THE STATE OF SOUTH CAROLINA
In The Court of Appeals

72420

APPEAL FROM LEXINGTION COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Case No. 2010-CP-32-2038

Oliver Grady Query, and the Estate of Grady W. Query, by its Personal Representative, Oliver Grady Query, Appellants-Respondents,

v.

Ladislao Castrejon, Alberto Lozano and Jesus Brito, Defendants, Of Whom Ladislao Castrejon is the Respondent-Appellant.

MOTION FOR LEAVE OF COURT TO FILE RULE 60 MOTION IN LOWER COURT

Allen Bullard
MONTGOMERY WILLARD, LLC
Post Office Box 11886
Columbia, South Carolina 29211
(803) 779-3500
Attorney for Respondent-Appellant

Respondent-Appellant, Ladislao Castrejon, submits that the trial court's order dated April 4, 2014, contains a scrivener's error or clerical mistake, and he, therefore, requests leave of Court to file a motion pursuant to Rule 60(a), SCRCP, with the trial court requesting the error be corrected. Rule 60(a), SCRCP provides in part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

A clerical error is a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function. Dion v. Ravenel, Eiserhardt Assocs., 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App. 1994).

At the conclusion of trial, the trial court requested the parties submit post-trial memoranda addressing certain issues raised at trial. (Exhibit 1). Both parties submitted their respective post-trial memoranda on February 11, 2014. (Exhibit 2). Subsequently, by letter dated March 13, 2014, the trial court informed the parties of its decision and requested that counsel for Mr. Castrejon draft a proposed order formally memorializing its decision. (Exhibit 3). In that letter under the heading "FINANCING ISSUES" the trial court said the following:

> The contract had standard subject to financing clause. Defendant testified he went to bank and could not procure a loan. While there was no documentary evidence to support this claim, there was no testimony from the lender to indicate otherwise. I find the Defendant's explanation credible.
>
> The agreed upon owner financing arrangement had two components: (1) a down payment and (2) the balance to be financed. Plaintiff argues by implication, that since he was acting as the "bank" he 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 persuasive *since it would change the financing equation from one of a good faith negotiation over what the parties believed they could or could not do, into one where the Seller could invoke any offer of owner financing terms to justify claim that Defendant breached the contract by not agreeing to the Seller's conditions as to terms, interest rates, down payment amount etc.* (emphasis added).

In the proposed order submitted to the trial court by Mr. Castrejon, the last paragraph of Section C (titled "Financing Issue) attempted to adequately reflect the trial court's ruling and read as follows:

> 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* ***untenable***. 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 persuasive*** *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.* (emphasis added)(Exhibit 4).

In the trial court's order dated April 4, 2014, the final paragraph of Section C was slightly modified by the trial court, and reads as follows:

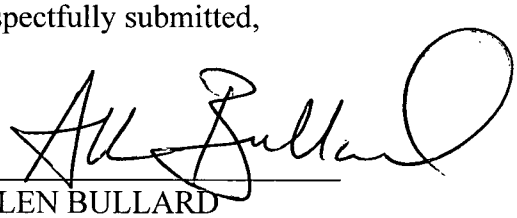
> Plaintiffs contend that their offer to provide owner financing for a portion of the purchase price satisfied the condition precedent and, thereby, made the contract enforceable. *However, Plaintiffs' position is* ***not persuasive***. The owner financing arrangement had two components: (1) a down payment 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.* (emphasis added)(Exhibit 5).

Mr. Castrejon submits that a clerical mistake or scrivener's error exists in the aforementioned paragraph which should be corrected before this appeal moves forward. Mr. Castrejon submits that the trial court's March 13, 2014 letter indicated that it found in his favor on the financing issue, and, therefore, the first few words of the final sentence of the paragraph at issue should read "That argument is flawed" rather than "That argument is not flawed." Mr. Castrejon submits that such a reading is more in keeping with the trial court's ruling as expressed in its March 13, 2014 letter and the context of the remainder of the paragraph. The trial court simply failed to delete the word "not" from the proposed order when it made its revisions for the final order. For that reason, Mr. Castrejon requests this Court grant him leave to file a motion pursuant to Rule 60(a), SCRCP, to correct the error in the order.

