Anderson.

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The closing deadline set forth in the contract was September 29, 2017, with an automatic extension of five (5) business days for an unsatisfied contingency through no fault of either party. The contract states: "Time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance periods."

Dr. Anderson testified that at the contract signing, Mrs. Pearson told Dr. Anderson, in Mr. Pearson's presence, that Mr. Pearson would provide a survey showing the size and location of the right-of-way, which would not be more than 2 acres, to serve the neighboring 9-acre parcel. The Transaction Brokerage Agreement described the property to be sold as "20 acres [instead of 21.99] or contingent on new survey." The contract of sale did not require Dr. Anderson to have a survey conducted. Her lender, AgSouth Farm Credit, required a survey and an appraisal as a condition of funding her loan.

Dr. Anderson testified that the loan officer at AgSouth Farm Credit, Lynne Christiansen, told Dr. Anderson that she needed the survey that the sellers were preparing. Further, Dr. Anderson sent an email to Ms. Christiansen dated July 27, 2023 (Exhibit 5) stating that the Pearsons had told her that they had met with a surveyor while they were in Spartanburg for the contract signing and expected the survey to be done within the next two weeks. Dr. Anderson testified that the Pearsons had to provide the survey, as opposed to Dr. Anderson providing it, because it was the Pearsons who wanted the right-of-way and they knew what they needed for the right-of-way.

At trial, Ms. Graves did not recall that Mrs. Pearson had promised to provide a survey at the time the contract was signed; however, 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.

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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. The survey was completed by August 16, 2023 and was available to the Pearsons by August 17, 2023. However, they never provided it to Dr. Anderson. Dr. Anderson 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 and designated William Wynn of Spartanburg as the closing attorney.

On August 17, 2017, Dr. Anderson texted Katie Graves to ask if Ms. Graves had spoken with the Pearsons about the survey. 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.

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.

Mrs. Pearson texted 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."

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."

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."

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?" During this time, from August 17, 2017 forward, Dr. Anderson was regularly texting Katie Graves to ask about the survey.

The September 12, 2917 text from Mrs. Pearson was the last that was heard from the Pearsons before September 29, 2017, the closing deadline (without an extension) set forth in the contract. On October 4, 2017, Ms. Graves again texted Mrs. Pearson saying that the contract needed to be extended. On October 23, Ms. Graves reached out again to Mrs. Pearson after having heard again from Dr. Anderson seeking an update. Mrs. Pearson responded: "We are building on the property our self. We no longer want to sell." Later on the same date, Mrs. Pearson stated: "We are no longer offering the 21 acres for sale."

Spartanburg County records show that the survey showing the new right-of-way (Exhibit 8) was recorded in the office of the Register of Deeds on behalf of Rudy Lamar Pearson on October 10, 2017, which was two business days after the conclusion of the 5-business-day automatic extension for the closing of the contract of sale. 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]."

Though there were discussions about trying to resolve the matter, eventually, Mrs. Pearson concluded the discussions. Plaintiff then sued Defendant for specific performance of the contract.

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ANALYSIS

Dr. Anderson's position is that she had a contract with Mr. Pearson to purchase certain property from him; that Mr. Pearson knew that in order for Dr. Anderson to have her loan funded to close the sale, she needed a survey and an appraisal for her lender; that Mr. Pearson asked to provide a survey of that property to preserve a right-of-way and then failed to provide that survey to Dr. Anderson before the contract deadlines passed despite being repeatedly asked to do so; that Mr. Pearson then refused to go forward with the contract because the deadlines had passed, though it was his failure to provide the survey on a timely basis that caused those deadlines to pass without the closing of the sale. Therefore, Dr. Anderson seeks the equitable remedy of specific performance of that contract.

At trial, Plaintiff's evidence was largely undisputed. It is clear that Plaintiff and Defendant signed a contract for the purchase and sale of real property. It was undisputed that Mr. Pearson's wife asked, on Mr. Pearson's behalf, to have a right-of-way located on the property being sold and that she stated that she and Mr. Pearson would provide the survey to Dr. Anderson to show where the right-of-way would be located. It was undisputed that Mrs. Pearson was told that Dr. Anderson needed this survey to provide to her lender so that her loan could be funded, and that Mrs. Pearson texted to Katie Graves on August 17, 2023 that the survey was ready. It was undisputed that Mrs. Pearson stated on at least two occasions after the contract was signed that the survey would be recorded by dates that preceded the closing deadline.[2] It was undisputed that Dr. Anderson relied upon the statement of Mrs. Pearson that the Pearsons would provide the survey and that the Pearsons never told Dr. Anderson or Ms. Graves otherwise. It was undisputed that the Pearsons did not

[2] Dr. Anderson testified that, for her purposes, she did not need the survey to be recorded.

provide the survey to Dr. Anderson before the closing deadline and then treated the contract as expired.

