STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON)	CASE NO.: 2010-CP-32-2038
Oliver Grady Query, and the Estate of Grady W. Query, by its Personal Representative, Oliver Grady Query,)	
Plaintiffs,)	
v.)	ORDER
Ladislao Castrejon, Alberto Lozano, and Jesus Brito,)	
Defendants.)	

PROCEDURAL HISTORY

This matter comes before the Court by way of a complaint filed by Plaintiffs Oliver Grady Query and the Estate of Grady W. Query on May 18, 2010. In their complaint Plaintiffs brought causes of action for breach of contract and novation against Defendants Ladislao Castrejon, Alberto Lozano and Jesus Brito. Mr. Castrejon timely answered, but Mr. Lozano did not initially do so. Therefore, at Plaintiffs' request an order of default was entered against Mr. Lozano on June 23, 2011. While still under the order of default Mr. Lozano filed an answer. After a hearing on a motion for relief from the order of default, Mr. Lozano was subsequently relieved from the order of default by this Court by order dated September 20, 2011, and his previously filed answer was entered as a response to Plaintiffs' complaint. Plaintiffs subsequently filed an amended complaint dated September 20, 2013, in which they brought an additional cause of action for specific performance against Defendants. Mr. Castrejon and Mr. Lozano both filed answers to the amended complaint. Mr. Brito did not.

Trial was held before this Court on November 21, 2013 at the Lexington County Judicial Center. Plaintiffs were present and represented by Mark V. Evans, Esquire.[1] Defendants Castrejon and Lozano were present and represented by Allen Bullard, Esquire. Mr. Brito was not present. At the outset of trial Plaintiffs withdrew their novation and specific performance causes of action against Defendants with prejudice. [Tr., p. 6, l. 17 – p. 7, l. 12]. At trial, Plaintiffs presented the testimony of Oliver Grady Query; Tommy Dawson, formerly of Re/Max Metro Associates; and Elizabeth Keys, a real estate appraiser with Intergra Realty Resources. Defendants presented the testimony of Ladislao Castrejon, Alberto Lozano and Joseph Rosen, a real estate appraiser with Rosen Appraisal Associates. This Court also accepted eleven exhibits offered into evidence by Plaintiffs, and two exhibits offered into evidence by Defendants.

At the conclusion of trial this Court instructed counsel for the parties to submit written post-trial memoranda addressing several issues raised at trial and summarizing their clients' respective positions on each with citations to the testimony and evidence presented as well as relevant legal authority. On November 22, 2011, Plaintiffs' counsel informed this Court that based upon the testimony and evidence presented at trial it was Plaintiffs' intention to dismiss all claims against Mr. Lozano with prejudice. This Court entered an order to that effect dated December 27, 2013, which was filed with the Lexington County Clerk of Court on January 3, 2014. Counsel submitted their post-trial memoranda on February 11, 2014.

FACTUAL BACKGROUND

This case involves a dispute over a contract for the purchase and sale of real property. Plaintiffs sought to hold Defendants liable for breach of an agreement to purchase an 11.29 acre parcel of land located in Gaston, South Carolina ("the property"). As mentioned above, subsequent to trial, Plaintiffs dismissed their claims against Mr. Lozano with prejudice. The

[1] Plaintiff Oliver Grady Query is the personal representative of the Estate of Grady W. Query.

claims against Mr. Lozano being disposed of thusly, the remainder of this order will focus only on the facts and law as they apply to the remaining claims against Mr. Castrejon.

At trial Plaintiffs first presented the testimony of Elizabeth Keys, the aforementioned real estate appraiser with Intergra Realty Resources. The parties stipulated that she was an expert in appraising. Ms. Keys testified that she performed an appraisal of the property and determined that its value as of September 24, 2008, the time of the parties' contemplated closing of the transaction, was $270,000. As part of her testimony Ms. Keys explained the methodology she employed in compiling her appraisal.