In addition, Mr. Castrejon submits that the above-cited paragraph in its current form creates an ambiguity that requires clarification before the appeal can properly move forward. At the outset of the paragraph the trial court states that the "[Appellants'-Respondents'] position is not persuasive," indicating that it does not agree with Appellants-Respondents' position. Thereafter, the trial court states that the argument is "not flawed," indicating that the trial court agrees with the Appellants'-Respondents' position. This ambiguity makes it unclear whether the trial court found for Mr. Castrejon or Appellants-Respondents on this issue. If Appellants-Respondents are the prevailing party on this issue, Mr. Castrejon intends to appeal the trial court's ruling, and would, thus, need to raise this issue in his initial brief as appellant. If Mr. Castrejon is not the prevailing party, Appellants-Respondents would likely want to raise it in their initial brief as appellants. Thus, it serves the interests of both parties to have the ambiguity created by the clerical mistake corrected by the trial court.

For the foregoing reasons, Mr. Castrejon requests leave of this Court to file a Motion pursuant to Rule 60(a) and that the time limits of this appeal be suspended until the motion is heard and ruled upon.

Respectfully submitted,



ALLEN BULLARD
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abullard@montgomerywillard.com

Attorney for Ladislao Castrejon, Respondent-Appellant

June 6, 2014.

EXHIBIT 1

on the impossibility of performance argument and it's very brief.

MR. BULLARD: I examined him on that issue, asked him about whether the -- the lien was going to remain, and he answered questions on it and was subject to redirect at that time.

THE COURT: I think he's correct. He questioned him about that.

MR. EVANS: Correct, Your Honor.

THE COURT: All right. Anything further?

MR. BULLARD: No, sir, Your Honor.

THE COURT: All right. I'm going to -- I want you all to -- these are the things I want you to address in your memos. If I -- if I leave something out in my questions -- in my memo questions, I'm not offended if, after you get a chance to go back and this all soaks in, for you to say, "You were also going to address issue A, B or C, you forgot about those." Just copy the other side. Because we -- there's a lot of issues. A lot of things to go around.

MR. BULLARD: Did you want us to -- copy the other side, do you mean with the memo or prior to addressing it in the memo, let the other side know we're going to address it?

THE COURT: Yes. If there's additional issues after I

EXHIBIT 2

Allen Bullard

From: Mark Evans <MEvans@qlawsc.com>
Sent: Tuesday, February 11, 2014 4:38 PM
To: SPENCE, JAMES
Cc: Allen Bullard
Attachments: Query Memo.pdf

Hello Judge Spence,

Attached please find Plaintiff's Memorandum of Law that you requested following the trial in this non-jury matter on November 21, 2013.

By copy of this email, I am providing same to Allen Bullard, Esq., attorney for Defendant Castrejon.

By separate email I am also sending you relevant pages of transcript and exhibits. Allen already has these and they are all listed in my memo so I am not sending him a copy of those unless you or he requests otherwise. Thank you.

Mark V. Evans

Mark V. Evans
Atty-at-Law

(843) 762-6640 Work
MEvans14@bellsouth.net
(843) 762-1500 fax
147 Wappoo Creek Dr. Suite 202
Charleston, SC 29412

Print Close

Query v. Castrejon (2010-CP-32-2038)

From: **Allen Bullard** (allen_bullard@msn.com)
Sent: Tue 2/11/14 11:32 PM
To: jspence@lex-co.com (jspence@lex-co.com); mevans@qlawsc.com (mevans@qlawsc.com)
1 attachment
Post-Trial Memorandum (Castrejon & Lozano).pdf (98.0 KB)

Judge Spence:

Attached please find Defendant Castrejon's and Defendant Lozano's joint Post-Trial Memorandum. I had to leave the office early today due to the weather, so I am not able to send you the exhibits mentioned in my motion from home. I will send them to you the next day the office is open. I'm afraid the office will be closed tomorrow (Wednesday), so it may be Thursday. I hope that is OK.

EXHIBIT 3

COPY

MASTER-IN-EQUITY COURT
COUNTY OF LEXINGTON
Lexington County Judicial Center
205 East Main Street, Suite 204
Lexington, SC 29072

James O. Spence
Master-in-Equity

Fax (803) 785-0609
Email: jspence@lex-co.com

March 13, 2014

Re: Query v Castrejohn et al/ 2013 CP 32 2038

Dear Mr. Evans and Mr. Bullard:

I hope all is well with everyone at home and work.

The purpose of this letter is to advise you of the decision reached in the above referenced contested real estate contract case and to ask for assistance in the preparation of the order. I appreciate your effort and zealous representation of your clients and well-thought memos regarding this very interesting case. My analysis of the case is limited to the trial testimony, reasonable inferences, and stipulated evidence. I will not cite all case law etc to all points discussed below since most arguments are addressed in your respective briefs/memos.