Defendant's position is that Dr. Anderson should have done more to protect her own interests: that, on the one hand, she should not have relied on the statements of Mrs. Pearson, who was not a party to the contract, that the Pearsons would provide a survey. Defendant argues that any purported contractual provisions that affected the closing of the contract were not effective under the Statute of Frauds. Defendant also argues, on the other hand, that Mrs. Pearson's statements and some confusion over the role of Katie Graves defeated the meeting of the minds necessary to form a contract. Defendant also argues that the right-of-way that Mr. Pearson asked for could not be accomplished because a property owner cannot give himself or herself an easement.

A party seeking specific performance must prove: "(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).

I. There Is Clear Evidence of a Valid Agreement.

Dr. Anderson and Mr. Pearson entered into a written contract, admitted into evidence as Exhibit 2. That contract called for Dr. Anderson to purchase the real property located at 355 Gibbs Road, Wellford, South Carolina 29385, Tax Map no. 5.08-00-017.00, from Mr. Pearson for $400,000.00. Dr. Anderson testified that she was ready, willing and able to purchase that property as stated in the contract, or with a right-of-way added.

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As noted above, Mr. Pearson raised three objections to the validity of the contract. First, he claims that his request to add a right-of-way was barred by the Statute of Frauds, S.C. Code Ann. § 32-3-10(4), and, therefore, any change to the contract regarding a right-of-way and a promise to provide a survey to Dr. Anderson was not material. His second argument is that the additions to the contract regarding a right-of-way were valid, but that there was no meeting of the minds between the parties as to what the right-of-way would be. Defendant also argues that because there was some confusion over Katie Graves's role in the transaction, there was not ultimately a meeting of the minds as to what the agreement actually was. He also argues that the right-of-way that Mr. Pearson asked for could not actually be accomplished.

A. Statute of Frauds

Defendant's Statute of Frauds argument actually supports a finding that there was a valid agreement between the parties. As noted above, Dr. Anderson testified that she was happy to purchase the property with no right-of-way located on it. Therefore, if Mr. Pearson's Statute of Frauds argument were to prevail, there would be no question as to the validity of the agreement. The only question would be whether the promise of Mr. Pearson, by way of Mrs. Pearson, to provide a survey to Dr. Anderson to complete the funding of her loan estops Mr. Pearson from relying on the expiration of the contract so as not to go forward with the sale. [3]

Second, assuming Mrs. Pearson acted as Mr. Pearson's agent as discussed below, because the promise to provide a survey showing the size and location of right-of-way induced the forbearance of Dr. Anderson to obtain her own survey, Mr. Pearson is equitably estopped to raise

[3] The same analysis applies to Mr. Pearson's parol evidence rule/doctrine of merger argument. If these bar the introduction of evidence that the contract was other than the sale of 21.99 acres located at 355 Gibbs Road in Wellford, then the only issue is whether the promise to provide a survey estops Mr. Pearson from relying on the expiration of the contract.

a Statute of Frauds defense. "In order to overcome statutory requirements that an agreement be in writing, the party asserting estoppel must show that he suffered a definite, substantial, detrimental change of position in reliance on such agreement and that no remedy except enforcement of the bargain is adequate to restore his former position." *Player v. Chandler*, 299 S.C. 101,106, 382 S.E.2d 891, 894 (1989).

Assuming Mrs. Pearson was Mr. Pearson's agent, then Mr. Pearson's actions, through Mrs. Pearson, meet the elements of equitable estoppel with respect to the agreement to provide a survey showing where the right-of-way would be. Mrs. Pearson knew that Dr. Anderson needed the survey to provide to her lender. Mrs. Pearson knowingly created an expectation in Dr. Anderson that Mr. Pearson would prepare and send a survey showing the right-of way to Dr. Anderson so that her lender could obtain an appraisal for her loan. Mrs. Pearson promised repeatedly to provide it by a date which would have allowed the appraisal to have been completed before the closing date. The evidence shows that the survey was available to Mrs. Pearson by August 17, 2017, approximately 6 weeks before the closing deadline, but she did not make it available to Dr. Anderson before the closing deadline, then Mrs. Pearson, on behalf of Mr. Pearson, declared the contract expired.