Next, Plaintiffs presented the testimony of Oliver Grady Query. Mr. Query provided testimony regarding, among other things, the initial formation of the parties' contract in March 2008. He testified that Plaintiffs agreed to sell the property to Mr. Castrejon for $302,500, and Mr. Castrejon agreed to make a two thousand dollar ($2000) earnest money deposit, a forty-eight thousand dollar ($48,000) down payment, and obtain a loan of two hundred fifty-two thousand five hundred dollars ($252,500). Mr. Query testified that after he was notified that Mr. Castrejon was unable to secure conventional financing from his bank (BB&T), Plaintiffs agreed to offer owner financing. Mr. Query testified that based upon his interactions with the attorney tasked to close the transaction, Sam Jefcoat, it was his understanding that a closing would be held on September 24, 2008 to consummate the transaction under the new owner financing terms. Mr. Query testified that to that end Plaintiffs executed a HUD financing statement and deed transferring the property to Mr. Castrejon and Mr. Brito, which were delivered to Mr. Dawson for ultimate delivery to the closing. Although he was uncertain of the reason why, Mr. Query testified that Mr. Castrejon did not purchase the property at the contemplated September 24, 2008 closing and still has not done so. Mr. Query testified that Plaintiffs were seeking damages

against Mr. Castrejon in the amount of the interest they would have earned on the owner financing offered to Mr. Castrejon as well as the difference between the contract price and the appraised value of the property at the time of the contemplated sale in September 2008.

Plaintiffs next presented the testimony of Tommy Dawson, an agent with Re/Max Metro Associates, who was Plaintiffs' real estate agent for purposes of this transaction. Mr. Dawson testified that it was he who conducted the negotiations with Mr. Castrejon on Plaintiffs' behalf which led to the formation of the March 2008 contract as well as the modification of the financing terms from conventional to owner financing. He testified that he forwarded the original contract to Mr. Castrejon's banker at BB&T, and understood that BB&T was unwilling to loan Mr. Castrejon the funds to purchase the property. He also testified that he was the one who reduced the terms of the owner financing deal to writing [Plaintiffs' Trial Exhibit #10] and forwarded them to Mr. Jefcoat.

Defendants then presented the testimony of Ladislao Castrejon. Mr. Castrejon testified once he became interested in purchasing the property, all discussion about the property and negotiations regarding a prospective sale were had with Mr. Dawson. He testified that the terms of the contract he agreed to in March 2008 required him to make a $50,000 down payment and obtain financing for the remaining $252,500 of the purchase price. Mr. Castrejon testified that he attempted to obtain financing from BB&T, a bank he had an ongoing business relationship with, but BB&T was unwilling to extend him any additional credit. He testified that it was not until several months after he informed Mr. Dawson that he was unable to obtain financing from BB&T that owner financing began to be discussed. He testified that he intended to obtain the $75,000 down payment called for under the terms of the owner financing deal from Jesus Brito,

but Mr. Brito ultimately decided on the day of closing (September 24, 2008) not to provide the funds for the down payment.

Defendants also presented the testimony of Joseph Rosen, a real estate appraiser with Rosen Appraisal Associates. As with Ms. Keys, the parties stipulated that Mr. Rosen was an expert in appraising. Mr. Rosen testified that he performed an appraisal of the property and determined that its value as of September 24, 2008, the time of the parties' contemplated closing of the transaction, was $315,000. As part of his testimony Mr. Rosen explained the methodology he employed in compiling his appraisal.

Plaintiffs claim Mr. Castrejon's failure to purchase the property constituted a breach of the parties' contract. Since Plaintiffs to date have not been able to secure a buyer for the property, they claim they are entitled to general damages measured as the difference between the contract price and the fair market value of the property on September 24, 2008, the time of the breach, as determined by Ms. Keys. In addition, Plaintiffs claim they are entitled to special damages in the form of the interest they would have earned on the owner financing they offered to Mr. Castrejon ($103,404.29) [Plaintiff's Trial Exhibit 7]. Mr. Castrejon has raised several defenses to the enforceability of the contract and to Plaintiffs' ability to prove and collect contract damages.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety, the documents received into evidence, the arguments of counsel and the parties' post-trial memoranda. This Court has further had the opportunity to observe the witnesses presented at trial, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law required by Rule 52, SCRCP.

A. Contract Issues

The elements required for formation of a contract are an offer, acceptance, and valuable consideration. Sauner v. Public Service Authority of South Carolina, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). In order for a contract to arise, there must be a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) ("[I]n order 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."); Rushing v. McKinney, 370 S.C. 280, 290, 633 S.E.2d 917, 922 (Ct. App. 2006) (holding that for a contract to arise, there must be a meeting of the minds of the parties involved).

