THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Case Number: 2010-CP-32-2038

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

v.

Ladislao Castrejon, Alberto Lozano and Jesus Brito, Defendants,

Of Whom Ladislao Castrejon is the Appellant-Respondent and Jesus Brito is the Respondent.

APPELLANTS' FINAL BRIEF OF RESPONDENTS-APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err in finding that the Appellant/Respondent Purchaser's obligation to purchase the subject real property pursuant to the sales contract at issue was excused by his alleged inability to obtain financing for the down payment, i.e. a condition precedent to performance?

2. Did the Trial Court err in failing to find that the Appellant/Respondent Purchaser first breached the real estate contract by not attending the closing and making the required down payment? If so, was his nonperformance nonetheless excused by the fact that Respondent/Appellant Seller may have conveyed the real property at the closing subject to an existing mortgage?

3. Did the Trial Court err in failing to enter a default judgment against Respondent Brito where it had earlier found there was no liability under the contract as to Brito's co-defendant?

STATEMENT OF THE CASE

Plaintiff commenced this action on May 18, 2010, with causes of action for breach of contract and novation resulting from a real estate closing that did not take place. Defendants Castrejon and Lozano answered the Complaint by asserting, among other things, that the contract was not enforceable because it had expired on its own terms and a condition precedent to the contract (arrangement of financing) had not occurred. Defendant Brito did not file an answer.

This case was subsequently referred to the Honorable James O. Spence, Master-in-Equity for Lexington County. After a non-jury trial on November 21, 2013, the Master found in favor of Defendant Castrejon. The day after the trial Plaintiff had agreed to dismiss all claims against Mr. Lozano with prejudice. On appeal, Plaintiff seeks to recover $100,000.00 in special damages, plus attorney's fees and costs.

The Master's Order finding in favor of Defendant Castrejon was filed on April 4, 2014, and served on the parties via email on April 7, 2014. A "scrivener's error" was corrected by subsequent order filed on May 8, 2014. Plaintiff served a Notice of Appeal on opposing counsel on May 7, 2014. Defendant Castrejon served a cross-Notice of Appeal on May 9, 2014.

On July 18, 2014, Defendant Castrejon filed a Rule 60(a) motion to correct another clerical error in the April 4, 2014, order. The motion was granted by order filed August 28, 2014. By letter dated September 8, 2014, the parties hereto were given thirty days to file their initial briefs and designation of matter.

On August 29, 2014, the Master's Order was filed denying Plaintiff's request for a default judgment against Defendant Brito. The basis for this ruling was that the complaint alleged joint liability against the Defendants and the Master had already found there was no liability under the contract.

Plaintiff appealed this order on September 8, 2014. Plaintiffs also moved to consolidate the two appeals and the motion was granted by Order filed October 2, 2014. By letter of the same date the parties were given thirty days to file their initial brief.

The Estate of Grady W. Query was closed during the pendency of this action. Plaintiff O. Grady Query was the sole heir of the estate and is, therefore, the only remaining Respondent/Appellant in this appeal.

ARGUMENT I

I. The Appellant/Respondent Purchaser's obligation to purchase the subject real property pursuant to the sales contract at issue was not excused by his alleged inability to obtain financing for the down payment, i.e. a condition precedent to performance.

The parties to this appeal agree that up until the morning of September 24, 2008, they were both prepared to perform their obligations under a contract for the purchase and sale of real property. On that date, the day of the scheduled closing, Mr. Castrejon's business associate Defendant Brito, visited the subject property and saw there was a large power line that divided the 11.29 acre parcel of land. Castrejon testified that he was relying upon Brito for the down payment funds, but Brito did not want to buy the property. Mr. Castrejon argues that he is excused from performance because the contract was contingent upon his ability to secure financing for the down payment. [R. p. 211, line 20 – p. 212, line 10; p. 213, line 16 – p. 214, line 7].

In his Order, the trial judge found [R. p. 6, paragraph 2] there was a binding contract between the parties, which was introduced as Plaintiffs' Trial Exhibit 4. He further found [R. p. 13, line 2] that paragraph 6 of the contract made it "...contingent upon above financing." The contract did not specify a particular type of financing, but the trial judge found [R. p. 11, line 7 – 8] that after Mr. Castrejon was unable to secure bank financing, "...Mr. Castrejon was made aware of and

agreed to the owner financing terms...".

Tommy Dawson, the real estate agent for Appellants-Respondents, testified that the amount of the down payment had been increased from $50,000.00 to $75,000.00 at Mr. Castrejon's request. Mr. Dawson further testified that he directly negotiated all of the terms of the owner financing with Mr. Castrejon and forwarded the agreed-upon contract terms to Mr. Castrejon's closing attorney via email on August 12, 2008. [R. p. 153, line 2 – p. 158, line 9; Plaintiffs' Trial Exhibit 10, R. p. 458 – 459]. Later that same day, the closing attorney sent an email to the seller, Mr. Query, confirming that the closing was scheduled to occur later that month under the owner financing terms. [Plaintiffs' Trial Exhibit 6, R. p. 451]. Seller Query testified he had sent the amortization schedule [Plaintiff Exhibit 7, R. p. 452 - 455] to the closing attorney confirming all of the terms of the owner financing. [R. p. 122, line 15 – p. 123, line 5].