Dr. Anderson suffered a definite, substantial, detrimental change of position in reliance on Mrs. Pearson's agreement to provide that survey, and Dr. Anderson has no adequate remedy except the enforcement of the bargain. '"[W]hen land is the subject matter of the 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."' *Shirey v. Bishop*, 431 S.C. 412, 422, 848 S.E.2d 325, 330 (Ct. App. 2020) (internal citations omitted). Therefore, assuming Mrs. Pearson was the agent for Mr. Pearson, Mr. Pearson is equitably estopped to raise the Statute of Frauds as a defense.

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Third, the evidence is clear that the reason this contract did not close is because Mr. Pearson did not provide a survey of the property to Dr. Anderson in time for her to complete the loan funding process. A promise to provide a survey is not covered by the Statute of Frauds.

B. Meeting of the Minds

To have a valid and enforceable contract, "'there 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).[4]

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. Dr. Anderson and Katie Graves both testified that Mrs. 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. This testimony was not disputed.

The Transaction Brokerage Agreement (included with Exhibit 2) 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. 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."

[4] Defendant's argument that there was not a meeting of the minds necessarily concedes that Mrs. Pearson was Mr. Pearson's agent.

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. Defendant argues that Mrs. Pearson's text on September 12, 2017 stating "That was the purpose of giving up an acre[]" 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. That position is consistent with the description in the Transaction Brokerage Agreement which both Dr. Anderson and Mrs. Pearson understood to be a part of the contract.

Defendant argued at trial that there was not a meeting of the minds as to what the right-of-way would be. Would it be a footpath? Would it be paved or gravel? Would it be large enough to allow a car to pass through it? For the reasons set forth above, those arguments do not create an material ambiguity that defeats the contract. Dr. Anderson agreed that Mr. Pearson could carve out up to 2 acres from what she was purchasing to create a right of way to access the remaining landlocked parcel from the road.

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. Essentially, the Parties called the up to two acres both a "carve out" reducing acreage Dr. Anderson would receive and a "right of way" as if Anderson would gain the title to the property but create a right of way over it for Pearson. The preponderance of the evidence shows that Dr. Anderson did not expect to own what was carved out for access to the landlocked parcel. The Parties discussed changing the property description at the signing of the

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contract accordingly. *See* Exhibit 1c (describing the property as 20 acres or contingent upon the survey). The survey does not use the term "R/W right of way" for the access to the landlocked parcel. It does, however, provide sufficient information for what the parties called a right of way to be "carved out" in the deed from Pearson to Anderson. The survey sufficiently supports Dr. Anderson's position that the Parties agreed to carve out from the parcel she was purchasing up to two acres extending from the landlocked parcel she was not purchasing to the road.

Mr. Pearson 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 if the parties had agreed on what the right -of-way would be. In *Champion v. Whaley,* 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984), the South Carolina Court of Appeals held that a "defendant cannot take advantage of the uncertainty created by his own wrongdoing." *Id.* at 121-22, 311 S.E.2d at 407. 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.

If Mr. Pearson had delivered the survey, there would have been no argument as to any ambiguity. Again, "a defendant cannot take advantage of the uncertainly created by his own wrongdoing." *Id.* Therefore, he cannot argue that she 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

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was sold with the 9-acre tract. Therefore, the property before the Court that Dr. Anderson wants to purchase as a result of this action is not in question.

As discussed in more detail below, Katie Graves's role in this matter is set forth in the documents that the parties signed. To the extent there was any confusion as to her role, particularly because her role primarily involved transmitting information between the parties, and what was transmitted is not in dispute, any misunderstanding as to her role did not affect the essential and material terms of the contract for the sale of real property.

C. Whether Reserving an Easement Could Be Accomplished.

Defendant's argument that the right-of-way he wanted could not be accomplished does not change the analysis either. Were that correct, that would not be Plaintiff's problem. As stated above, Plaintiff was content to purchase the property with no right-of-way. Also, the strength of Defendant's argument as to that point is not clear because, in fact, Defendant did record a plat survey of the property showing a right-of-way which benefits the neighboring tract.

Therefore, the Court finds that there is clear evidence of a valid agreement. The agreement was for Dr. Anderson to purchase the property at 355 Gibbs Road, and she agreed to Mr. Pearson's condition that a right-of way to serve the 9-acre tract, not to exceed two acres, would be located on the property to be purchased, for which Mr. Pearson would provide the survey providing the necessary information for that right-of-way.