This Court finds that the contract containing signatures dated March 27, 2008 [Plaintiffs' Trial Exhibit 4] contained the necessary elements of offer acceptance and valuable consideration, and, thus, constituted a binding contract as to Plaintiffs and Defendant Castrejon. Mr. Castrejon wanted to purchase the property and contacted Plaintiffs' real estate agent, Mr. Dawson, to gauge their interest. He subsequently made an offer to purchase, and although that initial offer was not accepted, he continued to engage in negotiations with Plaintiffs through Mr. Dawson until they ultimately arrived at a purchase price of $302,500. Both the Plaintiffs and Mr. Castrejon signed the contract indicating their assent to its terms, and Mr. Castrejon began the process of attempting to secure financing from his bank to complete the contemplated transaction.

The contract contained both a "time is of the essence" clause and one which set a specific deadline by which the transaction was to be consummated. [Plaintiff's Trial Exhibit #4, ¶ 11, ¶ 13]. That deadline was April 25, 2008. [Id., ¶ 11.] It is uncontroverted that the transaction did not close by the date specified in the Contract. [Tr., p. 60, ll. 2-14; p. 63, l. 22 – p. 64, l. 8; p. 69,

612

ll. 6-16; p. 75, ll. 8-10; p. 76, ll. 19-22; p. 79, ll. 1-7]. Defendant Castrejon argues a contract which by its terms has expired becomes legally defunct and unenforceable. Plaintiffs argue to the contrary.

As mentioned above, although it is undisputed that the contemplated transaction did not close by April 25, 2008, it is also uncontroverted that the parties continued negotiations past that date. Although it is clear Plaintiffs and Mr. Castrejon never spoke directly to one another, it is equally clear that they all continued working on alternative financing terms after the contractual deadline for closing the transaction had passed and eventually agreed upon a new financing arrangement involving owner financing and a closing date in September 2008. None of the parties attempted to terminate the contract when it did not close on April 25, 2008; nor did they propose a new contract-they simply continued to act as though the contract was still valid. Since none of the parties attempted to enforce the "time is of the essence" clause, the contract did not terminate on April 25, 2008.

Mr. Castrejon also argued that the owner financing terms and the agreement to extend the closing date constituted modifications to the contract which were unenforceable because they failed to comply with the Statute of Frauds. Mr. Castrejon argued further that Plaintiffs were prohibited from recovering contract damages on a contract brought outside the application of the Statute of Frauds by part performance. However, as noted above, this Court finds that the original contract was never terminated and, thus, the owner financing terms and the extension of the closing date were simply modifications to the terms of the original written contract and, therefore, the Statute of Frauds was not implicated.

B. Attorney Issues

12

Generally, in the attorney-client relationship, clients are bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority. Koutsogiannis v. BB&T, 365 S.C. 145, 149 616 S.E.2d 425, 428-429 (2005). What is at issue here is the extent of Mr. Jefcoat's authority. The parties do not dispute that Mr. Jefcoat was the attorney designated by Mr. Castrejon to close the contemplated transaction. Where the parties differ is in their interpretation of the scope of Mr. Jefcoat's representation. Mr. Castrejon contends that Mr. Jefcoat's scope of representation was limited to the closing of the transaction. [Tr., p. 163, l. 11 – p. 164, l. 12; p. 175, ll. 14-18]. Plaintiffs claim that Mr. Jefcoat had authority to negotiate terms of the purchase on behalf of Mr. Castrejon.

Again, while the general rule in South Carolina is that clients are bound by the acts of their attorneys, South Carolina courts recognize that the scope of an attorney's representation is dependent in large part upon whether or not the attorney's actions occur as part of his representation of the client in an active suit. Attorneys, under their general authority, have limited powers. There is a wide and clear distinction between the acts of attorneys under their general authority in matters not in court, and the acts of attorneys in the conduct and progress of a suit in court. Ex parte Jones, 47 S.C. 393, 25 S.E. 285 (1896). For instance, it is perfectly permissible for counsel of record in a matter pending before a court to agree to refer a case to arbitration. However, that same act would not be within an attorney's purview in a matter not before a court without his client's express permission. Id. The same limitation to an attorney's authority applies to negotiating contracts. As the Supreme Court noted in Annely v. De Saussure, 12 S.C. 488 (1879):

