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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEALS FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis
Master of Equity

Appellate Case No. 2014-002633

Stephen Dudek, Doreen Cross, Respondents,

v.

Thomas M. Ferro and Lorraine B. Ferro, Appellants.

And

Molly M. Morphew, Appellant,

v.

Stephen Dudek, Doreen Cross, Thomas Ferro and Lorraine Ferro, Defendants,

Of whom Stephen Dudek and Doreen Cross are Respondents.

APPELLANT'S FINAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....11

ARGUMENTS

I. THE MASTER IN EQUITY ERRED IN RULING THE RESPONDENTS CONTRACT IS ENFORCEABLE.....12

II. THE MASTER IN EQUITY ERRED IN CONCLUDING THAT THE FAILURE OF RESPONDENTS TO MEET THEIR CONDITIONS OF THEIR CONTRACT IN A TIMELY MANNER IS INCAPABLE OF BEING DEFENDED.....14

III. THE MASTER IN EQUITY ERRED IN BASING HIS RULING ON FINDINGS OF FACT THAT WERE NOT SUPPORTED BY THE TESTIMONY IN THE RECORD.....31

IV. THE MASTER IN EQUITY ERRED BY SUPPORTING HIS DECISION IN HIS ORDER USING FALSE, INCONSISTENT, UNRELIABLE AND OBFUSCATED TESTIMONIES, THEREFORE SHOWING BIAS IN FAVOR OF THE RESPONDENTS.....40

V. THE MASTER IN EQUITY ERRED IN, (1)HIS ASSERTION THAT APPELLANT MORPHEW SOUGHT DAMAGES AGAINST APPELLANTS FERRO ON BREACH OF THE MORPHEW CONTRACT, (2) THEREFORE APPELLANTS FERRO CHAMPION THE MORPHEW CONTRACT.....44

CONCLUSION.....44

In this breach of contract action, Appellant Morphew and Appellants Ferro appeal the master-in-equity's decision to grant specific performance to Respondents Stephen Dudek and Doreen Cross, and his decision to award damages to same.

TABLE OF AUTHORITIES

CASES

Ingram v. , 340 .C. at 106, 531 S.E.2d at 291 13

Cambell v. Carr. 361 S.C. 258, 263-64, 603 S.E.2d 625. 627-28 (CT.App. 2004) 13

Stickney v Keeble [1915] AC 386 14

Cureton v. Gilmore, 3 S.C. 46 45

With v O'Flanagan [1936] Ch 575 46

Thompson v. Dulles, 5 Rich. Eq. 370 47

STATUTES

S.C. Code Ann. § 40-57-137(H)(2)(c) 32

S.C. Code Ann. § 40-57-137(K) 43

S.C. Code Ann. § 40-57-145(19) 46

S.C. Code Ann. § 16-9-10(A)(1) 46

OTHER AUTHORITIES

www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/family/ chapter4.authcheckdam.pdf 14

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STATEMENT OF ISSUES ON APPEAL

1. Did the master in equity err in his ruling that the Respondents Contract is enforceable?
2. Did the master in equity err in concluding that the failure of Respondents to meet their conditions of their contract in a timely manner incapable of being defended?
3. Did the master in equity err by basing his ruling on findings of fact that were not supported by the testimony in the record?
4. Did the master in equity err by supporting his decisions upon false, inconsistent, unreliable and obfuscated testimonies, therefore showing bias in favor of the Respondents?
5. Did the master in equity err in his assertion that Appellant Morphew alternatively sought damages against Appellants Ferro on breach of the Morphew Contract, therefore Appellants Ferro champion the Morphew Contract?

STATEMENT OF THE CASE

On October 20, 2012, Respondents (Buyers, Stephen Dudek and Doreen Cross) signed the said Contract. Ms. Nicholson, agent for Respondents, negotiates with Appellants (Sellers, Thomas and Lorraine Ferro)/their agent, Rick Willis.

On October 22, 2012, Allison Williams (FF lending officer) generates and provides pre-approval letter for Respondents (R. pg. 191, lines 5-9 pg. 228)[1]

On October 24, Ms. Williams told Respondent Cross that the dividing of the land "may" be a problem for the appraiser. Ms. Williams sent an e-mail to [someone she could not specify (R. pg. 167 lines 6-10) to inquire if the land division will be a problem for the appraiser.[2] Ms. Nicholson met with Appellants Ferro (sellers) to ratify contract. Contract ratified. Nicholson told Appellants Ferro that the recording of the survey was required in order for Respondents to pursue their financing. Tommy Ferro immediately went to the surveyor's office and set an appointment for survey. Respondents, Ms. Nicholson, Rick Willis (agent for Ferro) and Appellants Ferro met on said property to flag property lines for surveyor.

On October 25, land survey performed by Ben Coker from Ashley Surveying.

On October 31, Respondents' Home Inspection performed.

On November 4, Appellants Ferro receive Respondents' "critical" repair list. The next day, Appellants Ferro answer what they will agree to in a short paragraph via e-mail.

On November 7, Ms. Nicholson receives the original critical list that has been marked as to what Appellants Ferro will and won't do. Ms. Nicholson forwards list to Respondents. The next

[1] "T." will represent "transcript", "pg." will represent "page number" and "l." will represent "line(s)" herein.
[2] Ms. Williams' testimony concludes the land division issue is <u>her opinion only;</u> she never followed up on the answer; therefore the information that the appraisal cannot be ordered or performed until the survey is recorded is just speculation. Ms. Williams did testify that this concern was more hers because she didn't want to have to correct the appraisal if anything changed after the survey got recorded (R. pg. 161, lines 13 -21 and pg. 214 lines 10-19)

day Ms. Nicholson asks for more clarification in regards to what Appellants Ferro agree on in regards to the repair list.

On November 10, Ferro again replies to clarification request from Respondents and sends back Respondents' original repair list request with his hand marked entries to as what he agrees to and what he doesn't agree to. Ferro schedules appointment for Structural Engineer inspection. The very next day, Appellants Ferro respond to another clarification request from Respondents in regards to the repair list. This line by line list corresponds to the sections and numbers from the original repair list request but with only items that the Appellants Ferro are agreeing to perform.

On November 12, Plumber inspection and repairs completed.

On November 14, Structural inspection performed. Structural engineer states to all present [Respondents, Ms. Nicholson, Tim Arnold (Respondents' contractor), and Appellants Ferro that he feels comfortable with the structural integrity of the home (as repeated below).

On November 20, Ben Coker from Ashley Surveying sends completed and recorded plat to Appellants Ferro. The next evening, Appellants Ferro forward to Willis.

On November 22, Willis sends recorded plat to Ms. Nicholson and asks for confirmation. No reply from Ms. Nicholson.

On November 23, Willis asks Ms. Nicholson if "*everything was on track to close next week*" and if she "*received the plat*" yesterday. No reply from Ms. Nicholson. Respondents receives recorded plat from Ms. Nicholson.

On November 26, Willis again asks Ms. Nicholson if "*the closing time has been set for the property*" and "*if they could please know where it is being held*". Ms. Nicholson responds that she's "*talking to the mortgage company now but they hadn't done the appraisal yet... Bank has not given a timeline for closing.*"[3] Willis forwards the 11-22-12 e-mail again to Ms. Nicholson

[3] Respondents have not applied for loan yet; appraisal would not be ordered; lender cannot give a closing date if application is not even made. Ms. Nicholson is providing misleading information to Willis/Appellants Ferro.

stating that the plat Ms. Nicholson received last Thursday IS the correct and recorded plat, and to please confirm she has received.

On November 27, Appellants Ferro asks what they should be expecting as a closing date. Ms. Nicholson responds that the bank does not know when they will be ready for closing.[4] Respondents contact closing attorney. Closing attorney (Woody Law Firm) sends out engagement letter, via U.S.P.S., to the Appellants Ferro asking them to fill out the required information (Social Security numbers, phone numbers and e-mail addresses) and return to them (R. pg. 258[5]). Respondents sends Appellants Ferro another revised request for repairs list.

On November 27, Respondent Cross contacts Ms. Williams (First Financial loan officer) and states she is still waiting for the structural and moisture reports so "*we can firm everything up*" and that her realtor [Nicholson] is "*starting to chew her nails ☺*" and that she "*will be in touch soon*". Respondent Cross verifies FF has the correct recorded survey plat (R. pg. 276[6]). Woody Law Firm sends introduction e-mail to FF stating they were contacted to handle Mr. Dudek's purchase, and that title has been ordered and asked for FF's title request.[7]

November 28, CL-100 performed by Palmetto Exterminators. Willis inquires to Ms. Nicholson if she is going to prepare an extension. (R. pg. 342)

November 30, FF updates status of Respondents "May 2012 file" to "Dead File"- over 180 days old.[8]

On November 30, Appellants Ferro receive completed CL-100 from Palmetto Exterminators. Willis takes CL-100 to closing attorney. All repairs agreed by Appellants Ferro are completed. Willis again asks Ms. Nicholson if they "*have any idea on a closing*", and "*if the*

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[4] Id.

[5] "Ex." Will represent "Exhibit" herein.

[6] "sp." will represent "specifically" herein.

[7] R. pg. 277 -E-mail 11-27-12 5:14pm from Carrie Boyer (Woody Law) to Allison Williams.

[8] R. pg. 278- "Memos for Loan", entry 11/30/12 9:27am; R. pg. 157, line 12 thru pg. 158, line 14.

appraisal got back" and to "*let them know when it was done*" (R. pg. 343). Appellants Ferro complete minor repair from termite damage and schedules appointment for treatment to termites and minor damage. **Contract expires**.

December 3, Rick implores to Ms. Nicholson "*get the appraisal done asap or they [Respondents] may lose the deal by default from the time taking so long*!" Ms. Nicholson then contacts Respondent Cross and asks her to start her loan process since the Appellants Ferro have shown they are "*serious about doing what is necessary within reason to close do **YOU** feel comfortable to have the mortgage company do what they need so we can close?*" Respondents agree they have no other concerns about the house and contact FF to apply for financing on Contract. Respondent Cross receives an automated "out of office" [until Dec. 5] message from Ms. William. Ms. Nicholson worriedly replies, "*we really need to get with FF hopefully they will call you back*" (R. pg. 352- e-mails 12-3-12 3 between Willis, Respondents, Ms. Nicholson).

December 3, Palmetto treats termites and minor repair. Ms. Nicholson is present at said property with her contractor to inspect repairs and insists to the **"no fault"** extension clause in paragraph 12 of contract, giving Respondents until the 15th of December to close.

December 5, Ms. Nicholson requests an e-mail from Carrie Boyer (Closing Attorney's paralegal) to state Woody Law Firm needs proof that the damage on the CL-100 report was repaired. Carrie Boyer sends e-mail to Ms. Nicholson stating, "*As requested. We will have to have proof that the damages have been repaired. Thanks.*" (R. pg. 346- e-mail 12-5-12 2:38pm).