What caused this contract not to close was not a dispute over the terms of the contract or any other problem with those terms. What caused it not to close was the failed promise to provide a survey to Dr. Anderson to meet her lender's requirements.

II. Mrs. Pearson Was Acting as Mr. Pearsons' Agent.

In the alternative to arguing that there was not a meeting of the minds because of Mrs. Pearson's promises, Defendant argues that Mrs. Pearson was not Mr. Pearson's agent, and therefore, her promises and other statements are not binding upon him. The preponderance of the evidence, however, is that she was.

The doctrine of apparent authority provides that "the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usage and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption." *Fernandez v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982).

"A purported principal can consciously or impliedly represent another to be his agent, as required for apparent agency, by either: (1) affirmative conduct or (2) conscious and voluntary inaction." *Froneberger v. Smith*, 406, S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013). *See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.,* 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct. App. 2000) ("Such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf.").

At trial, Mr. Pearson testified that he knew that his wife was communicating with the real estate agent on his behalf. Dr. Anderson testified that at the signing of the contract, Mrs. Pearson went over the entire contract with Mr. Pearson and told him when he could sign it. Dr. Anderson also testified that at the signing of the contract, Mrs. Pearson told Dr. Anderson in Mr. Pearson's presence that the Pearsons would provide a survey to Dr. Anderson to show where the right-of-way would be located.

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Katie Graves testified that Mrs. Pearson is the only person Katie Graves dealt with regarding the property. She further testified that in her telephone conversations with Mrs. Pearson about the contract, Mr. Pearson was present with Ms. Pearson, and Ms. Graves knew that because occasionally Mrs. Pearson would talk to him. Mrs. Pearson is the one who told Mrs. Graves what the price was for the property, and that is the price that is in the contract. Ms. Graves testified that it was Mrs. Pearson who told her about the need for a right-of-way. Mrs. Pearson is the only person with whom Mrs. Graves dealt regarding the survey. Mrs. Pearson is the only person who told Mrs. Graves that Mr. Pearson was cancelling the contract. Both Ms. Graves and Dr. Anderson testified that they believed that Mrs. Pearson had the authority to speak on Mr. Pearson's behalf because of his actions in allowing her to be the spokesperson regarding the contract and the survey.

Therefore, the Court finds that Mr. Pearson, through his conduct, reasonably allowed Ms. Graves and Dr. Anderson to believe that Mrs. Pearson had the authority to speak on his behalf, and, therefore, he is bound by her statements and her actions. This conclusion is bolstered by the fact that events played out almost exactly as Mrs. Pearson had stated they would. The Pearsons did obtain a survey of the property in question. The date on the survey shows that it was obtained approximately when Mrs. Pearson first told Katie Graves that the survey had been completed. Further, the survey shows a right-of-way serving the neighboring lot.

Furthermore, Defendant presented no evidence to refute that Mrs. Pearson acted as Mr. Pearson's agent in this matter. Katie Graves, in particular, testified extensively about her dealings with Mrs. Pearson acting on Mr. Pearson's behalf. Mr. Pearson testified that Mrs. Pearson was in Spartanburg the day of the trial. Defendant could have presented her to testify had he so chosen. Therefore, based upon the undisputed evidence, the Court finds that Mrs. Pearson acted as Mr. Pearson's agent in this matter.

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III. Katie Graves's Role Is Set Forth in the Documents.

Having found that Mrs. Pearson was Mr. Pearson's agent regarding this transaction, whether Katie Graves was also his agent is less important than it otherwise would be relative to Dr. Anderson's right to rely on the statements of Mrs. Pearson. Defendant also argues, however, that this misunderstanding about whom Katie Graves represented meant that there was not meeting of the minds as to all essential terms of the contract.

The evidence shows that Mrs. Pearson believed that Katie Graves was acting as Mr. Pearson's agent in that she insisted that Katie Graves provide her with a statement that Katie Graves was no longer acting as the Pearsons' agent after Mrs. Pearson said that the contract would not go forward. Dr. Anderson also testified that she believed that Katie Graves was the Pearsons' agent. Ms. Graves, for her part, testified that she was acting as the buyer's (Dr. Anderson's) agent.

However, at the signing of the contract, Dr. Anderson and Ms. Graves signed a document entitled "Transaction Brokerage Agreement" stating that Ms. Graves was a broker, not an agent, for Dr. Anderson. Mr. Pearson also signed a document entitled "Compensation Agreement" stating that Mr. Pearson would pay Ms. Graves's commission, but that she was not his agent.