> The relation of attorney and client implies authority to enforce the demands of his client, of obtaining either voluntary or coercive satisfaction of such demands, and

> to bind the client as a party litigant in certain matters appertaining to the conduct of causes; but it does not confer a general power of attorney to contract independently in relation to such demands, nor to transfer such demands to a third party. *The proper duty of a counselor is to advise his clients; if he becomes a negotiator, a business manager, it is through some other form of authorization than that implied in being selected as a legal adviser merely*. (emphasis added).

Even in cases where actions are pending, and attorneys are of record, there is a line beyond which they cannot go and bind their clients. Attorneys, without express authority, have no right to compromise or settle their clients' rights, to release a lien, or substitute one security for another, in matters not in court. Graves v. Serbin Farms, Inc., 295 S.C. 391, 392-393, 368 S.E.2d 682, 683 (Ct. App. 1988).

In this matter, Mr. Jefcoat's involvement was merely as a facilitator or scrivener for the contemplated closing of the sale of the property. He was not hired to negotiate or alter the terms of the Contract, and his retention to close the real estate transaction did not provide him with the authority to renegotiate the terms of the transaction or to otherwise bind Mr. Castrejon. To negotiate contractual terms for Mr. Castrejon, Mr. Jefcoat would have needed express authority from Mr. Castrejon to do so. This Court finds that he did not.

Nevertheless, Mr. Jefcoat could still bind Mr. Castrejon if he had the requisite apparent authority. A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts. Orphan Aid Society v. Jenkins, 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987) (quoting McCall v. Finley, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987)). "It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." Id.

The doctrine of apparent authority provides that the principal is bound by acts of his agent when he has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom, is led to believe the agent has certain

authority and in turn deals with the agent based on that assumption. Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), *rev'd on other grounds,* 313 S.C. 412, 438 S.E.2d 248 (1993). Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. Restatement (Second) of Agency § 27 (1958); Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. at 142, 399 S.E.2d at 433. Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief. Id. Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent. Id., at 142-43.

To establish apparent agency, it is not enough simply to prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant. Watkins v. Mobil Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986). In order for a third party to recover against the principal based upon this theory, it must be shown that he reasonably relied on the indicia of authority *originated by the principal* and such reliance must have effected a change of position by the third party. Beasley v. Kerr-McGee Chem. Corp., Inc., 273 S.C. 523, 257 S.E.2d 726 (1979); Watkins v. Mobil Oil Corp. Apparent authority must be established based upon the manifestations of the principal, not the agent. Orphan Aid Society v. Jenkins, 294 S.C. 106, 362 S.E.2d 885, 887 (Ct. App. 1987).

Plaintiffs were unable to show Mr. Jefcoat had apparent authority, because they produced no proof of indicia of Mr. Jefcoat's apparent authority originating from Mr. Castrejon. Both Mr. Query and Mr. Castrejon testified that they never spoke to one another. [Tr., p. 81, l. 21 – p. 82, l. 7; p. 162, ll. 11-19]. Therefore, there could be no manifestation of any kind by Mr. Castrejon

to Mr. Query, much less one that Mr. Jefcoat had authority to negotiate terms of the transaction on his behalf. Although Mr. Dawson did communicate with Mr. Castrejon regarding Mr. Jefcoat, no evidence was presented showing that Mr. Castrejon indicated to Mr. Dawson that Mr. Jefcoat's involvement in the transaction would be in any capacity other than a closing attorney. [Tr. p. 113, l. 8 – p. 114, l. 11; p. 141, l. 13 – p. 142., l. 18]. Thus, Mr. Jefcoat lacked apparent authority as well.

Even though Mr. Jefcoat lacked authority to bind Mr. Castrejon, this Court, nevertheless, finds that Mr. Castrejon was made aware of and agreed to the owner financing terms and the proposed closing date in September 2008. He had made arrangements to borrow the down payment necessary to meet the terms of the owner financing deal from Mr. Brito and planned to close the transaction on September 24, 2008. Just as his decision not to close was not based upon the passage of the April 25, 2008 deadline in the original contract, neither was it due to any unauthorized agreement by Mr. Jefcoat. Mr. Castrejon did not close because Jeffcoat had agreed to the owner financing option without his approval. Rather Castrejon did not close after Brito viewed the property and decided that he would not advance the down payment since he did not like the property after he physically inspected it.