On December 5, Respondents apply for loan phone call. Respondents receive loan application, bank disclosures and their "Customer Loan Application Checklist" requirements from Allison Williams at FF[9], via e-mail & attachments.

[9] "FF" will represent First Federal Bank herein.

On December 6, Appellants Ferro fax closing attorney's completed engagement letter back. **Appellants Ferro handwrites on the bottom of the letter, "*Today 12/6/12 Need to close in 7 days or less or no closing. Tom 12/6/12.*" File sent to first reviewing department. FF appraisal department orders appraisal. FF requests another contract due to the Sellers names missing.

On December 7, Respondents' file sent to UW[10].

On December 8, Appellant Morphew looks at house.

On December 10, Respondents sign and mail application and disclosures to FF.

On December 11, UW reviews file [but nothing in it except for a blank prequalification application dated May 7, 2012].

On December 11, Appellant Morphew applies with several lenders for pre-approval.

On December 12, UW requests the signed application and banking disclosures, a legible copy of the sales contract, Addendum A, B, C and the signed Contract Extension from Respondents. Appraisal performed.

On December 15, 15-Day contract extension clause (paragraph 12) expires.

On December 16, Appellants Ferro send Respondents a contract cancellation notice due to not closing on or before the contract date. Appellant Morphew signed a contingent back up contract. Ms. Nicholson sends response back to Willis questioning the cancellation notice.

On December 17, Ms. Nicholson sends another response requesting more repairs plus attaching the December 12th approval letter, containing several buyer contingencies including Respondents IRS Transcripts, a legible contract and all its Addendums, and a Contract Extension. Rick responds and explains in detail why they issued the cancellation notice.

[10] "UW" will represent First Federal Underwriting department.

On December 17, Appraisal reviewed by UW. UW "still to review loan once the contract and all addendums, including a Contract Extension, and Respondent' IRS Transcripts are received." Respondents IRS Transcripts ordered by FF.

On December 18, UW receives application and banking disclosures.

On December 20, UW receives a legible Contract unsigned by the Appellants Ferro. Michael Scarafile (President and General Counsel of Carolina One Real Estate) sends letter to Willis stating Respondents are able and willing to close within 5 day notice [by December 21, 2012], and if Appellants Ferro don't agree to close then a lawsuit will be filed against them, plus a Lis Pendens to "prevent the Appellants Ferro from selling to anyone else". No closing date offered by Mr. Scarafile.

December 20, UW receives the legible copy of the sales contract and all addendums. UW questions an **unsigned** copy of a Repair Addendum that appeared but "*was not in the original submission*" (R. pg. 278- "Memos for Loan", entry 12/20/12 10:43am)

December 24, Attorney Joe Qualey, for Appellants Ferro, reviews contract and sends a letter to Susan Nicholson stating, "*Since the closing did not occur within the required time period* ***(Time being of the Essence)****, this contract is null and void.*"[11]

On December 31, 2012, UW sends a request to Ms. Williams (FF lending officer) to get an update on the Contract Extension needed from Respondents to obtain the loan.

On January 3, **2013**: FF issues a 10-day notice to Respondents, again requesting a signed Contract Extension.

On January 10, Appellants Ferro speaks with Atty. Joe Qualey and informs him he has another buyer and intends to sell to other buyer. Atty. Qualey informs Respondents attorney, David Collins, the Appellants Ferro have another buyer and do not intend to sell to Respondents.

[11] (R. pg. 275)

On January 11, Atty. Collins files a Lis Pendens on property to prevent the sale of said property to Appellants Ferro backup buyer. On January 12, FF is told the loan is a short sale, therefore they don't need a Contract Extension. UW sends out inquiry to Respondents to see if there has been a verbal acceptance of a short sale.[12]

On January 15, 2013: Atty. Collins files another Lis Pendens, and a lawsuit against Appellants Ferro.

On January 16, Respondents file is reviewed for non-compliance and sent back to UW for decline due to expired 10-day notice (no response from Respondents).

On January 18, Respondents loan declined as of 1/18/2013 due to incomplete application and no response to FF's 10- day letter requesting the Contract Extension required at application on December 5, 2012. FF sends e-mail to Ms. Williams stating the file is being declined for not sending a Contract Extension.[13] Ms. Williams informs Sandi Steele (FF) that Respondents are in litigation, an order was placed so the Seller cannot sell to anyone else, and suggests speaking to their (FF) attorneys about how to proceed in case they get drawn into a lawsuit. Allison Williams requested the file be escalated to Linda Hitchcock (FF) for determination of declination or hold until resolution (R. pg. 281).

January 23, File is sent back to UW for 2nd review [as a single female]. Declined for incomplete application (R. pg. 278- Memos for Loan entry 1-23-13 10:40am)

January 25, 2013: Willis requests information from FF regarding Respondents loan status. Kay (Mortgage Processor Team Leader) at FF calls Respondent Cross to ask her if she want her to provide the information to the listing agent [Willis] and if so Kay would need this in writing (R. pg. 278- Memos for Loan entry 1-25-13 1:25pm)

January 29, 2013: UW states no response from Respondent re: Willis request for their financing information (R. pg. 278- entry 1-29-13 8:14am). File is sent back to UW for another review.

January 30, 2013: Respondent Cross responds to FF inquiry re: Willis. Respondent Cross requests FF to e-mail the questions that were being asked by the listing agent. Kay (FF) e-mails

[12] Ms. Williams testifies she doesn't know why/how that came about but "it looks like "that girl" made an assumption and that is not right and that entire paragraph is not right" (R. pg. 183 lines 1-4 and pg. 278 Memos for Loan entry 1-12-2013 12:19pm).

[13] (R. pg. 281)

questions to Respondent Cross. Cross e-mails Kay the name of their attorney and to direct any questions to him[14]. Morphew files lawsuit against Respondents for breach of contract and damages.

January 31, 2013: Refund and decline letter e-mailed to Respondents. File is put in W/R storage drawer[15].

March 4, Atty. Massalon sends subpoena to FF requesting any information, documents, etc. in their possession relating to Respondents regarding purchase of 788 E. Butternut (TMS#128-00-00-090). (R. pg. 283)

March 8, 2013: Atty. Massalon/Atty. Collins mtg. to discuss if Respondents had financing and were not in breach of contract. Atty. Collins provided the Dec 12th pre-approval letter and stated that the reason his clients did not close is because "*the sellers did not provide a Cl-100.*"

March 13, 2013: FF response to the subpoena from Atty. Massalon for information regarding Respondents loan: "*...there are no accounts for this client at our institution. We researched our internal system and Dorchester County Register of Deeds and were unable to locate any loan documents related to the above referenced customers for the specific address and TMS number.*" (R. pg. 282).

March 15, Atty. Massalon mtg. with Atty. Collins. Though FF stated there were no loans approved or even on file for his client, Atty. Collins stated "*his clients had loan approval, but couldn't close because they never got a CL-100.*"

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[14] (R. pg. 309- E-mails 1-30-13 8:23am and 9:18am between Respondent Cross and Kay Rode (Mortgage Processing Team Leader)

[15] (R. pg. 278- Memos for Loan entry 1-31-13 11:05am)

March 21, Atty. Massalon has office conference with Atty. Collins re settlement and rediscovery. Dec 12th pre-approval letter presented as "proof" Collins clients had financing per contract. Collins again stated the CL-100 was the issue his clients couldn't close.

May 23, 2013, 9:15am, Atty. Collins cancelled today's 10:00am deposition for his clients. Respondent Dudek would not be able to attend and Respondent Cross" felt uncomfortable performing a deposition without Mr. Dudek". Deposition rescheduled for 6-12-13.

June 12, 2013, 10am: Deposition postponed to 10:23. Respondents arrived late.

On Aug 1, Atty. Massalon sends 2nd subpoena to FF to obtain any documentation, etc. on Respondents; included the loan number.

August 8, 2013, FF again responds there is not such loan, customer or property. Atty. Neville, for Atty. Massalon, calls FF and discusses this anomaly. Was told she "could not/would not" discuss.

November 20, 2013, Consent Order for Reference to the Honorable James E. Chellis, Master of Equity.

June 10, 2014, Atty. Massalon received the pertinent loan file from FF less than 24 hours before trial; file received in response to the Subpoena issued to FF last year (March 4, 2013) (R. pg. 291)

June 11, 2014 (9:30am), First day of trial, Appellant Morphew, Respondents Dudek and Cross, and Appellants Ferro.

June 12, (9:30am), Second, and final, day of trial.

November 7, Judge sends out ruling from trial.

December 5, 2014, Appellant Morphew files and serves appeal. Appellants Ferro serve Notice of Appeal.

December 11, 2014, Appellants Ferro file Notice of Appeal.

STANDARD OF REVIEW

"On appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law. Madren v.. Bradford, 378 S.C. 187, 191, 661 S.E.2d 390, 393 (Ct.App.2008) (citing Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005)). "The judge's findings are equivalent to a jury's findings in a law action."

Questions regarding credibility and weight of evidence are exclusively for the trial judge. Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (CT.App. 1989). "The appellate court will not disturb the trial court's findings of fact as long as they are reasonably supported by the evidence." Epworth, 365 S.C. at 164, 616 S.E.2d at 714.

A case with legal and equitable issues presents a divided scope of review. *Perry v. Gadsden*, 313 S.C. 296, 437 S.E.2d 174 (CT.App. 1993). When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. *Corley v. Ott*, 326 S.C. 89, 485 S.E.2d 97 (1997)

"An action for breach of fiduciary duty is an action at law and the trial judge's findings of fact will be upheld unless without evidentiary support." *Id.*; *Future Group, II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (1996). An action seeking damages for breach of contract is also an action at law and the trial judge's findings of fact will be upheld unless without support.*Brown v. Allstate Ins. Co.*, 337 S.C. 499, 523 S.E.2d 807 (CT.App. 1999).

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Town of Winnsboro v. Wiedeman-Singleton, Inc. (Winnsboro I)*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (CT.App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992) (*Winnsboro II*) (citation omitted).

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E.2d 876 (1974)." *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

"Conclusions of law, however, are reviewed under a pure de novo standard, according no deference to the conclusions of law made by the lower courts." *Bank/First Citizens Bank v. Citizens & Assocs.,* 82 S.W.3d 259, *262 (2002).*

ARGUMENTS

I. THE MASTER IN EQUITY ERRED IN RULING THE RESPONDENTS CONTRACT IS ENFORCEABLE.

Respondents Contract was ratified on October 24, 2012. Respondents were required to apply for financing by November 3, 2012. Respondents applied for financing on December 5, 2012. Contract expired on November 30, 2012. FF did not have a "live contract" when Respondents made application for said property and would not provide financing to Respondents without the Contract Extension (R. pg. 181, lines 3-6; pg. 182 lines 22-23; pg. 110 lines 2-6; pg. 111 line 24 thru pg. 112 line 6). When a contract expires, it is no longer is enforceable; "*a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable*" 1949 Cap. 192. 25 *of* 53. 7 *of* 56, 2-(2)(j), and "*an agreement not enforceable by law is said to be void*" 1949 Cap. 192. 25 *of* 53. 7 *of* 56, 2-(2)(g). Respondents' Contract is void.