The contract itself provides in paragraph 34 that "Notice to/from a Broker representing a Party is deemed notice to/from the Party." Therefore, as a matter of contract, Mrs. Pearson's statements to Ms. Graves are deemed to have been made directly to Dr. Anderson, and Ms. Graves's repeated requests to Mrs. Pearson about the survey are deemed to have been made directly from Dr. Anderson to Mrs. Pearson as the agent of Mr. Pearson.

Similarly, for these reasons, any misunderstandings about Ms. Graves's role does not mean that there was not a meeting of the minds as to the essential terms of the contract. At the contract's signing, the parties and Ms. Graves agreed about her role. Further, even if they had not, the Court

finds that, in the context of this case, that misunderstanding could not be said to go to the essential and material terms of the contract.

IV. The Agreement was Partly Carried Into Execution on One Side with the Approbation of the Other.

Therefore, having found that there was a valid contract, there remain two other elements of specific performance that must be met before the Court can order that relief: (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,* 361 S.C. at 262, 603 S.E.2d at 628.

Regarding the second element, the Court finds that that the agreement had been partly carried into execution on one side with the approbation of the other. Dr. Anderson paid the earnest money required. While Defendant argues the amount of the earnest money, $3,000.00, was so small that it should not count, there is no case law supporting that argument. In *Clardy*, payment of the requested earnest money was sufficient part performance to justify an order of specific performance. 383 S.C. at 426, 679 S.E.2d at 531. Further, in accordance with the terms of the agreement. Dr. Anderson sought and obtained a loan commitment from AgSouth and repeatedly tried to obtain a survey from Mr. Pearson. Mr. Pearson, for his part, did obtain a survey showing where he wanted the right-of-way to be. Thus, he had also partly carried the contract into execution with the approbation of Dr. Anderson.

V. Dr. Anderson Remained Ready, Willing, and Able to Perform the Contract.

Finally, the Court finds that Dr. Anderson remained at all times ready, willing, and able to perform her part of the contract. The only step she had left to complete was to obtain the funding for her loan, and the only step remaining for her to obtain that loan was to receive the survey so that an appraisal could be performed so that the loan could be funded. Even if the appraisal had come

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back below 75% of the value of the property, Dr. Anderson testified that she could have purchased it, which would have been her right under the contract. Plaintiff does not have to have tendered the funds to close in order to seek specific performance. *Shay v. Austin,* 466 F. Supp. 2d 664 (D.S.C. 2006) (citing *Speed v. Speed,* 213 S.C. 401, 49 S.E.2d 588, 593 (1948)).

VI. Mr. Pearson Is Equitably Estopped to Deny That He Had Agreed to Provide The Survey to Dr. Anderson to Allow Her to Obtain A Loan.

Defendant relies heavily on expiration of the deadline to close in the contract and on the contract's "time is of the essence" clause. However, under the facts of this case, Defendant cannot rely on those provisions.

> '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).

This sale did not go forward for only one reason: Mr. Pearson did not timely provide the survey to Dr. Anderson that Mr. Pearson's agent, Mrs. Pearson, had not only agreed to provide to Dr. Anderson, but had actually asked to provide. Mrs. Pearson, as Mr. Pearson's agent, told Dr. Anderson, through Katie Graves, that Mr. Pearson would provide the survey for Dr. Anderson to take to her lender to obtain an appraisal so that her loan could fund, but Mr. Pearson, through Mrs. Pearson, knowingly did not keep that promise.

It is absolutely clear that Mrs. Pearson knew that Dr. Anderson was waiting on the survey, that Mrs. Pearson promised to provide the survey, and that Mrs. Pearson then waited until the

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expiration date of the contract had passed to make it available. Mr. Pearson's conduct, via his agent, Mrs. Pearson, was unquestionably inequitable. Dr. Anderson reasonably relied on Mrs. Pearson's promise that the survey would be provided.

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 on 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.

> Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position. *Regions Bank v. Schmauch*, 354 S.C. 648, 674-75, 582 S.E.2d 432, 446 (Ct. App. 2003) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001)).

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Mac Papers, Inc. v. Genesis Press, Inc., 426 S.C. 393, 403–04, 826 S.E.2d 874, 880 (Ct. App. 2019). Thus, equitable estoppel does more than take a contract out the Statute of Frauds. It also prevents a party from taking advantage of its own actions in causing the other party not to be able to complete its performance of a contract.