C. Financing Issue

At trial Plaintiffs presented the Court with two offers to purchase the property. Both were on a standard form of the Greater Columbia Association of Realtors captioned "Land, Lots and Acreage Offer to Purchase," and both were dated March 20, 2008 in paragraph 1. However, the first appeared to be the initial offer to purchase as it contained a purchase price that was lower than the purchase price ultimately agreed to by the parties. It also failed to contain signatures of the Plaintiffs (Sellers). [Plaintiffs' Trial Exhibit #3]. The second represented the

actual agreement between the parties as it contained Mr. Query's signatures, indicating his acceptance of the offer to purchase. The signatures contained on the second document were all dated March 27, 2008. It is this second document which Plaintiffs seek to enforce ("the Contract"). [Trial Transcript, p. 56, l. 24 – p. 59, l. 15; p. 69, ll. 6-13; p. 70, ll. 6-12]. Paragraphs 3 of the Contract required Mr. Castrejon, the purchaser, to make a two thousand dollar ($2000) earnest money deposit, which was to be held by Re/Max, Mr. Query's realtor, a forty-eight thousand dollar ($48,000) down payment, and obtain a loan of two hundred fifty-two thousand five hundred dollars ($252,500). [Plaintiff's Trial Exhibit #4, ¶ 3]. Paragraph 6 of the Contract explicitly made the Contract contingent upon Mr. Castrejon obtaining the financing referenced in paragraph 3. [Id., ¶ 6]. The financing was never obtained and, thus, the contingency was not met.

At trial, each of the parties acknowledged that Mr. Castrejon made attempts to secure $252,500 in financing from BB&T, the bank with whom he had a previous lending relationship, but those attempts were unsuccessful. [Tr., p. 59, l. 16 – p. 60, l. 1; p. 60, ll. 15-20; p. 103, l. 6 – p. 104, l. 9; p. 160, l. 1 – p. 161, l. 2]. Mr. Castrejon also made attempts to secure the down payment from Mr. Brito, but that too was unsuccessful. [Tr. p. 162, l. 20 – p. 163, l. 4; pp. 163, ll. 8-10; p. 164, l. 20 – p. 165, l. 7].

A condition precedent is an act which must occur before performance is due. Alexander's Land Co., L.L.C. v. M&M&K Corp., 390 S.C. 582, 596, 703 S.E.2d 207, 214 (2010). If a contract contains a condition precedent, that condition must occur before a party's duty to perform arises. McGill v. Moore, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009). Generally, the failure of one to perform under a contract because of his inability to obtain financing from a third party on whom he relied to furnish money will not excuse performance, in the absence of a

contract provision in that regard. However, paragraph 6 of the Contract had just such a term. It read, "Contract is contingent upon above financing." In 2008 the South Carolina Court of Appeals, construing identical language, determined that the phrase "is contingent upon" is a clear and unambiguous condition precedent. The Court reasoned as follows:

> The use of the language "is contingent upon" is unequivocal and patently indicates the parties' respective obligations to buy and sell ... are contingent on [the purchaser's] ability to secure financing. No other meaning could be deduced from such clear and commonly used language.

M&M Group, Inc. v. Holmes, 379 S.C. 468; 666 S.E.2d 262 (Ct. App. 2008).

Financing is "the act or process or an instance of raising or providing funds" or "the funds thus raised or provided." (Merriam-Webster Dictionary, 2014 Online Edition, http://www.merriam-webster.com/dictionary/financing); BLACK'S LAW DICTIONARY 663 (8th Ed. 2004) ("the act or process of raising or providing funds"). The phrase "above financing" found in paragraph 6 of the Contract had three components – (1) an earnest money deposit of $2000; (2) a $48,000 down payment; and, (3) a $252,500 loan. Since each of the three components of the contract purchase price noted above had to be paid to Plaintiffs before their obligation to deliver the property to Mr. Castrejon, they collectively make up the "financing" for this transaction. Although Mr. Castrejon made an effort to secure both, he was never able to deliver the down payment, nor the additional $252,500. Mr. Castrejon tried but failed to obtain the down payment from Jesus Brito. While there was some indication that he might be able to do so, Mr. Brito eventually decided he was not willing to provide the funds, and Mr. Castrejon had no other means to obtain them. Likewise, his attempts to obtain a loan from BB&T for $252,500 proved unsuccessful. Mr. Castrejon's inability to obtain the down payment ($48,000) and remaining funds ($252,500) for the purchase of the property, therefore, constitute a failure of the contract's financing contingency, and excuses him from performance. Storen v. Meadors,