Respondents loan file was re-reviewed for compliance and officially declined by FF due to an incomplete application/lack of a required signed Contract Extension and failure to respond to FF's 10-day notice (R.pg. 295-300- "Notice of Withdrawal/Decline"; R. pg. 301-"10 day letter" requesting the Contract Extension required [as of Dec. 5]; R. pg. 281- e-mail 1-18-13 between Sandi Steele and Allison Williams), which rendered the said Contract void and invalid. FF closed the file as of 1-18-13. (R. pg. 194, lines 2-13). Ms. Williams testified there never was a closing date because **the remaining condition**, a signed Contract Extension, was never received from Respondents (R. pg. 180, line 14 thru pg. 181 line 1-6).

Respondents utter failure and intentional refusal (R. pg.104 line 22 thru pg.105 line 22) to perform their financing condition rendered the said Contract voidable in itself and placed the Respondents in a material breach of contract. Therefore, Appellants Ferro were well within their

rights, as per Contract paragraph, to cancel the Contract; and as provided by the effect of failure to perform at a fixed time, in a contract in which time is essential **(Time is of the Essence)**: "*When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*" 1949 Cap. 192. 25 *of* 53. 7 *of* 56, 55(1).

Appellants argue that the trial court erred in its finding that the Respondents Contract was, and is, enforceable. The contract does not meet the provision of Specific Performance, and the Respondents unlawfully failed to perform their obligations and were not **able** (from the time of application) on December 5th, to perform the closing of escrow without the Contract Extension[16], therefore Specific Performance cannot be ordered on Appellants Ferro. "*In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement has been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.*" *Ingram v.* , 340 .C. at 106, 531 S.E.2d at 291, *Cambell v. Carr.* 361 S.C. 258, 263-64, 603 S.E.2d 625. 627-28 (CT.App. 2004).

Appellants contend Respondents, (1) unlawfully failed to perform their conditions of said Contract, (2) applied for financing on an expired contract without a Contract Extension, (3) were denied financing due to an incomplete application for not supplying a signed Contract Extension, (4) for not responding to a 10-day notice from FF, and (5) concealed above material

[16] FF issued a requirement for a "signed Contract Extension" at the time of Respondent's request for financing on December 5, 2012. Ms. Williams sent Respondents with a list of needed items in order to close by anticipated closing date of 1/4/2013. (Pl. Ex. 16 sp. Customer Loan Application Checklist 12-5-12)

facts from Appellants, their lawyers, and the trial court. Appellants further contend Respondents are in serious Buyer Material Breach of Contract, and clearly acted unjustly, unfairly and in bad faith without any regard to the consequences or to the well-being of ALL parties past and currently involved (all as repeated therein) "*Specific performance may be refused if the claimant has acted unjustly or unfairly on the basis that the claimant must come to equity with "clean hands.*" Stickney v Keeble [1915] AC 386.

II. THE MASTER IN EQUITY ERRED IN CONCLUDING THAT THE FAILURE OF RESPONDENTS TO MEET THEIR CONDITIONS OF THEIR CONTRACT IN A TIMELY MANNER IS INCAPABLE OF BEING DEFENDED.

Respondents' failure to meet their conditions of their Contract per **Time is of the Essence** <u>IS</u> fully capable of being defended, as stated in each failed Respondent contract condition addressed below. Therefore Respondents failure to meet their conditions per their **Time is of the Essence** Contract is an evident Breach of Contract.

A contingency clause, in the context of real estate, refers to "conditions attached to an offer to purchase property and included in the real estate contract which must be met in order to make the purchase offer binding on the buyer." Meaning, i.e., "if the prospective buyer cannot get a mortgage within a fixed period of time with the specified terms, the buyer can call off the whole deal and get back his deposit." The agreement with the seller is therefore conditional on the buyer being able to <u>obtain</u> a mortgage on the property". The buyer must perform that duty OR discharge the contingency, to avoid liability for breach of contract[17] (The American Bar Association[18]).

1. <u>FINANCING CONTINGENCY</u>

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[17] http://www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/family/chapter4.authcheckdam.pdf

[18] The American Bar Association, founded August 21, 1878, is a voluntary bar association of lawyers and law students, which is not specific to any jurisdiction in the United States.

There are a total of 5 **Buyer sub-contingencies** [1.1 through 1.5 below] under Paragraph 8 of Respondents contract (R. pg. 229, para. 8)

1.1 Respondents were required per their Residential Sales Contract, to "*apply for lending within 10 consecutive days of contract ratification.*" TIME IS OF THE ESSENCE.

Respondent Cross testified that she was required to apply for her loan within 10 consecutive days of contract ratification (R. pg. 98 l. 23-25 thru pg. 99 l. 1-14). Ms. Nicholson testified she sent notice to Respondent Cross on October 24 that she needed to APPLY for her loan (R. pg. 206 line 12 thru pg. 207 line 9).

Per FF, application was made December 5th, 2012 (R. pg. 302- "Uniform Residential Loan Application" signed by Respondents on December 10, 2012)

Respondent Cross admits the application was made over 40 days from contract ratification (R. pg. 103 lines 12-15) AND it was made after the Contract escrow closing expiration date. Application was not made within 10 days, per contract terms. Buyer Default.

1.2 Respondents were obligated under financing condition, to "*provide to the Sellers [Appellants Ferro] written satisfactory loan approval within 20 consecutive days that contains no credit, income, or asset conditions. TIME IS OF THE ESSENCE.*"

Cross testified she was required to provide Appellants Ferro with proof of financing no later than November13, 2012 (R. pg. 99 lines 2-4). Cross also testified she supplied an [satisfactory] approval letter for $295,000 [dated 10-22-12] (R. pg. 228) to Appellants Ferro on October 24, 2012 (R. pgs. 99-100). Appellants argue that if Respondents applied for financing on December 5, 2012, and FF pulled their credit on December 5 (R. pg. 340 and 341- credit reports, pg.

278 -"Memos for Loan" entry 12-12-12 1:27pm), then it is impossible to receive satisfactory loan approval (per contract terms as stated above) 45 days **before** applying for the loan on a contract that is not even signed by the Sellers. Appellants further argue that Respondents lending officer, Allison Williams, did not have a copy of said Contract when issuing such approval letter (R. pg. 158 line 1 thru pg. 159 line 11), had no banking disclosures, and no application (R. pg. 163 line 4-21) on file for said property, so again how can an approval letter, below the contract price, be issued and therefore legally provided to Appellants Ferro on October 24th ?

Per FF, satisfactory loan approval was on December 12, 2014. Sellers received this document via e-mail on December 17 from Ms. Nicholson (R. pg. 259), after Sellers issued a notice of termination on December 16, 2012. Appellants further argue if FF bank did not issue satisfactory loan approval per contract until December 12th, (1) the October 24th letter is not valid; (2) Appellants Ferro receiving such document 54 days after ratification does not meet the 20 day requirement; (3) presenting such notice to the Appellants Ferro is intentional misrepresentation; and by suggesting the Respondents have started their loan process AND are able to secure financing per contract, (3) tribute Buyer breach of contract.

1.3 ***"Buyer also agrees to provide all documents or information requested by the lending company in a prompt and timely manner."*** (R. pg. 229, pa. 8)[19]

FF requested lending documents be completed and returned within 48 hours (R. pg. 307 and pg. 308) - FF "Letter of Introduction" and "Customer Loan

[19] "pa." will represent "paragraph" for all reference documents herein.

Application Check List"). When Respondents made application, they did not sign and return the application and bank disclosures until 5 days later.

FF had requested a Contract Extension from Respondents at the time they made application on December 5th due to the contract being expired. FF again asked for this item on December 12th, and again on January 3, 2013. Respondents did not provide, nor did they disclose to FF that the sellers had not agreed to an extension (R. pg. 180 line 24 thru pg. 181 line 6) (R. pg. 295)(R. pg. 301- "10 day letter" requesting the Contract Extension requested Dec. 5th).

Respondents failed to respond at all to the 10-day notice issued on January 3 from FF (as repeated above).

1.4 ***"Buyer...diligently pursue...take any action that is needed or requested by Lender to process the loan application..."***

Respondents did not diligently pursue financing for said property. Respondents did not apply for their financing until December 5th. Respondent Cross testifies that she diligently pursued their financing since contract ratification by "communicating" with her lender (R. pg. 117). Appellants argue that "communicating with a lender does not qualify as applying for and "diligently pursuing" a loan. Buyer breach of contract.

Respondents did not take the action that was needed, or requested by the Lender, to process the loan. (1) Respondents waited until the Contract expired to apply for financing; (2) FF requested the application and all disclosures to be returned within 48 hours, but Respondents did not sign or return them for 5 days after making application; (3) FF required a Contract Extension at time of application in order to process the loan for closing. Respondents neither provided that document, nor did she respond to FF's 10-day notice, (3) FF submitted a

request on December 12, 2012 for a required legible contract and all addendums (R. pg. 278- line dated 12-12-12 1:29pm) that would include the missing Sellers names. Under Writing received and cleared this request on December 20th. The legible contract submitted and cleared by FF on December 20 contained no Sellers names. The legible Contract was unsigned by the Appellants Ferro, not initialed by the changes made by the Buyer's agent, not initialed at the bottom of each page, and none of the addendums were signed or initialed. (R. pg. 310).

1.5 ***"Buyer further hereby gives permission to Lender to disclose pertinent information concerning the Buyer's credit –worthiness or any other information needed for the loan processing to the listing or cooperating broker(s) or agents(s)"*** (R. pg. 229- Paragraph 8).

Respondent Cross denied Appellants Ferro agent, Rick Willis, access to Respondents loan processing information when Willis contacted Respondents' lender to inquire about Respondents financing status. Respondent Cross replies to Kathryn Rode (FF Mortgage Loan Team Lead), "*Thank you for bringing this request to our attention. Stephen and I would like to direct any questions from Mr. Willis regarding this matter to Mr. David Collins (contract information attached).*" (R. pg. 309- e-mail 1-30-13 Respondent Cross and Kathryn Rode dated 1-30-13). Buyer default.