CONTRACT ISSUES: While Defendant argues that the initial contract terminated and any subsequent actions would be barred by Statute of Frauds, Plaintiff is correct in his argument that the original contract was never terminated. The parties had a binding contract that they continue to negotiate and treat as viable. After the initial closing date occurred, the parties, the purchaser's attorney, the real estate agent all continued to act as though the contract was still viable. Neither side invoked the TIME IS OF THE ESSENCE clause. Neither side took any action such as (1) calling (2) writing (3) emailing (4) conveying in any fashion that the contract was terminated. Neither side suggested or insisted that a new contract be prepared, with new terms, new down payment etc. While the TIME IS OF THE ESSENCE was a clause that could have been invoked by either party; neither did. It was an arrow lift in the quiver.

ATTORNEY ISSUES: Defendant was represented by an attorney who had previously represented him in real estate matters. While Defendant is correct in his legal analysis that an attorney (without express authority) has not ability to negotiate new terms or settle cases or make independent legal decisions on his own, Defendant's own testimony indicate that he had to have been in discussion and approval of the new owner financing terms. Defendant testified that he had procured a friend to pay the owner financing down payment and close the deal subject to owner financing terms. A new survey had been procured. Defendant did not close the transaction due to (1) time is of the essence issues or (2) his attorney agreeing to something unauthorized, he didn't close because his down payment source refused to pay the money once he inspected the property and saw the power line easement.

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FINANCING ISSUES: The contract had standard subject to financing clause. Defendant testified he went to bank and could not procure a loan. While there was no documentary evidence to support this claim, there was no testimony from the lender to indicate otherwise. I find the Defendant's explanation credible.

The agreed upon owner financing arrangement had two components: (1) a down payment and (2) the balance to be financed. Plaintiff argues by implication, that since he was acting as the "bank" he 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 persuasive since it would change the financing equation from one of a good faith negotiation over what the parties believed they could or could not do, into one where the Seller could invoke any offer of owner financing terms to justify claim that Defendant breached the contract by not agreeing to the Seller's conditions as to terms, interest rates, down payment amount etc.

CLEAR TITLE ISSUE: More importantly, Plaintiff had legal obligation to convey clear title--not one subject to a first mortgage. Plaintiff's testimony that he was negotiating with Bank was not sufficient. Plaintiff stated that he intended to take a second behind the existing loan --an arrangement that contemplated Seller receiving funds from Purchaser and applying them to the First Mortgage.

The court cannot accept that the Defendant's attorney, would have allowed the closing to go forward. Doing so would put the Defendant at the Seller's mercy—i.e. his promise to take the Defendant's money and apply to the First Mortgage. If he failed to do, the Defendant would have his property foreclosed by the first, notwithstanding Defendant may have made all his payments to the Seller—a situation not unlike many Contract for Deed or Installments Sales Contract matters.

This scenario without more evidence, is simply not an acceptable manner to pass clear title. There are only a certain number of viable ways to conform with the contract requirement to pass title free from encumbrances (a) satisfy the mortgage (b) substitute collateral (c) subordinate 1st to owner financing (d) Release land from mortgage for payment (e) have Purchaser Lawyer to explain to Defendant and have Defendant then agree in writing to agree to be second behind 1st. (f) No evidence of HUD/Closing statement or request or agreement to hold docs/funds in trust to allow reasonable/stated time to cure.

APPRAISAL ISSUES: Finally, while both appraisers were qualified, the Defendant's appraisal was more persuasive. Defendant's comps were better illustrations of the value of the property. While size of tract is important, mere acreage is not always the key indicator-an acre at the beach generally worth more than an acre in a rural part of the county. Defendant's testimony about (1) shape/size (2) location of comparables (3) affect of power line on over all tract value are more persuasive than Plaintiff's appraisal testimony.

Based on the above, Plaintiff's claims denied.

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This letter is not a final order. Please include arguments and details contained in memorandum.

The court asks Mr. Bullard to submit a ***judiciously objective proposed order citing transcript,*** in the following format, addressing (a) Factual/Procedural Background (b) Issues (c) Rules (d) Application (e) Conclusion. (Please review MIE Web site on Lexington County Website for Honorable Justice Kittredge 2007 MIE Bench Bar Seminar Notes and S.C. Court of Appeals Judge Bruce Williams Order Writing Tips) citing:

1. Include a time line of events.
2. Cite case law elements for each issue above.
3. Case law citing applicable legal criteria ie, specific burden of proof, ie preponderance, clear and convincing.
4. RULE 52 applications of specific facts supporting cause(s) of action/defenses.
5. Any critical evidentiary matter.
6. Please prepare Order and cite authority according to Rules 85(a) and 239 SCACR.

None of this letter need be inserted verbatim in the proposed order. Please send me (within thirty days) the proposed Order by a WORD e-mail attachment and provide a copy of the order to all parties as required by rule.