295 S.C. 438, 440, 369 S.E.2d 651, 652 (Ct. App. 1988)(prospective buyer excused from performance under a real estate purchase contract with a financing contingency clause when buyer made good faith effort to obtain financing); Nodolf v. Nelson, 103 Wis.2d 656, 658, 309 N.W.2d 397, 398 (Ct. App. 1981)("Subject to financing" clause in real estate purchase contract creates condition precedent to buyer's performance which delays the enforceability of the contract until condition has been met).

Plaintiffs contend that their offer to provide owner financing for a portion of the purchase price satisfied the condition precedent and, thereby, made the contract enforceable. However, Plaintiffs' position is not persuasive. The owner financing arrangement had two components: (1) a down payment and (2) the balance to be financed. Plaintiffs argue by implication that since they were the "bank," they could have reached an agreement wherein Defendant could have paid some amount as a down payment with the balance being negotiated. That argument is not flawed since it would convert the financing equation from one of a good faith negotiation into one where Plaintiffs could invoke any offer of owner financing terms to justify a claim that Mr. Castrejon breached the Contract by not agreeing to their conditions as to terms, interest rates, down payment amount, etc.

D. Clear Title Issue

The Contract required Plaintiffs to convey marketable title, free of encumbrances. Specifically, paragraph 11 of the Contract read as follows:

> Conveyance shall be made subject to all easements as well as covenants of record (*provided they do not make the title unmarketable*) and to all governmental statutes, ordinances, rules and regulations. *Seller agrees to convey by marketable title* and to have prepared a proper statutory warranty deed *free of encumbrances*, except as herein stated. (emphasis added).

There were no exceptions to Plaintiffs' duty to convey the property free of encumbrances noted elsewhere in the Contract.

An encumbrance is a right or interest in the land granted which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee. A mortgage is a classic example. Truck South, Inc. v. Patel, 339 S.C. 40, 48, 528 S.E.2d 424, 428-429 (2000); Martin v. Floyd, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984) (quoting 21 C.J.S. Covenants § 142); see also BLACK'S LAW DICTIONARY 547 (7th ed. 1999)("A claim or liability that is attached to property or some other right that may lessen its value, *such as a lien or mortgage*; any property right that is not an ownership interest.")(emphasis added).

A marketable title is one free from encumbrances and any reasonable doubt to its validity. Gibbs v. G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). It is a title which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept. Scalise Development, Inc. v. Tidelands Investments, LLC, 392 S.C. 27, 33, 707 S.E.2d 440, 443 (Ct. App. 2011). A purchaser of realty cannot be required to take a doubtful title. Sanders v. Coastal Capital Ventures, Inc., 296 S.C. 132, 134, 370 S.E.2d 903, 905 (Ct. App. 1988).

Mr. Query testified at trial that Plaintiffs intended to use the $75,000 down payment to reduce the existing mortgage. However, he acknowledged that the existing mortgage would not be paid off in full, but would remain against the property, with Plaintiffs' owner financing constituting a second mortgage against the property. [Tr., p. 98, l. 15 – p. 99, l. 21]. A purchaser of real property is not required to accept an encumbered title, trusting to the good faith of the sellers to satisfy the liens at some future time. Robeson-Marion Development Company, Inc. v. Powers Company, Inc., 256 S.C. 583, 183 S.E.2d 454 (1971); Treadaway v. Williams, 163 So.