Attorney John Massalon submitted two (2) subpoenas (March 2013 and August 2013) and spoke directly with one of the answering representatives on August 12, 2013. He requested all and any information, documents, e-mails, etc., in regards to Stephen Dudek and /or Doreen Cross and/or 788 E Butternut and/or loan # to FF's Registered Agent office in Columbia, SC. All 3 requests came back with the same response, "no such names, no such loan number, no such property."

(R. pg. 192). It wasn't until Ms. Williams received a subpoena for said trial that Atty. Massalon received the requested documents...in reply to his March 4th subpoena. FF file (R. pg. 276-341 *What is represented in the Record on Appeal is not the complete file received) documents were provided to Atty. Massalon less than 24 hours before court was to start (R. pg. 32 lines 3-7).

Per contract, Para 8, "*Should the Buyer fail to make application OR receive approval within said period AND to diligently pursue the application, the Seller shall have the option to terminate this Agreement, with written notice*" And "*If Buyer fails to comply with these above contingencies, Buyer shall be in default of this agreement subject to the terms of Para 16.*" (R. pg. 229, para 8). Respondents did not perform this required obligation, therefore, per contract, Respondents are in default and Appellants Ferro have every legal right to terminate said contract.

2. CLOSING OF ESCROW CONTINGENCY

Respondents had a contract close of escrow date of November 30, 2012. Respondents did not (by their own hand) perform this condition due to the fact they had not applied for financing on or before November 30, 2012 (as prev.[20] defended above). Respondents, and their Agent Ms. Nicholson, concealed the fact that they were not going to close [on or before November 30] because Respondents refused to move forward to obtain financing on said property until they were satisfied Appellants Ferro had COMPLETED all repairs to their complete satisfaction (as prev. defended above). This constitutes a serious Buyer Breach of Contract.

[20] "prev." represents "previously" herein said document.

Respondents enforced "their right" to use the no fault extension clause (R. pg. 229, para 12) which Respondents, by doing so, guaranteed they would close on or before December 15, 2012 **TIME IS OF THE ESSENCE**. Respondents did not (by their own hand) perform this clause agreement (as prev. defended herein).

Ms. Morphew argues that Respondents and their agent, Susan Nicholson, knew when they "enforced their right" to the Contract's "no fault" extension clause that there would be no way they could close on or before December 15. Ms. Morphew also argues that Respondents and their agents were very aware that closing escrow would be impossible without the formal Contract Extension (as prev. stated). Ms.Williams testified there never was a closing date because **the remaining condition**, a signed contract extension, was never received from Respondents (R. pg. 180 line 14 through pg. 181 line 6).

Respondent Cross testified that she had a right to the 15-day [no fault] extension clause in the contract (R. pg. 92 lines 23-25) and that she spoke to her agent and lender before presenting it to the Appellants Ferro (R. pg. 94 lines 11-13). Respondent Cross agreed the extension clause was a "no fault" clause (R. pg. 94 lines 2-5), but then contends the Appellants Ferro were at fault (R. pg. 93 line 25 thru pg. 94 line 1). Respondent Cross agrees extension clause was **TIME IS OF THE ESSENCE.**" (R. pg. 94 lines 6-10).

Appellant Ferro testified that Respondents were at fault for not closing on or before November 30 and was not due this extension because the extension did not apply (R. pg. 146 lines 3-25). Contract states, "*If the Transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party than both parties agree to extend this period not to exceed 15 consecutive days from the original closing date.* ***Closing shall occur during this time extension and in no event shall closing occur later than the above extension date, time is of the***

essence**.*** *" (R. pg. 93 lines 7-15),* which means, if you don't close by the date stipulated then the contract is over, and absolutely "no event" can prevent it. Respondent Cross agreed that "in no event could the closing happen after December 15, 2013 but stated she "didn't know how strenuous this [law] is" (R. pg. 93 lines 22-25). Appellants argue that Respondent Cross didn't take the Contract clause seriously even though Respondents knew closing was critical for the Appellants Ferro (R. pg. 221, lines 3-9) (R. pg. 134, lines 3-8), that's why they were given a discount on the price [to agree to close quickly] (R. pg. 135, lines 17-21).

Appellants argue that Respondents filing a lawsuit and placing all fault on the Appellants Ferro for their own failure [to obtain financing and to close escrow] after they made a claimed a "no- fault agreement" with the Appellants Ferro is unlawful.

Respondents' lawyer, Collins, states in his request for a direct verdict, "*The fact of the matter is if this thing* [Contract] *had been carried over to maybe the next week this transaction probably would have gone ahead and closed and we wouldn't be sitting here in front of you.*" (R. pg. 197, lines 12-16). Material fact proves that Atty. Collins is incorrect and stated false information. Because Respondents were legally required by FF to submit a signed Contract Extension due to applying on an expired contract, and Respondents did not provide a signed Contract Extension to FF, they were denied financing on said Contract. Therefore, despite Atty. Collins testimony, the closing could never have taken place, regardless of any other contract condition, without a signed Contract Extension. Hence why the Appellants Ferro were never presented with a closing date.

3. INSPECTION CONTINGENCY

Per Respondents, Paragraph 19H "Condition of Property: Disclaimer", "***The Seller is not required to make any repairs under any circumstances until Purchaser's financing has been approved.***" Appellants argue that Appellants Ferro spent a considerable amount of time and money making repairs (R. pg. 352 and pgs. 342-360, various e-mails) and they did this without proof that the Respondents had financing or were going close[21] escrow per contract. By this action, Appellants Ferro showed extreme good faith and fair dealings, and clearly showed they were more than willing to close with Respondents.

Respondent Cross testified that that the reason she didn't start her financing per contract is because Ms. Williams suggested Respondent Cross to make sure the sellers were showing some effort on their part according to the contract and "*whenever I felt that was happening to let her* [Ms. Williams] *know and she would start the loan*." Respondent Cross admitted she unilaterally "changed" the language of the Contract and unlawfully performed as such (R. pg. 109 lines 3-15). Buyer Breach of Contract.

Buyer's Inspection Contingency expired on November 20 (R. pg. 229, Para 19B). Respondents were required to submit a notice of cancellation of the contract on or before November 20 if they were not satisfied with the Inspection Report and/or what the Appellants Ferro agreed on as to repairs. Respondents did not send a cancellation request per Para 19B terms. Therefore, Appellants argue that per the contract language so stated in Para 19B, Respondents waived their right to the Inspection Condition and were obligated to close escrow on or before Contract date of November 30, 2012. Appellants also argue that the Buyer's Inspection Condition does not waive Respondents financial obligations.

[21] On December 3, 2012, Appellants Ferro did not think Respondents were going to close and told this directly to Ms. Nicholson (R. pg. 219 line 21 thru pg. 220 line 3)

Appellants argue Respondents spent all month negotiating repairs, while critically failing to meet their financing condition. (R. pg. 209, line 23 thru pg. 218, line 23; R. pg 342-360, various e-mails).

4. CL-100 CONTINGENCY

Respondents Contract Cl-100 contingency (R. pg. 229, Addendum A, first line) is similar to the inspection condition as stated above. The CL-100 condition, "*Buyer total satisfaction of CL-100*" is protection for the buyer that enables the buyer to waive his **escrow to close condition** if the Buyer is not satisfied with the Cl-100 report. This does not waive their obligation to obtain financing (as defended herein).

If the Buyer is not totally satisfied with the CL-100 [report], they have the (1) option to terminate the contract and retain their earnest money, (2) take the property as is, or (3) negotiate repairs and/or credit at closing. If the seller refuses to make repairs, and the Buyer is not satisfied, the Buyer is obligated to send written notice of termination (R. pg. 229, para. 19E). Respondents did not send a written notice of termination, therefore waived their right to this condition.

If Seller agrees to make repairs and/or treat any applicable damage, the contract itself states, "*If the infestation report reveals the presence of or damage by termite infestation or other wood destroying organisms, Seller shall remedy such deficiencies, subject to section (E) below, and shall furnish buyer with a report of a qualified inspector that property is free from infestation or damage herein mentioned or that infestation or damage has been treated and/or repaired as appropriate in a workmanlike manner* *on or before* ***closing,***" NOT on or before Contract's expiration date of November 30, 2012. A closing date and time was NEVER set because financing was never cleared for closing (R. pg. 319 - UW blank "FILE TO CLOSE REQUIREMENTS"), therefore again, Appellants

were under no legal obligation to provide Respondents with a Cl-100 clearance letter until closing. (R. pg. 229, paragraph 19D).

Appellants contend that, (1) the Appellants Ferro performed per contract CL-100 date (R.pg. 229, para 19D), (2) Respondents set the CL-100 expiration date of November 30th, and (3) if the Respondents required the CL-100 sooner THEY were obligated to request a date change by submitting, in writing, to Appellants Ferro a request; (3) the Appellants Ferro performed the minor, and not structual, damage immediately, and then had the repair and termites professionally treated the very next business day after receiving the report (R. pg. 242 and pg. 255, Wood Infestation Report and Treatment receipt), and Appellants Ferro performed without a closing date; (4) Ms. Nicholson was present while Palmetto was treating per Cl-100 (R. pg. 359 - e-mail 12-6-12 1:11pm), therefore Respondents knew about treatment/repair on December 3; (5) Respondents received the full CL-100 (R. pg. 59 line 12 thru pg. 60 line 7).

Atty. Collins incorrectly stated that the contract required Appellants Ferro to provide [Respondents] a Cl-100 report by November 30 (R. pg. 118 lines 20-22). The contract clearly states, "*The Seller shall, at their expense, have the property inspected and shall* ***OBTAIN*** *a current Wood Infestation Report (CL-100) from a licensed and bonded pest control operator, on or before November 30, 2012."* (R. pg. 229, para 19D) The Contract does not state "provide Buyer" on or before November 30. Providing it to Respondents on or before contract expiration date was not a contract requirement, therefore Appellants Ferro performed per contract and are not in breach of contract. Further note, Respondent Cross testifies they received the report the date it was prepared and required (November 30). (R. pg. 119 lines 1-7).