The contract states in paragraph 6: "Contract is contingent upon above financing. If loan cannot be obtained, earnest money will be refunded to Purchaser." In spite of the fact that the "loan amount" in paragraph 3(C) clearly does not include the down payment (which is broken down into two parts in 3(A) and (B)), Mr. Castrejon argued, and the trial judge agreed, that the contract here is contingent upon a loan being obtained to pay the remainder of the down payment.

"In construing a contract, the primary concern of the court is to ascertain and give effect to the intent of the parties...The language of a contract must first be considered in determining the intention of the parties to that contract." Worley v. Yarborough Ford, Inc., 317 S.C. 206, 452 S.E. 2d 622, 624 (Ct. App. 1994).

> "To discover the intention of a contract, the court must first look to its language-if the language if perfectly plain and capable of legal construction, it alone determines the document's force and effect." ("If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.").

> If practical, documents will be interpreted to give effect to all of their provisions.
>
> The primary test of a contract's character is "the intention of the parties, such intention to be gathered from the whole scope and effect of the language used." The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." "In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered." Parties are governed by their outward expressions and the court is not free to consider their secret intentions.

M&M Group, Inc. v. Holmes, 379 S.C. 468, 476, 666 S.E. 2d 262 (Ct. App. 2008) (citations omitted).

> A condition precedent to a contract is "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises."
>
> .....
>
> "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 the money will not excuse performance, in the absence of a contract provision in that regard." Id. (citing 17A Am.Jur. 2d *Contracts* § 680 (1991)) (other citations omitted).

"Generally, 'a condition precedent may not be implied when it might have been provided for by the express agreement.'" Worley, 317 S.C. at 209, 452 S.E. 2d at 625 (citing 17A C.J.S. Contracts § 338 (1963)).

In the instant case, there is no provision in the contract that makes the buyer's performance contingent upon his ability to obtain financing for the down payment. [R. p. 220, lines 13 - 15]. If buyer's bank had agreed to provide funds for the "loan amount" referenced in paragraph 3(c) of the contract, then buyer would have been obligated to provide the down payment from his personal funds. This obligation did not change when the parties agreed to proceed with owner financing rather than bank financing.

The agreed-upon price for the property consisted of two parts, a down payment (broken down into "earnest money" and the balance of the down payment to be paid at closing) and a "Loan amount to be obtained by Purchaser." Black's Law Dictionary defines "down payment" as "[t]he portion of a purchase price paid in cash (or its equivalent) at the time the sale agreement is executed." (7th ed. 1999).

The trial judge here found [R. p. 7, lines 7 – 9] that after Castrejon was unable to obtain bank financing, the parties "...continued working on alternative financing terms...and eventually agreed upon a new financing arrangement involving owner financing..." The agreed-upon terms of the owner financing – down payment, interest rate, loan amount – were explicitly outlined in the amortization schedule and related documents located in the closing attorney's file. [Plaintiff Trial Exhibit 5]. Castrejon was fully aware that a down payment of $75,000.00, was part of those terms. [R. p. 211, line 20 – p. 212, line 10].

The closing was originally scheduled to occur in August 2008, but it did not go forward at that time only because a current survey of the property was needed. That survey was performed on September 3, 2008 [Plaintiff Trial Exhibit 8, R. p. 456], and the closing was rescheduled for September 24, 2008.

After this litigation had commenced, various legal defenses were asserted on behalf of Appellant/Respondent Purchaser, but the only reason the closing did not go forward in September 2008, was because Castrejon's business partner did not like the property and Castrejon later testified that he was relying on him for the down payment funds. Castrejon so testified and the trial judge ruled he was excused from performance on that basis [R. p. 19]. This Court's ruling on this issue should be dispositive as to this appeal.

ARGUMENT II

II. The Appellant/Respondent Purchaser breached the contract first by failing to attend the closing and make the required down payment. His nonperformance is not excused on the grounds that had the closing occurred, the property may have been conveyed to him subject to an existing mortgage, especially where the existing mortgage had been fully disclosed by the Seller.

The trial judge further found that Purchaser Castrejon was excused from performance under the sales contract because he would not have received clear title to subject property had the closing occurred. [R. p. 16, lines 4 - 9]. Paragraph 11 of the contract stated that the property would be conveyed "free of encumbrances, except as herein stated." There is no question there was an existing mortgage on the property on the day of the scheduled closing between the parties here.