2d 911, 914 (La. App. 4th Cir. 1964) (purchaser not required to purchase property when uncancelled encumbrances exceed amount seller receives at closing); Shear v. Helm, 195 Kan. 281, 287, 403 P.2d 941 (1965) (buyer not expected to proceed with contract where seller unable to remove encumbrances). There was no testimony that seller would have cured this problem by obtaining a (1) subordination agreement (2) substitution of collateral or (3) release of the subject property from the mortgage Since the funds Plaintiffs would have received upon closing the owner financing deal would not have been sufficient to remove the existing mortgage, Mr. Castrejon was excused from proceeding with the transaction, and cannot, therefore, be found in breach.

E. Appraisal Issues

In an action for breach of a contract to purchase real estate, general damages may be measured by the difference between the contract price and the fair market value of the property at the time of the breach. Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984). The Contract purchase price was $302,500. Both Plaintiffs and Mr. Castrejon presented testimony from appraisers who opined as to the value of the property in September 2008, the time Plaintiffs claim Mr. Castrejon breached the contract. Plaintiffs' expert, Elizabeth Keys, opined that the value of the property at that time was $270,000 [Plaintiff's Trial Exhibit #1]. Mr. Castrejon's expert, Joseph Rosen, opined that the value of the property in September 2008 was $315,000. [Defendants' Trial Exhibit #2]. Therefore, based upon Ms. Keys' appraisal, Plaintiffs' general damages would be the difference between the purchase price ($302,500) and the property's appraised value ($270,000), or $32,500. However, based upon Mr. Rosen's appraisal, Plaintiffs would have no damage, as the property's value exceeded the Contract purchase price.

The property is considered commercial vacant property. It is slightly over 11 acres in size. It is shaped like a backward "L", with the top of the L fronting on Highway 321 in Gaston. [Id., p. 15]. Ms. Keys' confined her pool of comparable properties to those which were between 3 and 20 acres in size. [Tr., p. 40, ll. 15-23]. For this reason she could find no comparable sales in the Gaston area. The three properties she ended up using as comparables were not located in proximity to Gaston, but were, instead, located in West Columbia, Springdale and Edmund. [Plaintiffs' Trial Exhibit #1, p. 33; Tr. p. 53, l. 11 – p. 54, l. 5]. Although Mr. Rosen was able to locate sales of commercial vacant land in Gaston during the relevant time period, Ms. Keys testified that she discounted them, because they were too small and because their highest and best use was not commercial retail. [Tr. p. 45, l. 20 – p. 46, l. 14; p. 48, ll. 2-16]. How she arrived at the 3 acre demarcation line was not entirely clear.

Mr. Rosen determined that the 4 acres of the property which fronted 321 carried the value of the property due to the fact it was bisected by a power line. [Tr., p. 194, l. 20 - p. 195, l. 6]. He felt that the remainder of the property had very little utility. Mr. Rosen found three comparable commercial vacant properties located in the city of Gaston which sold within the relevant time period. [Defendants' Trial Exhibit #2, p. 34; Tr., p. 195, ll. 6-8]. Although they did fall below the three acre threshold imposed by Ms. Keys, Mr. Rosen explained that the subject property's real utility was in the 4 acres which fronted 321, so these properties were comparable in size to the portion of the property with any real utility, an approach which Ms. Keys admitted was proper. [Tr., p. 49, ll. 8-14]. More importantly, however, was the fact that they were all located in Gaston. [Tr., p. 195, l. 20 - p. 196, l. 3]. He felt that it could be misleading to use properties outside Gaston when trying to appraise a property in Gaston. [Tr., p. 193, l. 15 - p. 194, l. 5; p. 195, ll. 15-19].

This Court finds Mr. Rosen's appraisal was more appropriate for a property located in Gaston. His comparables were all in the same vicinity. Although they were significantly smaller than the overall tract of land to be sold, they were very close in size to the portion of the property that was usable for retail development. Ms. Keys placed more importance on the size of the lots rather than the location, and intentionally ignored viable comparables in the vicinity. Based upon evaluating both appraisers' testimony, Rosen's appraisal represents a more accurate appraisal of the true value of the property, and Plaintiffs' therefore would not have been able to recover general damages, even had they prevailed on their breach of contract claim.

CONCLUSION

For the foregoing reasons, Plaintiffs claims against Mr. Castrejon are denied and dismissed with prejudice.

AND IT IS SO ORDERED this 4th day of April, 2014.

JAMES O. SPENCE
Master-In-Equity
Lexington County

Lexington, South Carolina.