Appellants Ferro repaired the minor damage within 24 hours of receiving the report and had treatment performed within 1 business day of receiving the report. Minor,

"*not structurally significant damage should not interfere with the sale of the house" (R. pg. 242-* Clemson University Department of Pesticide Regulation, Bulletin 16, "Understanding Your Wood Infestation Report", pg. 1) and is not required by a closing attorney or lender to be repaired, "*If a Wood Destroying Insect Information Report (Termite Report) is required, it is the closing agent's responsibility to determine that the report is completed properly and will be acceptable in all respects. Borrower(s) must sign the report [at closing] accepting and acknowledging receipt of the Termite Report. The form must be completed in detail and signed by the exterminator. The original must be forwarded to Lender[if applicable] in the closed loan package. If active termite infestation is indicated, the property must be treated prior to closing. A qualified building expert must also inspect the home for any structural damage. If the Structural Report shows only cosmetic damage, the loan may then close. If the Structural Report shows any structural damage, that damage must be repaired prior to closing.*" (FF Mortgage General Closing Instructions, (7/2011)

Though Rick Willis and Appellants Ferro agreed to pay for the CL-100 clearance inspection (R. pg. 204 lines 9-11), Ms. Nicholson testified that she had been tasked to arrange her client's contractor to come back to inspect, which she tried to do but was afraid if she scheduled it she would be left holding the bill. Ms. Nicholson testified that she "*sent an e-mail to Mr. Vasco [contractor] and gave him their [Sellers] contact information because everything had to be through the Ferros in order to get access to the property and appointments confirmed. Again, I didn't want to be the one that actually set it up because I didn't want to be held to pay if nobody paid, which was an agreement that Mr. Willis and Mr. Ferro decided on*" (R. pg. 204, lines 16-22). Ms. Nicholson also

testified that she "*left it up to the contractor to call him* [Ferro]…." (R. pg. 205, lines 14-15)

Ms. Nicholson admits that it was her responsibility to change the date required of the Sellers to obtain a CL-100, to give her clients more time by stating, "*Well, it depends. On this particular deal because they changed the date, we [herself/Cross/Dudek] probably should have changed the date on the Cl-100 to bump that up as well to give us plenty of time*".

Ms. Nicholson testified she couldn't confirm that the bank required the CL-100 on Respondents' financing to be cleared but "just asked if everything was satisfied" (R. pg. 212, line 25 thru pg. 213, line 9). Even Ms. Williams (FF lending officer) testified that she had no idea if the bank was requiring a clearance letter or not (R. pg. 203, lines 9-12). But Ms. Nicholson clearly tells Appellants Ferro that it IS being required from FF; she states, "*The bank is requiring that it gets repaired to clear the report...*" *And* "*...the bank will need a letter from a certified contractor to evaluate...those repairs need to be completed and a receipt...will need to be sent to the lender*" (R. pg. 366 - e-mail 12-6-12, 1:11pm) (R. pg. 358 - e-mail 12-5-12, 2:56pm)

Allison Williams testified that FF <u>does not require a CL-100</u> from any client unless something is on the appraisal, and specifically did not, and never, had required a Cl-100 from Respondents. (R. pg. 177 lines 20-25) (R. pg. 338, question #4).

Respondent Cross admits that she was not waiting on the recorded plat or the CL-100 to start her financing, but that she making sure "*that there was some sort of effort on the buyers part to take care of things according to the contract and whenever I felt that was happening to let her know and she would start the loan*" (R. pg. 108 line 13 through pg. 109 line 15).

The trial court was putting this CL-100 critical date on the Appellants Ferro, making them totally at fault. Appellants Ferro did not set the date the CL-100 was to be obtained, it was set by their agent Susan Nicholson, which she admits she should have changed the date to give her clients more time. Appellants Ferro were not asked by Respondents to change the date due or to obtain the CL-100 at an earlier date in order to review the report. The Sellers did not draft the Contract, Respondents agent, Ms. Nicholson, did. The Respondents never issued a cancellation notice to Appellants Ferro is they were so dissatisfied with the CL-100.

The trial court erred in its ruling that the Sellers are in breach of contract due to not delivering the CL-100 in a timely fashion, not making repairs in a timely fashion, and not communicating in fair and decent manner. The Sellers performed per contract and are not in breach of contract per CL-100 contingency (as defended herein).

Respondents have been claiming [for the past 2 years] "they could not/would not close on or before November 30 is because they never received the CL-100", and that "the lack of Appellants Ferro "clearing the CL-100" is what prevented them from closing on or before the contract extension date of December 15", and what "was preventing them from closing at any time after". During the trial, when asked "If the judge finds in this case that the contract did not expire, can you still say I don't want to buy it because I don't like the inspection report of the termite letter?" Cross replies, "You want me to look into the future, okay." Atty. Massalon questions, "No, I'm saying that if in this case that the contract that you have is still valid, can you still get out of it if you don't like the CL-100 or the inspection?" Cross replies, "No, I know I will like the CL-100 and I would assume that the Judge would order that." Appellants reason, If Respondent Cross "knows" she <u>will like</u> the CL-100 /inspection <u>now</u> [without seeing it], then how come she didn't

"know" 2 years ago [without seeing it] that she would like it? Why is it a non-issue now? It's the "same scenario" just different times.

Appellants argue that the Respondent's claim is misrepresentation, when material fact and trial testimony clearly shows it was own failures to perform their legal contractual conditions as per their own Time is of the Essence Contract, specifically their financing condition, that prevented them from closing on or before November 30, 2012. It was because Respondents applied for financing after the contract expired, and they could not obtain a Contract Extension, is what prevented them from closing on or before December 15, 2012. It was this very reason that Respondents could not close at any time after December 15. Appellants argue that Respondents were not concerned with the CL-100 as they have been insisting for the past 2 years[22], but instead have been using this "excuse" to justify and excuse their failing to close escrow by blaming fault on Appellants Ferro.

Appellants argue this is a serious Buyer Material Breach of Contract.

5. <u>EXTENSION CLAUSE (Paragraph 12)</u>

"If the Transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party than both parties agree to extend this period not to exceed 15 consecutive days from the original closing date. Closing shall occur during this time extension and in no event shall closing occur later than the above extension date, TIME IS OF THE ESSENCE."

Ms. Nicholson agrees the extension clause is a "no fault" extension, meaning closing did not occur for a reason and it was <u>neither</u> party's fault (R. pg. 207 line 16 thru pg. 208 line 22). When the Respondents claimed this no-fault extension clause, they were

[22] Respondents stated that they were satisfied with <u>everything</u> and were ready to contact their lender to start the financing process (R. pg. 344 - E-mails 12-3-12 11:11am, 11:20am, 3.22pm, 4:13pm)

guaranteeing to the Appellants Ferro they were **able** and willing to close on or before December 15th, 2012, therefore leading Appellants Ferro they had already applied for financing.

Respondents and Ms. Nicholson intentionally misrepresented themselves to the Appellants Ferro by claiming this "no fault" clause:

First argument: Respondents place [all] fault on the Sellers. Furthermore, Respondents had placed "fault" on the Sellers **before** the Sellers had even signed the Contract (R. pg. 362 - e-mail 10-24-12 10:47am). Respondents were, in fact, at fault themselves for not applying for financing before the Contract expired.

Second argument: Respondents had firsthand knowledge that they were **not able** to close on or before December 15th . When Respondents applied for their loan on 12-5-12, FF stated an anticipated closing date of **1/4/2013** (R. pg. 308 - 12-5-12 "Customer Loan Application Checklist"). Allison Williams [also] stated an anticipated closing date of **12/31/12** (R. pg. 307 - the cover letter from Ms. Williams to Respondents).

Third argument: [Common sense and] fact show that it is near to impossible to close escrow within 10 days of applying for a loan.

Ms. Morphew argues that not only did Respondents display a blatant disregard for the legal ramifications of this **Time is of the Essence** clause, but they clearly displayed bad faith and unfair dealings with the Appellants Ferro by misrepresentation and concealment of pertinent information that effects the merits of the contract, and are in serious Breach of Contract.

6. SURVEY/LAND DIVISION

Provision in Contract, "*Seller shall have property subdivided to include in this sale the 3340 of house, storage building and 6 acres.*" Appellants Ferro scheduled appt for survey within 1 hour of Contract ratification -for the very next day. Respondents

marked survey lines of property, they were purchasing, the day of Contract ratification. Appellants Ferro sent Respondents recorded plat immediately after receiving it. Appellants performed and completed per the land division condition per **Time is of the Essence** (R. pgs. 136-139).

Respondent Cross indicates using this as a bargaining tool to gain more acreage and the barn, without paying for it, later on by stating to her agent Ms. Nicholson, [the sellers could] "*throw in the extra acreage and the barn and we'll guarantee the end of November for sure. We're willing to do that ☺*". Ms. Nicholson replied "*If the home isn't divided in time then it will be their fault not yours*" and "*If the seller wants to throw in the extra acreage....the trick is to get him to do that without any extra charge!*" (R. pg. 362, e-mail 10-24-12, 10:41am & 10:47am, between Respondent Cross and Ms. Nicholson.).

7. STRUCTURAL ENGINEER INSPECTION

Respondents asked Appellants to schedule and pay for a Structural Engineer due to their concern after receiving the Home Inspection report. Appellants Ferro agreed to do this and spoke to the Structural Engineer about the Appellants' concerns and scheduled an inspection immediately (R. pg. 136 lines 14-22) (R. pg. 353-354 - e-mail 11-10-12 Ferro to Willis dated 11-10).The inspection was performed by Eugene Brisbane on November 15th. During the inspection he told the Respondents, Respondents' contractor, Tim, and the Appellants Ferro several times the home is structurally sound (T. 140 line 11 through pg. 141 line 15). Ms. Nicholson also testified that the structural engineer stated to "all" that the home was structurally good, and that their contractor agreed with the Structural Engineer. (R. pg. 214 lines 22-25) (R. pg. 355, e-mail dated 11-27-12, 12:44pm).

Respondent Cross testified that she was not satisfied with the structural integrity of the home until she received the structural engineers report (R. pg. 106 lines 7-23 and pg. 107 lines 17-18), even though she was aware the structural engineer and their

contractor were comfortable on the 14th when the structural engineer stated that he felt the structural integrity of the home was ok (R. pg. 215 lines 4-8).

Appellant Tommy Ferro also testified that the structural engineer stated to Respondents that he said "*I assure you that in my experience this house is fine and sound and he was going to write off on it that it was sound*" and "*the structure is fine...*" "*...this house is structurally sound*" (R. pg. 140 line 15 through pg. 141 line 15). Appellant Tommy Ferro testified that Respondent Cross was badgering Eugene every time he answered her questions (R. pg. 140 lines 19-25). Respondent Cross demonstrated a belligerent and condescending attitude in regards to the structural engineer and all parties involved that day (R. pg. 360). Respondent Cross asked Ms. Nicholson later "*can we hold Eugene* [structural engineer] *liable* [sue him] *if future information becomes available contradicting this report,..*" (R. pg. 360) (R. pg. 215 lines 23 -25, pg. 216 lines 10-17), and "*It sounds like it will be a challenge to take the information from Tim and use it in the counteroffer*" (R. pg. 360, e-mail dated 11-16-12, 10:52am) (R. pg. 216 line 19 through pg. 217 line 13).