Defendant argues that Dr. Anderson should have asked for an extension before the contract had expired as in *Faulkner*. That argument is without merit in the context of this case. Unlike in *Faulkner*, Plaintiff was not asking for more time to do something she needed to do. Plaintiff was waiting on Defendant to do something that Defendant had promised to do, so that Plaintiff's loan could be funded. Also, Defendant overlooks that actually, Dr. Anderson did ask for more time before the contract had expired. Defendant argued at trial that since the Pearsons live in Maryland, filing the survey should be expected to take more time than it would if the Pearsons lived in South Carolina. The contract provides an automatic five-business-day extension if a contingency in the contract could not be fulfilled by the deadline through no fault of either party. On October 4, 2017, less than five business days after September 29, 2017, Katie Graves asked Mrs. Pearson to extend the contract to allow for more time for the survey to be recorded. Therefore, even if providing the survey on a timely basis was not Mr. Pearson's fault, Dr. Anderson asked for an extension before the contract had expired.

"[T]here exists in every contract an implied covenant of good faith and fair dealing." *Commercial Credit Corp. v. Nelson Motors, Inc.* 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966). "[O]ne who prevents a condition of a contract cannot rely on the other party's resulting nonperformance in an action on the contract." *Champion,* 280 S.C. at 120, 311 S.E.2d at 406 (Ct. App. 1984). "It is sufficient for the plaintiff to present evidence that the defendant's prevention

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'substantially contributed' to the nonoccurrence of the condition." *Id.* at 121, 311 S.E.2d at 407 (internal citation omitted).

> Ordinarily, a contract for the sale of land containing a clause that "time is of the essence" must be performed by the date fixed in the contract or the contract is no longer viable. "This general rule is, however, subject to the limitation that such a contract may nevertheless be specifically enforced if the failure to perform within the designated time results from the act or fault of the party against whom specific performance is demanded."
>
> ...
>
> Accordingly, where a contract expressly states that time is of the essence—such that performance by the purchaser within a specified time is a condition precedent to the seller's duty to perform his part—and the purchaser has been caused to delay his performance beyond the specified time by the request or agreement or other conduct of the seller, the purchaser can enforce the contract in spite of the seller's delay.

61 Am. Jur. 3d *Proof of Facts* 325, §7 (2001 & Supp. 2023).

Defendant argues that Dr. Anderson could have conducted her own survey. She could have had an appraisal conducted despite Mrs. Pearson's promises. She could have set up a closing on her own with the closing attorney and demanded Mr. Pearson's performance prior to the expiration date in the contract.

These arguments fly in face of the facts and of the case law regarding specific performance. Plaintiff testified and presented emails from her loan officer at AgSouth to the effect that the survey needed to show the right-of-way that Defendant wanted. As Plaintiff testified, Defendant is the party that wanted a right-of-way. Plaintiff could not place the right-of-way on the survey. Further, Plaintiff is not even required to have tendered the funds for performance, much less unilaterally set up a closing to call out Defendant's inequitable conduct. As demonstrated in *Faulkner*, even where both sides are represented by counsel, each side is entitled to rely on the good faith and fair dealing of the other party. Neither side can take advantage of its own inequitable conduct.

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VII. The Contract Was Equitable Between the Parties.

Having found the existence of a valid contract, that it was partly carried into execution by one party with the approbation of the other, and that Plaintiff was and remains ready, willing, and able to perform the contract, the final issue is whether the contract is equitable between the parties. "Mere inadequacy of consideration is not a ground for refusing the remedy of specific performance; in order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud." *Campbell,* 361 S.C. at 264, 603 S.E.2d at 628 (internal citation omitted).

The contract at issue in this case was negotiated at arm's length, and no evidence was presented that at the time the contract was entered into the consideration was inadequate, much less that it was the result of any inequitable conduct on the part of the Plaintiff.

CONCLUSION

The Court finds that Plaintiff is entitled to specific performance of the contract. The failure of the contract to close by the date in the written agreement was caused by the actions of Defendant in failing to provide the survey he had promised to provide to Plaintiff on a timely basis so that Plaintiff could finalize her loan.

Therefore, Plaintiff shall select a closing attorney and notify Mr. Pearson of the closing date within 30 days of today's date.

{Judge's Electronic Signature Page to Follow}

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Spartanburg Common Pleas

Case Caption: Erin Burns Anderson VS Rudy Lamar Pearson

Case Number: 2018CP4201222

Type: Master/Order/Other

IT IS SO ORDERED.

s/ Shannon M. Phillips - 3087

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