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, 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.

FINAL BRIEF OF APPELLANT-RESPONDENT IN RESPONSE TO FINAL BRIEF OF RESPONDENTS-APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower court correctly determine that the contract was unenforceable due to the failure of a financing condition precedent?

II. Did the lower court correctly determine that Mr. Castrejon was excused from performance because Respondents-Appellants did could not fulfill their contractual obligation to convey title to the property free of encumbrances?

STATEMENT OF THE CASE

This matter came before the Lexington County Court of Common Pleas by way of a complaint filed by Oliver Grady Query and the Estate of Grady W. Query ("Respondents-Appellants") on May 18, 2010. In their complaint Respondents-Appellants brought causes of action for breach of contract and novation against Ladislao Castrejon, Alberto Lozano and Jesus Brito. Mr. Castrejon, the Appellant-Respondent, timely answered. Mr. Lozano did not initially do so. Therefore, at Respondents-Appellants' 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 the lower court by order dated September 20, 2011, and his previously filed answer was entered as a response to Respondents-Appellants' complaint. Respondents-Appellants subsequently filed an amended complaint dated September 20, 2013, in which they brought an additional cause of action for specific performance against Mr. Castrejon, Mr. Lozano and Mr. Brito. Mr. Castrejon and Mr. Lozano both filed answers to the amended complaint. Mr. Brito did not.

Trial was held before the Honorable James O. Spence on November 21, 2013 at the Lexington County Judicial Center. Respondents-Appellants were present and represented by Mark V. Evans, Esquire. Mr. Castrejon and Mr. Lozano were present and represented by Allen Bullard, Esquire. Mr. Brito was not present and was not represented. At the outset of trial Respondents-Appellants withdrew their novation and specific performance causes of action against Mr. Castrejon, Mr. Lozano and Mr. Brito with prejudice. [R. p. 55, line 17 – p. 56, line 12]. At trial, Respondents-Appellants

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. Mr. Castrejon and Mr. Lozano testified on their own behalves. They also presented the testimony of Joseph Rosen, a real estate appraiser with Rosen Appraisal Associates. The trial court also accepted eleven exhibits offered into evidence by Respondents-Appellants, and two exhibits offered into evidence by Mr. Castrejon and Mr. Lozano.

On November 22, 2013, Respondents-Appellants informed the trial court that based upon the testimony and evidence presented at trial Respondents-Appellants wished to dismiss all claims against Mr. Lozano with prejudice. The trial 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. Subsequently, by order dated April 4, 2014 the trial court entered judgment in favor of Mr. Castrejon. The parties received written notice of entry of the order on April 7, 2014. Thereafter, the trial court entered an order dated April 25, 2014 which corrected a scrivener's error on page 11 of its April 4, 2014 order.

By letter dated May 7, 2014, Respondents-Appellants served notice of appeal on Mr. Castrejon. By letter dated May 9, 2014, Mr. Castrejon served Respondents-Appellants with his notice of cross-appeal. By letter dated May 12, 2014 Mr. Castrejon filed his notice of appeal with this Court and the Lexington County Clerk of Court. By letter dated May 14, 2014 Respondents-Appellants filed their notice of appeal with this Court and the Lexington County Clerk of Court.

On June 9, 2014, Mr. Castrejon filed a motion requesting leave of court to file a motion pursuant to Rule 60, SCRCP, in an effort to correct an additional scrivener's error

in the lower court's order. Prior to receiving a ruling from this Court on the motion, on June 16, 2014, Mr. Castrejon filed and served his initial brief and designation of matter to be included in the record on appeal. By order dated July 17, 2014 this Court granted Mr. Castrejon's motion for leave of court and further ordered that the time limits for this appeal be held in abeyance pending a decision on the Rule 60 motion by the lower court. The lower court granted Mr. Castrejon's Rule 60 motion by order dated August 15, 2014. Subsequently, on September 8, 2014, this Court issued a new briefing schedule. In addition, on October 2, 2014 this Court consolidated the appeal between Respondents-Appellants and Mr. Brito (Case Number 2014-001926) with this appeal. Mr. Castrejon filed his initial brief for his cross-appeal in the consolidated appeal on October 30, 2014. Respondents-Appellants filed their initial brief for their appeal on November 6, 2014. Mr. Castrejon's response to Respondents-Appellants' initial brief follows.

FACTS

This case involves a dispute over a contract for the purchase and sale of real property. Respondents-Appellants sought to hold Mr. Castrejon liable for breach of an agreement to purchase an 11.29 acre parcel of land located in Gaston, South Carolina ("the Property").

At trial Respondents-Appellants 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. [R. p. 88, line 17 - p. 89, line 4]. 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. [R. p. 91, lines 15-19]. As part of her testimony Ms. Keys explained the methodology she employed in compiling her appraisal. [Tr. p. 89, line 15 - p. 90, line 25].