Appellants argues that Respondents claim they were very concerned about the structural integrity of the home but never issued a written notice, as required per paragraph 16 of said Contract, to the Appellants Ferro stating her concerns and asking for an Inspection extension, or a cancellation notice. Also, Appellants argues the structural inspection was not a contingency contained within the Contract. This was an item on Respondents repair/issue list that Appellants Ferro agreed to schedule and pay for (R. pg. 238, A.1.) The structural inspection, like the Home Inspection (as prev. stated) did not waive Respondents obligation to apply and obtain financing per Contract.

Appellants contend that Appellants Ferro demonstrated good faith and fair dealings by scheduling and paying for the structural inspection, and demonstrated TIME IS OF THE ESSENCE by scheduling this inspection as soon as it was agreed upon.

III. THE MASTER IN EQUITY ERRED IN BASING HIS RULING ON FINDINGS OF FACT THAT WERE NOT SUPPORTED BY THE TESTIMONY IN THE RECORD.

Appellants appeal the following FINDINGS OF FACT and contends they were not supported by testimony in the record and/or material evidence:

(1) Though the trial court was correct that Respondents were not obligated to close on escrow until Appellants Ferro performed the conditions for which they were responsible, it erred in his failure to realize that the Respondents' Inspection Condition had an expiration date [of November 20] and were obligated to perform per paragraph 19E of Contract[23] Respondents did not issue a notice of cancellation, therefore waived their rights per Inspection Condition. Also, under this Finding of Fact's footnote, reference #13, the trial court erred stating the 'Respondents never received the CL-100 so therefore they did not have an opportunity to determine if the structure of the home was satisfactory'. Respondent Dudek clearly testified they, did in fact, receive a copy of the termite report and it was dated November 30th, 2012 (R. pg. 119 lines 1-10) (R. pg. 131 line 19 thru pg. 132 line 22) (R. pg.133 lines 17-25). Furthermore, Respondent Cross testified that they were waiting on a <u>clear</u> CL-100 [<u>not</u> the CL-100] (R. pg. 110 lines 6-7). Appellants argue if Respondents never saw the CL-100 to review, then how can they have stated to Appellants Ferro on December 5th that their lender was requiring the repair/treatment and a letter of clearance?

Appellants argue that Ms. Nicholson testified she received it, therefore it's assumed by the duties of the agent that Respondents also received this information. Agent will "*in accordance*

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[23] Respondents were to either 1) issue a cancellation request, 2) take the property as is, or 3) negotiate with the Sellers for a credit at closing.

with subsection (A), promote the interest of the buyer by performing the buyer's agent's duties which include:", "disclosing to the buyer all relevant facts concerning the transaction which are actually known to the licensee or, if acting in a reasonable manner, should have been known to the licensee, except as directed otherwise in this section." S.C. Code § SECTION 40-57-137, (H)(2)(c).

(2) The trial court erred that the Respondents obligation to provide written satisfactory loan approval within 20 consecutive days [of contract ratification] that contains no credit, income or asset conditions, is impossible.

(a) An impossibility cannot be measured if the preceding event never occurred "*If an event is sure, then it will always happen, and no outcome not in this event can possibly occur*" Law of Probability, Jacod, Jean; Protter, (2004). Probability Essentials. Springer. p. 37 (i.e., If Respondents did not apply for financing until the contract expired, there is no way to measure the possibility the Respondents could not obtain a satisfactory loan approval per Contract; therefore one cannot state as a fact loan approval per Contract is an impossibility.

(b) Respondents applied for financing on 12-5-12 (R. pg. 338, line 1) and received such approval on 12-12-12 [7 days] (R. pg. 114 line 23 thru pg. 115 line 2). This data theoretically proves the very certain possibility Respondents would have received satisfactory loan approval [per contract terms] within 20 days of contract ratification; therefore disproving the trial court statement of impossibility. "*In probability theory, one says that an event happens almost surely if it happens with probability one.*"Stroock, D. W. (2011). Probability theory: an analytic view, p 186, Cambridge University press.

(c) Appellant Morphew testified her contract had the same approval requirement of "satisfactory loan approval with no credit, income or asset issues" as Respondents' Contract (R. pg. 261) and had loan approval per contract in 13 days. **(3)** The trial court erred in its assessment

that Respondents' contract required unconditional loan approval described in Paragraph 8. The Contract required "*satisfactory loan approval within 20 consecutive days that contains no* [buyer] *credit, income, or asset conditions.* ***TIME IS OF THE ESSENCE.***" Contract terms for financing is not an "unconditional" requirement, nor does it state "unconditional" (R. pg. 229, paragraph 8).

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(4) The trial court erred stating conventional residential loan approvals without conditions are impossible. Not only are loan approvals without conditions possible, but every mortgage loan that is cleared for closing is an unconditional loan approval. "*After a thorough study of the borrower's credit and finances has been undertaken along with an appraisal of the property the lender may agree to make the loan. The lender will then issue a "commitment";* as in commitment, meaning "*an unconditional promise to lend money.*"[24]

(5) The trial court erred stating there was uncontroverted evidence that revealed an approved subdivided plat dated October 20, 2012 that was received by Respondents on Friday November 23, 2012 and that this lack not providing the approved survey for over a month delayed the Buyer's from pursuing their financing. The plat is dated **November 20, 2013** , not October 20 (R. Pg. 97 lines 20-21). Because of his error, the Master in Equity was under the misunderstanding Appellants Ferros did not provide the recorded plat in a timely manner (per Time is of the Essence) and caused the Respondents a critical delay from pursuing financing. Appellants Ferro did provide the recorded plat immediately to Respondents AND per Respondent Cross' testimony, the recorded plat did not prevent them from pursuing their financing (R. pg. 104 line 12 thru pg. 105 line 9). (All as prev. defended herein).

On October 24th, the day of Contract ratification, Respondent Cross indicates using the alleged "recorded survey" issue as a bargaining tool to gain more acreage and the barn later on, [and get it for free], by stating to her agent Ms. Nicholson, [the sellers could] "*throw in the extra*

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[24] Jerome P. Friedlander, II, Attorney at Law, "Understanding The Residential Real Estate Contract" (2010) http://www.friedlanderlaw.net/wp-content/themes/friedlander/inc/real-estate-booklet.pdf.

acreage and the barn and we'll guarantee the end of November for sure. We're willing to do that☺". Ms. Nicholson replied "*If the home isn't divided in time then it will be their fault not yours*" and "*If the seller wants to throw in the extra acreage....the trick is to get him to do that without any extra charge!*" (R. pg. 362, e-mail dated Oct 24 10:41am & 10:47am). Furthermore, Ms. Williams had never followed up within her bank if there even was going to be a problem at all (R. pg. 361, e-mail 10-24-12 12:23pm). Therefore Respondents and their agent were acting on opinion not fact.

Appellants argue Respondents testified the recorded plat caused them delay in pursuing their financing per contract when in fact Respondents used this "non-issue" as to help excuse them from their financing obligation, and were clearly planning to use this information as a "trump" card to claim more and blame fault on the Sellers later. This clearly shows bad faith and unfair dealings on part of the Respondents and their agent.

(6) The trial court erred stating the CL-100 report had a "number" of problems. This suggests "numerous" when in actuality there was only 1 minor issue, and not structurally related. The CL-100 report revealed very minor damage to a piece of subflooring that was not structural related. The CL-100 report revealed a few live termites at subfloor damage. The home is steel framed with brick outer. No other issue reported. Appellants argue that if the cleared CL-100 was an issue for closing, and continued to be an issue, then why did Ms. Nicholson from Carolina One claim (after receiving the notice of cancellation from the Appellants Ferro) that "*We have everything we need to close hopefully this week pending the title work is clear from the closing attorney.*" (R. pg. 356 - e-mail 12-16-12 6:09pm from Ms. Nicholson to Willis)

(7) (a) The trial court erred that the Appellants Ferro responses to the critical concern list was labeled as a failure and that (b) the Appellants Ferro responses and the manner of which it was presented violates Appellants Ferro's obligation to deal in good faith and fairly with Respondents, and (c) that the Appellant Ferro failed to immediately respond in writing to the

critical concerns per Respondent Cross' submitted list. Appellants Ferro not only responded immediately to several requests and inquiries by Respondents, but Appellants Ferro had all agreed to repair items completed before the contract expiration date and they performed all items without a closing date (As prev. defended herein, "Inspection Condition").

(8) The trial court erred that the Appellants Ferro failed to provide Respondents with an approved subdivision plat until four days prior to the escrow closing date on said contract. Appellants Ferro provided the plat within 2 days of receiving it AND it was 8 days, not 4 days, prior to escrow closing date on said Contract. Note that the Respondents waited 13 days after receiving said recorded plat to apply for financing. Respondents testified the recorded plat was not what prevented them from applying for financing (as prev. defended herein, "Survey").

(9) (a) The trial court was correct the contract called for the Appellants Ferro to provide a CL-100 "clearance" letter if they so agreed to make the repairs/treatment, but erred when stating the Appellants Ferro completely and utterly failed this condition. The Contract called for the Appellants Ferro, to provide a clearance letter on or before **CLOSING**, NOT on or before November 30th (as defended herein,"CL-100 Condition"). Appellants Ferro were under no obligation to perform this condition until receiving a closing date from Respondents. Also, Appellants Ferro were *"not obligated to make ANY repairs under ANY circumstances until Purchaser's financing has been approved."* (R. pg. 229, paragraph 19(H).

(10) The trial court erred by finding Appellants Ferro's alleged failures as a reason to excuse the obligation of Respondents Dudek and Cross to deliver the purchase price on or before November 30, 2012. As prev. defended herein, Appellants Ferro did not fail at all, while the Respondents unlawfully failed (by their own hand) many of their obligations and therefore are not entitled to be excused for non-performance (as repeated herein, covering entire brief).

(11) The trial court erred that the Appellants Ferro failed to observe TIME IS OF THE ESSENCE. Appellants Ferro Appellants Ferro observed and performed all contract obligations

before contract escrow expiration date of the said Contract, even though they were not obligated to do so (as prev. defended herein).

(12) The court erred in stating that Appellants Ferro failed to respond with dispatch and with clear intentions, which in turn waives their right to assert Respondents Dudek and Cross did not comply with their obligations to observe that TIME IS OF THE ESSENCE. Appellants Ferro responded to all dispatch and made clear their intentions (as repeated herein, Conditions). Appellants Ferro observed that TIME IS OF THE ESSENCE and acted with good faith and fair dealings at all times with Respondents, while Respondents did not observe that TIME IS OF THE ESSENCE by failing to perform their Contract obligations. Therefore the Appellants Ferro had every right to assert Respondents did not comply with their obligations to observe that TIME IS OF THE ESSENCE.

(13) The trial court erred that the Respondents' Paragraph 8 (financing) conditions are impossible (as repeated herein, "Financing Conditions"); therefore the trial court erred allowing Respondents conditions to be reset.