Very Truly Yours,

S/ JOS

James O. Spence

NOTE: MEMO FILED, SCANNED AND EMAILED TO BOTH ATTORNEYS ON MARCH 13, 2014.

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EXHIBIT 4

Allen Bullard

From: Allen Bullard
Sent: Friday, March 28, 2014 10:45 AM
To: 'SPENCE, JAMES'
Cc: Mark Evans
Subject: Query v. Castrejon (2010-CP-32-2038)
Attachments: proposed order of dismissal (Query v. Castrejon).doc

Judge Spence:

I have attached a copy of a draft proposed order in the aforementioned matter in WORD format for your review and comments. I am also providing Mr. Evans with a copy, so that he may make you aware of any comments he may have regarding the order.

Please let me know of any corrections you would like made.

Allen Bullard
Montgomery Willard, LLC
1002 Calhoun Street (29201)
Post Office Box 11886
Columbia, South Carolina 29211
(803) 779-3500
(803) 799-2755 (fax)

From: SPENCE, JAMES [mailto:JSPENCE@lex-co.com]
Sent: Thursday, March 13, 2014 11:42 AM
To: Mark Evans; Allen Bullard
Subject: FW: Message from KMBT_283

March 13, 2014

I hope all is well at home and work with everyone.

Query v Castrejohn Decision Memo attached.

Thanks to all,

JOS

From: bizhub283@lex-co.com [mailto:bizhub283@lex-co.com]
Sent: Thursday, March 13, 2014 7:40 AM
To: SPENCE, JAMES
Subject: Message from KMBT_283

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 OF DISMISSAL
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,

ll. 6-16; p. 75, ll. 8-10; p. 76, ll. 19-22; p. 79, ll. 1-7]. Mr. 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 uncontroverted 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. 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

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 Mr. Brito decided not to provide the down payment funds after he inspected the property.

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 untenable. 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 persuasive 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). 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. For these reasons, Mr. 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 _____ day of _____, 2014.

JAMES O. SPENCE
Master-In-Equity
Lexington County

Lexington, South Carolina.

EXHIBIT 5

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,

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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,

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

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.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTION COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Case No. 2010-CP-32-2038

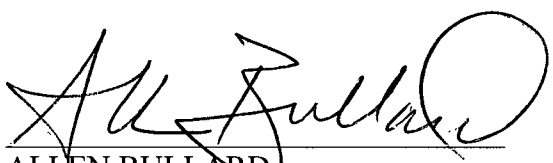
Oliver Grady Query, and the Estate of Grady W. Query, by its Personal Representative, Oliver Grady Query, Appellants-Respondents,

v.

Ladislao Castrejon, Alberto Lozano and Jesus Brito, Defendants, Of Whom Ladislao Castrejon is the Respondent-Appellant.

PROOF OF SERVICE

I certify that I have served Respondent-Appellant's Motion for Leave of Court to File Rule 60 Motion in Lower Court by depositing a copy of it in the United States Mail, postage prepaid, on June 6, 2014, addressed to their attorney of record, Mark V. Evans, 147 Wappoo Creek Drive, Suite 202, Charleston, South Carolina 29412.



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June 6, 2014.

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June 6, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Oliver Grady Query v. Ladislao Castrejon
Appellate Case No.: 2014-001041
Our File No.: 2135450

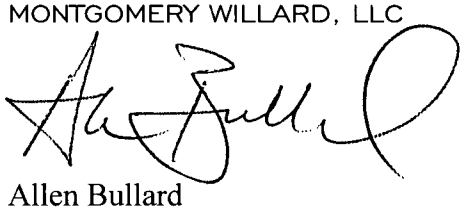
Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent-Appellant Ladislao Castrejon's Motion for Leave of Court to File Rule 60 Motion in Lower Court. I have also enclosed a check in the amount of $25 to cover the filing fee.

Please feel free to contact me if you have any questions or concerns.

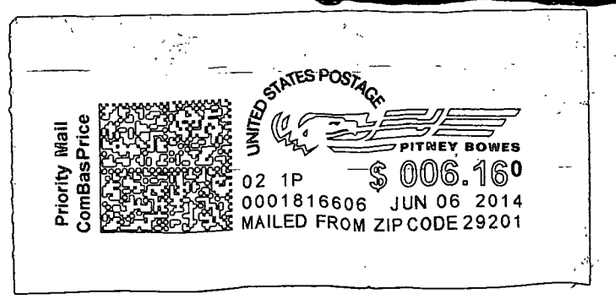
Sincerely,

MONTGOMERY WILLARD, LLC



Allen Bullard

cc: Mark V. Evans, Esquire



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