Next, Respondents-Appellants 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 Respondents-Appellants 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 subsequent to the parties' execution of the contract, he learned that Mr. Castrejon was unable to secure conventional financing from his bank (BB&T). Mr. Query testified that Respondents-Appellants thereafter offered to owner finance the transaction. [R. p. 109, line 15 - p. 110, line 2; p. 113, lines 8-20]. 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 he 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. [R. p. 125, line 19 - p. 127, line 17]. 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. [R. p. 128, lines 2-7]. Respondents-Appellants stipulated they 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, plus costs and attorney's fees. [R. p. 133, line 1 - p. 136, line 4].

Respondents-Appellants next presented the testimony of Tommy Dawson, an agent with Re/Max Metro Associates, who was Respondents-Appellants' real estate agent for purposes of this transaction. [R. p. 182, lines 7-14]. Mr. Dawson conducted the negotiations with Mr. Castrejon on Respondents-Appellants' 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. [R. p. 130, line 21 - p. 131, line 7; p. 153, lines 2-17; p. 168, line 17 - p. 170, line 16; p. 172, lines 8-24]. 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. [R. p. 161, line 12 - p. 162, line 7; p. 174, line 15 - p. 175, line 4; p. 176, lines 7-15]. He also testified that he

was the one who reduced the terms of the owner financing deal to writing [Respondents-Appellants' Trial Exhibit #10] and forwarded them to Mr. Jefcoat. [R. p. 154, line 2 - p. 157, line 25].

Mr. Castrejon testified on his own behalf. He 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. [R. p. 204, line 18 - p. 205, line 21; p. 208, lines 4-22; p. 211, lines 11-19]. 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 a loan for the remaining $252,500 of the purchase price. [R. p. 215, line 22 - p. 216, line 17; p. 217, lines 13-20; p. 219, lines 19-22]. 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. [R. p. 209, line 1 - p. 210, line 2]. 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. [R. p. 210, lines 3-10]. 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. [R. p. 211, line 20 - p. 212, line 10; p. 213, line 20 - p. 214, line 7].

Mr. Castrejon also presented the testimony of Joseph Rosen, a real estate appraiser with Rosen Appraisal Associates. [R. p. 238, line 15 - p. 239, line 4]. As with Ms. Keys, the parties stipulated that Mr. Rosen was an expert in appraising. [R. p. 88, line 17 - p. 89, line 4; p. 240, lines 24-25]. 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. [R. p. 245, lines 4-8]. As part of his testimony Mr. Rosen explained the methodology he employed in compiling his appraisal. [R. p. 241, line 23 - p. 245, line 3].

Respondents-Appellants claimed Mr. Castrejon's failure to purchase the Property constituted a breach of the parties' contract. Since Respondents-Appellants had not been able to secure a buyer for the Property as of the date of trial, they claimed they were 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, Respondents-Appellants claimed they were 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), plus costs and attorney's fees. Mr. Castrejon raised several defenses to the enforceability of the contract and to Respondents-Appellants' ability to prove and collect contract damages.

ARGUMENT I

The lower court correctly determined that the contract was unenforceable due to the failure of a financing condition precedent.

The lower court's ruling relating to the failure of the financing condition precedent had two components. As noted in Respondents-Appellants' initial brief, the lower court found that the term "financing" in paragraph 6 of the parties' contract included an earnest money deposit, a down payment and a loan, and that the contract was contingent on Mr. Castrejon obtaining all three components of the financing. Since Mr. Castrejon was unable to obtain sufficient funds to pay the down payment at closing, the lower court determined the financing condition precedent was not met. [R. pp. 11-14]. In addition, the lower court found that the owner financing terms offered by Respondents-Appellants failed to satisfy the financing condition precedent, because it converted the financing terms from a product of a good faith negotiation to one which provided Respondents-Appellants unfettered discretion to impose financing terms on Mr. Castrejon. [R. p. 14].

Although Respondents-Appellants take issue with the lower court's ruling that Mr. Castrejon's inability to obtain funds to make the down payment constituted a failure of the contract's financing contingency, they do not challenge the lower court's ruling that their offer of owner financing also leads to a failure of the financing condition precedent. Since Respondents-Appellants fail to challenge that ruling in their brief, that issue is deemed abandoned. Fields v. Melrose Limited Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (An issue raised on appeal but not argued in a party's brief is deemed abandoned and will not be considered by the appellate court); Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (An

appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's initial brief). An unchallenged or abandon issue precludes consideration on appeal, becomes the law of the case, and requires affirmance. First Union Nat'l Bank v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998).

Thus, Respondents-Appellants' failure to challenge the lower court's ruling that their offer of owner financing did not meet the financing condition precedent makes that ruling the law of the case and requires affirmance of the lower court on this issue. Therefore, even if Respondents-Appellants were to prevail on their argument that the lower court erred in ruling that Mr. Castrejon's inability to obtain funds to make the down payment constituted a failure of the financing contingency, the lower court's additional ground for finding a failure of the financing contingency remains unappealed and unaffected.