(14) The trial court erred that, (1) Respondents observed TIME IS OF THE ESSENCE per their obligations in the said contract, (2) erred that Appellants Ferro did not reciprocate TIME IS OF THE ESSENCE and if Appellants Ferro observed TIME IS OF THE ESSENCE, this would have led to a closing nearly two years ago. As repeated above arguments, Appellants Ferro observed that TIME IS OF THE ESSENCE but Respondents did not. Furthermore, Respondents failed to consider the position they have put Appellants Ferro, and consequently Appellant Morphew, in by not observing that TIME IS OF THE ESSENCE. It was the Respondents failure to observe TIME IS OF THE ESSENCE that prevented the closing two years ago (as defended herein, "Financing/Inspection Conditions").

(15) The trial court erred that Appellants Ferro did not exercise a simple rule of common decency, that is, "do unto others as you would have them do unto you." by exercising a

duty of good faith and fair dealings in its performance and in its enforcement. Appellants Ferro clearly exercised good faith and fair dealing. It was the Respondents failures to exercise the simple rule of common decency.[25]

(16) The trial court erred ruling the Appellants Ferro are in default, therefore Respondents are entitled to recover reasonable costs, including a reasonable attorney fee Appellants Ferro are in not in default. The Respondents are in default, therefore are not entitled to recover any costs (all as defended herein).

(17) The trial court erred compelling specific performance due to no adequate remedy at law Contract is not enforceable (as defended herein). Respondents are in Breach of Contract (as defended herein). Therefore specific performance is neither applicable nor an applicable remedy.

(18) (a) The trial court erred concluding the Respondents worked in good faith to consummate the sale. By not respecting and performing their contract terms and conditions, and intentionally misleading all parties involved, the Respondents clearly demonstrated bad faith and unfair dealings (as defended herein); (b) the trial court erred stating evidence supports a finding Appellants Ferro acts and omissions demonstrated unfair dealing. Evidence did not support a finding that Appellants Ferro neither acted in bad faith nor omitted anything required of them (as

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[25] Respondents failed by, (1) waiting until the contract expired before making application, (2) failure to observe their duty to disclose critical material facts, such as being declined for financing, to Appellants Ferro, (3) not responding to FF's 10-day notice, (4) intentionally preventing listing agent from obtaining Respondents financing information, (5) taking the "no fault" extension clause when they knew they themselves were at fault and wouldn't be closing by the clause's date, (6) taking the "no fault" extension clause when they had been faulting, and are continuing to fault, Ferros for missing the closing date, (7) claiming the CL-100 prevented them from closing for the past 2 years, when they had stated [on 12-3-12]they were satisfied with all the critical concerns, (8) falsely stating [and all along to, Appellants Ferro] that the land had to be subdivided before an appraisal could be ordered and/or performed, (9) falsely stating [and all along to, Appellants Ferro] that the CL-100 and or cleared CL-100 was required by FF; (10) falsely stating they were able and ready to close on November 30 and December 15, (11) misleading Appellants Ferro in order to take the 15-day "no fault" extension clause within the Contract, (12) filing a lawsuit against Appellants Ferro after taking the "no fault" extension clause, (13) filing a lawsuit against Appellants Ferro knowing they had no "contract" without a formal signed Contract Extension, (14) continuing their lawsuit after receiving the declination of financing from FF on 1-18-13, (15) taking an oath to tell the truth in a court of law and intentionally breaking that oath. (All as prev. argued above).

defended herein); (c) the trial court erred concluding Appellants Ferro failed to point to meaningful communication with Respondents. Respondents were the ones to utterly fail in their communication with Appellants Ferro (as defended herein); (d) the trial court erred concluding that Respondents acted with care and kept Appellants Ferro advised of the concerns they had. Respondents did not act with care, but instead unlawfully acted with total disregard for the Contract (as defended herein) and for the well-being of Appellants Ferro and Appellate Morphew; (e) the trial court erred concluding Pl. Exhibit 3 demonstrated Appellants Ferro obfuscated the intent and meaning of the contract in the performance conditions incumbent upon them to fulfill. Appellants Ferro followed and fulfilled their Contract obligations to the lawful intent and meaning of the Contract, while it was Respondents that obfuscated the intent and meaning of said Contract (as defended herein); (f) the trial court erred concluding Appellants Ferro acted without intent to fulfill the contract according to its plain terms. Appellants Ferro had completed their contract obligations by November 30, and went above and beyond to further complete their obligations <u>not required</u> until financing had been obtained and/or until a closing. Also, Appellants Ferro agreed to the 15- day no fault extension clause contained in the Contract with the [misled] assumption Respondents were guaranteeing a closing on or before December 15th, 2012 (as defended herein). Also, Appellants Ferro had more than enough reason to not only want, but <u>need</u>, the Respondents to close per agreement since they had already obtained a house in Kentucky and were in the process of moving in November and Appellants Ferro gave Respondents a very large discount (R. Pg. 135 lines 9-21), from $325,000 to $303,000 plus they would pay $5,000 towards closing cost (R. pg. 91 lines 1-15); (g) the trial court erred concluding the Appellants Ferro attempted to use the contracts time is of the essence provisions as an exemption and tried to use it as a tool to avoid their having to deal with critical concerns raised by Respondents. Appellants Ferro acted fairly and honestly and observed all Time is of the Essence deadlines (as defended herein); (h) the trial

court erred concluding Respondents were acting at all times within their right under the contract. Respondents utterly failed to act within their right under the Contract (as stated herein).

IV: THE MASTER IN EQUITY ERRED BY SUPPORTING HIS DECISION IN HIS ORDER USING FALSE, INCONSISTENT, UNRELIABLE AND OBFUSCATED TESTIMONIES, THEREFORE SHOWING BIAS IN FAVOR OF THE RESPONDENTS.

Appellants contend the trial court was presented with conflicting, false and/or obfuscated testimony from Respondents, and its choice to rely on Respondent Cross, Ms. Williams and Ms. Nicholson's, trial testimony was unreasonable and showed bias in favor of the Respondents.

The examples below reveal that the key witnesses were duplicitous and disingenuous by "testifying one thing" and then "testifying the complete opposite".

Example 1:

First, Respondent Cross testified she was required to apply for her loan per her contract and states she applied on May 7, 2012 [5 months before said property was a "twinkle in their eye"] (R. pg. 98 l. 23-25, R. pg. 99 l. 1-14). **Then** Respondent Cross admits she applied for financing on said Contract on December 5, 2012 (R. pg. 103 l. 2-15) (R. pg. 302, "Uniform Residential Loan Application signed/dated by Respondents 12-10-12). Respondent Cross admits the application was made over 40 days from contract ratification (R. pg. 103 lines 12-15) AND made after Contract's closing expiration date.

Example 2:

First, Allison William, FF, testified Respondents submitted an application for said property in May 2012 (T.pg. 180-181). **Then** Ms. Williams admits later that the May pre-approval application was not an "application" for Respondents' Contract. She testifies an "application" is made on a loan when there's property specified (R.pg. 150-151). Application dated May 7 2012 is not property specific, therefore does not qualify as an application per Respondents contract terms (R. pg. 320, "Residential Loan Application" 5-7-12).

Example 3:

Respondent Cross testified she supplied a [satisfactory] approval letter to Sellers on October 24, 2012 (R. pg. 99-100). Appellants argue the Respondents' loan was applied for on December 5, 2012, hence it is impossible to receive a satisfactory loan approval 40 days prior to ever applying.

Example 4:

Ms. Williams (FF) testified she supplied a pre-approval letter on 10-22-12 to Respondents per their request. Ms. Williams then admits, after looking at the evidence, this would not be from her due to the e-mail formatting not hers and the dates and times on the attachments were 3 ½ months in the future in the middle of the night (R. p. 163-166). Appellants argue as to the validity of said documents and, again question how satisfactory loan approval can be given 10-22-12 if the loan wasn't applied for until 12-5-12 and FF has neither seen nor has the signed contract (R. pg. 159 lines 10-15).

Example 5:

Respondent Cross testified they were ready and able to close with all documents, and that '*nobody was waiting on anything from us*' because they 'provided [it all] a long time ago' (R. pg. 122, lines 8-14). But FF WAS waiting on a signed Contract Extension, a legible signed contract and all addendums, IRS transcripts, and a completed title search. Also, per FF they were unable to obtain Respondent Cross' verbal verification of employment until January 4, 2013, therefore Respondents were NOT ready to close on the 14th of December.

Example 6:

First Respondent Cross testified that she had all required application/loan documents in place before contract end date of Nov. 30. **Then** Respondent Cross changes her story and testifies that she had all documents in place at bank on the December 5th (R. pg. 101) but **then again** changes her story to testify that she applied and received the documents from Ms. Williams, per encrypted e-mail on December 5 but didn't sign and return the papers until 12-10-12. (R. pg. 104). Respondent Cross further testified she held onto the application and banking documents because she was waiting for repairs to be completed and "*for Mr. Ferro to take me seriously...*" It would be impossible for loan documents to be in file before application was made; there was nothing in the December 6th submitted loan file but an [unsigned/no property] pre-qualification application dated 5-7-12 (R.pg. 326 - "Underwriting Approval Conditions", several 12-11-12 entries); (3)

Application and all FF disclosures were dated December 5 but not signed and submitted by Respondents [via mail] to FF until December 10, 2012. (R. pg. 329 and pg. 302 - bank's disclosures and the "Uniform Residential Loan Application"), (4) FF received all signed disclosures and a signed application December 12, cleared December 18 (R. pg. 326 - "Underwriting Approval Conditions", several 12-11-12 entries)

Example 7:

Respondent Cross testified that the appraisal was ordered the "minute that the re-division of the property was accomplished" (R. pg. 120 lines 10-15). Appellants argue that the subdivision was accomplished on November 20th and the appraisal was ordered on December 6th, therefore the appraisal was not ordered as Respondent Cross testified; instead it was ordered 16 days later.

Example 8:

First Respondent Cross testified that she received the recorded plat on November 23, 2012 from her agent, Ms. Nicholson (R. pg. 95 lines 8-10 and pg. 96 lines 15-16). **Then** Respondent Cross testified that she "*never saw the plat with the stamp, never,*" **and then** testified that she received the recorded plat in January 2013 when Respondent Dudek went to St. George to get a copy of it (R. pg. 125 line 19 thru pg. 126 line 8).

Example 9:

Respondent Cross testified the clear CL-100 was a requirement for lender in order to start/obtain financing (R. pg. 118 lines 20-22; R. pg. 110 lines 2-8)). But Allison Williams, FF Lending Officer, testified that FF does not require a CL-100 from any client unless something is on the appraisal, and specifically did not, and never, had required a Cl-100 from Respondents (as stated herein), (R. pg. 177 lines 20 through pg. 178 line 15), (R. pg. 338, question #4).