First of all, the existing mortgage was never an issue as the parties prepared for the closing. It was not raised as an issue until after this litigation commenced. Purchaser Castrejon's closing attorney was fully aware of the existing mortgage as evidenced in his written communications to Seller [Plaintiff Trial Exhibit 6, R. p. 451]. Both he and his client were prepared to close until the day of closing, when Defendant Brito visited the property and saw there was a power line through the middle of the eleven acre tract. Again, Appellant/Respondent Castrejon testified that the only reason the closing did not take place was his inability to obtain the down payment from his business partner.

The trial judge found that the contract here did not terminate because "none of the parties attempted to enforce the 'time is of the essence' clause." [R. p. 7, lines 11 - 13]. Likewise, the Purchaser here never sought to enforce the "free of encumbrances" clause. And, in fact, the existing

mortgage is "stated herein" in that it is part of the closing attorney's written communications to Seller confirming the agreement of the parties as to the terms of the contract. [Plaintiff Trial Exhibit 6, R. p. 451]. The existence of the first mortgage was fully disclosed well in advance of closing.

In addition, what Seller here may or may not have done had the closing occurred as scheduled is speculation. The existing mortgage was never raised as an issue during negotiations between the parties. Respondent/Appellant Query testified that he had been in negotiations with the bank to "take this property out of" ... the "mortgage that included this property as security." [R. p. 147, Line 5 – p. 148, line 21]. Although the down payment would have paid off most of the existing mortgage, Seller Query did not pursue further negotiations with the bank to eliminate it entirely since the Purchaser never raised it as an issue until after litigation had commenced.

"Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests." Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539, 543 (Ct. App. 2008) (citations omitted); Langston v. Niles, 265 S.C. 445, 458, 219 S.E.2d 829 (1975). Here, Appellant/Respondent Castrejon breached the contract at issue by failing to attend the closing and make the required down payment. Since he was clearly guilty of the first breach of the contract, all liability for the nonperformance of the contract rests upon him. His performance should not be excused on the basis of a matter that was never even raised until after litigation had commenced. Had the matter truly been an issue between the parties, Seller Query would have been given an opportunity to address it.

Finally, when the parties to a contract have reached an agreement it is the duty of the court to enforce it "... regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Silver at 543.

ARGUMENT III

III. Did the Trial Court err in failing to enter a default judgment against Respondent Brito where it had earlier found there was no liability under the contract as to Brito's co-defendant?

Although Defendant Brito failed to answer the complaint and was in default, the Master denied Plaintiff's request for entry of a default judgment. The master noted [R. p. 28, lines 5 – 7] the conflict between the plain language of SCRCP 55 and "the underlying concept that the purpose of the trial is to arrive at the truth."

This appears to be a novel issue in South Carolina as there are no reported cases deciding the issue. The Master reviewed conflicting rulings from Georgia and North Carolina in reaching his ruling.

In the event this Court affirms the finding by the Master in favor of Appellant/Respondent Castrejon , Appellant Query requests this Court follow the reasoning applied by the Supreme Court of Georgia in the case of Fred Chenoweth Equipment Company v. Oculus Corporation, 254 Ga. 321, 328 S.E.2d 539 (Ga. 1985):

> Considering the case before us, the default judgment against Oculus did not reach the merits of the claim on the contract. The default judgment merely determined that Oculus failed to follow the procedural requirement that a timely answer be filed. The consequence of this failure was that judgment was entered against Oculus. When the claim against Deepwater and Aetna on their bond is pursued in the trial court it will be necessary to decide the merits of the contract claim because there is no liability on the bond unless there is first liability on the contract. Should it be determined Oculus has no liability on the contract we view this as neither absurd nor inconsistent with the default judgment against Oculus. Oculus suffered judgment because of its failure to answer the complaint and was therefore denied an

> opportunity to litigate the merits. This is no less than and no greater than the harshness existing in a default judgment against a single defendant. The merits are not reached because of the default. It may be the other defendants will go on to prevail on the merits but we do not think this should relieve Oculus of its default.
>
> The trial court ascertained Oculus was in default, considered Rule 54(b) of the Civil Practice Act, [2] correctly determined there was no just reason for delay and entered final judgment against Oculus. This was the correct procedure.

In the event, however, this Court rules in favor of Respondents/Appellants as to Appellant/Respondent Castrejon's liability under the contract, it is requested that this matter be remanded to the trial court for entry of default judgment against Respondent Brito.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the trial court and enter judgment for Respondents/Appellants against Appellant/Respondent Castrejon on the breach of contract claim. Respondents/Appellants further request this Court reverse the judgment of the trial court as to Respondent Brito and remand for entry of a default judgment against him.

Respectfully submitted,

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Of whom Jesus Brito is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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Of whom Jesus Brito is the Respondent.

PROOF OF SERVICE

I hereby certify that on this 17th day of Feb. 2015, a true and correct copy of the foregoing document was mailed, postage fully prepaid, via the United States Mail, addressed as follows:

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