Nevertheless, even were the court to reach the merits of Respondents-Appellants' argument regarding Mr. Castrejon's inability to secure funds for the down payment, their argument still fails. 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 parties' contract had just such a term. It read, "Contract is contingent upon above financing." In 2008 this Court, construing identical

language, determined that the phrase "is contingent upon" is a clear and unambiguous condition precedent. This 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).

A contract is ambiguous when its terms are capable of having more than one meaning when viewed by a reasonably intelligent person. Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 747 S.E.2d 178 (2013). Here, the term "financing" in paragraph 6 of the parties' contract is not explicitly defined. Mr. Castrejon submits that while the Respondents-Appellants interpret the term "financing" to mean solely the loan contemplated in section 3(C) of the contract, that term is also susceptible to other reasonable interpretations. One such interpretation is that "financing" in the context of this transaction consisted all the funds Mr. Castrejon was required to supply the Sellers, Respondents-Appellants, in order to purchase the property -- the earnest money deposit, the down payment and a loan to be obtained by him.

In the initial, written contract, the financing consisted of an earnest money deposit of $2000, a $48,000 down payment, and a $252,500 loan. 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, constituted a failure of the contract's financing contingency, and excused 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).

At trial Respondents-Appellants contended that their offer to provide owner financing for a portion of the purchase price satisfied the condition precedent and, thereby, made the contract enforceable. As argued in his initial brief of his cross-appeal, Mr. Castrejon submits, first and foremost, that Respondent-Appellants attempts to orally modify the terms of the parties' contract violated the Statute of Frauds, and those terms are, therefore, unenforceable.[1] Nonetheless, even were that not so, the lower court correctly determined that even under the terms of the owner financing deal proposed by Respondent-Appellants, the financing contingency failed.

The uncontroverted evidence at trial indicated that Mr. Castrejon was never able to secure the down payment component of his financing under the owner financing deal. Mr. Castrejon was relying on a business associate, Jesus Brito, to supply the funds for the down payment, and initially, Mr. Brito indicated he would do so. Unfortunately, Mr. Brito changed his mind, and Mr. Castrejon had no other means to make good on the

[1] Mr. Castrejon incorporates herein by reference his argument in his initial brief of his cross appeal on this issue.

$75,000 down payment. [R. p. 211, line 20 – p. 212, line 10; p. 213, line 20 – p. 214, line 7]. Therefore, he was not able to procure all the financing required under the terms of the owner financing deal either.

Respondents-Appellants appear to take the position Mr. Castrejon was required to provide the down payment from his own personal assets. However, neither the contract nor the skeletal terms of the owner financing deal restricted Mr. Castrejon's potential sources of funds for the down payment in this manner, nor did either contain any comparable provision limiting the financing contingency to only a portion of the purchase price. Even if the contract had contained a provision prohibiting Mr. Castrejon from borrowing the funds for the down payment, Respondents-Appellants waived any such requirement, for they were aware that someone other than Mr. Castrejon might be supplying money to the transaction and voiced no objection at the time. [R. p. 113, line 21 - p. 114, line 1]. In fact, Respondents-Appellants allowed a deed to be prepared which listed Mr. Brito, an individual not a party to the written contract, as a grantee. [R. p. 140, lines 13-23]. Since Mr. Castrejon was not able to secure the down payment portion of the financing from Mr. Brito, which Respondents-Appellants apparently knew he was attempting to do and consented to, the lower court correctly concluded the condition precedent as to financing was not met and the contract was unenforceable.

ARGUMENT II

The lower court correctly determined that Mr. Castrejon was excused from performance because Respondents-Appellants could not fulfill their obligation to convey title to the property free of encumbrances.

The parties' contract required Respondents-Appellants 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).

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 Respondents-Appellants 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 Respondents-Appellants' owner financing constitute a second mortgage against the property. [R. p. 147, line 15 – p. 148, line 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). In an action at law for money damages for breach of a land sale contract, tried by the judge without a jury, the judge's finding of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports those findings. Sanders v. Coastal Capital Ventures, Inc., 296 S.C. 132, 134, 370 S.E.2d 903, 905 (Ct. App. 1988). Since Mr. Query testified that the funds Respondents-Appellants were to receive under the owner financing terms would not have been sufficient to remove the existing mortgage, there is evidence which reasonably supports the lower court's findings, and its determination on this issue should be affirmed.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the lower court on the issues addressed above.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I certify that I have served Appellant-Respondent's Final Brief in Response to Respondents-Appellants' Final Brief on Respondents-Appellants and by depositing a copy of it in the United States Mail, postage prepaid, on February 4, 2015, addressed to their attorney of record, Mark V. Evans, 147 Wappoo Creek Drive, Suite 202, Charleston, South Carolina 29412. I also certify that I have served Appellant-Respondent's Final Brief in Response to Respondents-Appellants' Final Brief on Respondent Jesus Brito by depositing a copy of it in the United States Mail, postage prepaid, on February 4, 2015, addressed to 16 Forest Parkway, Building C-1119, Forest Park, Georgia, 30297-2015.

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