Example 10:

First, Ms. Nicholson testified that the bank did not request or require the CL-100 or the CL-100 to be cleared but only that Ms. Williams asked her if "*they* [Respondents] *got it cleared*" . **Then** immediately afterwards, Ms. Nicholson testified that she had no idea if the bank was requiring a clearance letter or not (R. pg. 212 line 25 through pg. 213 line 9). **But** Ms. Nicholson

told the Appellants Ferro and their agent that the bank was requiring the Cl-100 to be cleared, "*The bank is requiring that it gets repaired to clear the report which will need to be done by a certified licensed contractor.*" (R. pg. 358 - e-mail 12-5-12, 2:56pm), and "...*the bank will need a letter from a certified contractor to evaluate. If they decide that repairs are needed then those repairs need to be completed and a receipt of work completed will need to be sent to the lender*" (R. pg. 359 - e-mail 12-6-12 1:19pm). The Respondents agent has a duty to treat all prospective sellers honestly and not knowingly give them false information. "*A licensee who represents a buyer shall treat all prospective sellers honestly and may not knowingly give them false or misleading information about the buyer's ability to perform the terms of a transaction.*" S.C. Code § SECTION 40-57-137 (K).

Example 11:

First, Respondent Cross testified that she received the structural engineer report on November 28 (R. pg. 108 lines 16-20). **Then** Respondent Cross testified that she received the structural engineer's report on November 8, read it and showed it to her nephew [not a structural engineer] to check it (R. pg. 107, lines 10-19).

Example 12:

Respondent Cross stated she did not sign a buyer's agreement with Susan Nicholson and Carolina One (R. Pg. 86 lines 8-13). Whereas Susan Nicholson's testimony says Respondents did sign a buyer's agreement (R. pg. 202 lines 18-23)

Appellants contend the trial court was presented with questionable, false, conflicting and obfuscated testimony associated to material documents and facts of law, and its choice to rely on key witnesses Respondent Cross, Allison Williams, Respondent Dudek and Susan Nicholson's testimony as part of its reasoning for judgment was unreasonable and warrants a reversal by this court.

The trial courts judgment was centered on Respondents and their applicable witness's testimonies, not the common contract law and the material documents presented at trial. Appellants argue based on the trial court's many errors in its Order (all as prev. defended herein), the trial court revealed bias in favor of Respondents.

V: THE MASTER IN EQUITY ERRED IN, (1) HIS ASSERTION THAT APPELLANT MORPHEW SOUGHT DAMAGES AGAINST APPELLANTS FERRO ON BREACH OF

THE MORPHEW CONTRACT, (2) THEREFORE APPELLANTS FERRO CHAMPION THE MORPHEW CONTRACT.

The trial court erred in his Order that Appellant Morphew was seeking damages against Appellants Ferro, specifically on breach of the Morphew Contract. Appellants argue that the Complaint filed by Appellant Morphew in January of 2013 was for Respondents' breach of contract and was to seek damages against Respondents Dudek and Cross for causing Appellant Morphew breach of contract due to Respondents' unlawful objections. Appellant Morphew was seeking specific performance [only] from Appellants Ferro. (Respondents' Complaint and Lis Pendens).

The trial court erred that the reason Appellants Ferro champion the Morphew Contract is because Appellant Morphew sought damages from them. As stated above Appellant Morphew did not seek damages from Appellants Ferro, only specific performance. Appellants Ferro champion Morphew Contract because Respondents were asked and given several chances to close escrow/produce a closing date but they did not. When they were delivered a cancellation notice Respondents did not and/or could not supply a closing date, only more excuses, blame, threats of a lawsuit and tying up their home for 2+ years. [Especially] at this point, Appellants Ferro had no faith Respondents were going to close and chose to move on and honor the Morphew Contract. She has been honest and forthright, and proved she has been and is able to close escrow, whereas Respondents have continuously shown a lack of honesty, and unfaithful and unfair dealings.

Conclusion

Respondents failed to apply for financing [as contractually required]. Respondents applied after the Contract close of escrow expiration date, which led to a requirement for a Contract Extension from their lender. Respondents failed to provide FF with a signed Contract Extension. Respondents were not ABLE [and have not been able] to close escrow per said

Contract, despite Respondents continuous contention (as stated in Respondent Complaint, trial testimony, and trial court Order) that they "*...have complied with all terms of the contract and remains ready, willing and able to comply with the contract's terms.*" Appellants contend Respondents unlawfully provided false information to the Appellants Ferro, their agent Rick Willis, Appellant Morphew, Atty. Massalon and to the trial court.

Respondents failed to close escrow on or before November 30, 2012 because they purposely waited [42 days] to apply for financing. Respondents were intentionally negligent (as prev. defended). Respondents are in default per paragraph 8, and therefore the trial court erred in awarding specific performance to Respondents. "*He, therefore, who demands the execution of an agreement, ought to show that there has been no default in him in performing all that was to be done on his part; for, if either he will not, or through his own negligence cannot perform the whole on his side, he has no title in equity to the performance of the other party, since such performance could not be mutual. And, upon this reasoning, it is that where a man has trifled or shown a backwardness in performing his part of the contract, equity will not decree a specific performance in his favor.*" Cureton v. Gilmore, 3 S.C. 46.

Respondents failed to close escrow on or before December 15, 2012 [and any time after December 15th] because they applied for financing on December 5th, the contract had already expired, and Respondents failed to provide their lender with a required, signed Contract Extension. This led to Respondents being declined for financing and the contract declared invalid. Where there was previously a valid and enforceable contract and the contract became invalid and unenforceable, the Respondents and their agent were obligated to inform the Sellers of the change in their contract and loan status, "*Where a statement was true when it was made but due to a change of circumstances becomes false, there is a duty to disclose the change*"[26] and "*fails to*

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[26] With v O'Flanagan [1936] Ch 575

disclose in accordance with Section 40-57-137 any material facts concerning a real estate action." S.C. Code § 40-57-145 (19)[27] Not only did Respondents intentionally failed to inform the Appellants Ferro they no longer had financing, but they chose to deny any and all loan information from the Sellers agent when he inquired specific information from FF, breaching yet another of their contract conditions.

Appellants hold true the Respondents also failed to disclose their loan information when, (1) 2 separate subpoenas from Atty. Massalon was issued to FF in 2013 to provide any and all loan documents and correspondence related to Respondents, property and/or Loan number [note, FF denied such people, loan and property existed in their system until a subpoena was issued for Ms. Williams' attendance at trial in 2014. The financing/loan file was provided, per March 2013 subpoena, just hours before trial was to begin (R. pg. 88 lines 5-9)(Pl. Ex. 16, First Federal File), (2) Appellants Ferro Answer to Respondents complaint asked for details (such as date application made, why a closing date was not set, etc.), (3) at their deposition in June 2013 and, (4) **while under oath** during the trial, Respondents and their agent(s) failed to disclose Respondents had been denied a loan. Instead they gave inconsistent, misleading and false information, and did not provide honest and truthful answers as sworn in a court of law. "It is unlawful for a person to wilfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State." S.C. Code §16-9-10 (A)(1).

The Contract expired by its own terms several times over (as defended herein) and warranted no signature on the cancellation request from the Appellants Ferro; therefore Appellant Morphew's contingent contract was enforceable and the valid contract as of 1-18-2012.

The court focused its inquiry on whether the Sellers performed and completed their contract obligations before the Contract's escrow expiration date of November 30, 2012. That

[27] HISTORY: 1997 Act No. 24, Section 1; 2004 Act No. 218, Sections 20, 21; 2006 Act No. 352, Section 1; 2014 Act No. 258 (S.75), Section 3, eff June 9, 2014.

inquiry in turn focused on whether the completion of the particular Seller's contract obligations waived the Buyer's contract obligations. This would be a correct focus if the issue contained a contract that specified in writing, as a whole, or individually, that Buyer [financing and inspection] contingencies are waived until Seller [completed repairs] obligations are performed. However, the Seller's contract conditions were not a pre-requisite for the Buyers to perform their conditions (i.e., **financing** and **inspection** conditions) (as prev. defended herein, Conditions arguments).

The trial court was presented with conflicting, false and/or obfuscated testimony from Respondents, and its choice to rely on Ms. Williams, Respondent Cross and Ms. Nicholson testimony, was unreasonable (especially since they provided no documentation themselves to back up their testimony at trial), and showed bias in favor of the Respondents, therefore warrants a reversal by this court.

Appellants ask the appellate court to reverse the trial court's Order of Specific Performance. "*The principle is sound and just, and demanded alike by morals and by policy, that he who has neglected to perform a duty which he might have performed, and ought to have performed, has no claim upon the court to compel the other party to perform his engagements. Whenever such negligent party comes into this Court, he must be told that he has neglected to do Equity, and has, therefore, deprived himself of the equity he claims.*" Thompson v. Dulles, 5 Rich. Eq. 370.

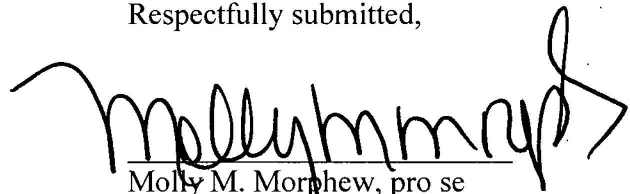
If the Respondents and their agents disclosed the material facts regarding the status of Respondents loan status in a fair and timely manner, as their duty intended, we wouldn't be here 2 years later wasting the court's and the other parties' time, resources and legal fees. The Respondents unlawful actions have caused Appellant Morphew to incur substantial expenses and expended considerable time, effort, and emotional equity in order to purchase the Property. As a

direct and proximate result of Respondents' conduct as set forth herein, Appellant Morphew has been injured and damaged. Appellant Morphew is entitled to recover damages against respondents in an amount to be proven at the trial of this matter, plus pre-judgment interest at the rate allowed by law.

Appellants Ferro fulfilled all their conditions contained within the purchase agreement, acted with good faith, fairness and honesty, observed Time is of the Essence, and are not, and have never been, in breach of contract (as stated herein). On the other hand, Respondents are in serious material breach of contract by refusing and/or failing to perform their contract conditions, showing bad faith and unfair dealing towards the Appellants Ferro, intentionally give false information to the Appellants Ferro to slow down their Time is of the Essence Contract in order to attempt to attain all requested repairs completed and paid for by the Appellants Ferro, and by refusing to sign a release of their contract after their contract expired (as stated herein).

The Respondents unlawfully filed and continued a lawsuit that was frivolous, and if they or their agents had disclosed Respondents' financing information 2 years ago, as duty required, they would have sold their home and save Appellants Ferro substantial expenses, considerable time, effort, and emotional equity. As a direct and proximate result of Respondent Cross conduct as set forth herein, Appellants Ferro have been injured and damaged. Appellants Ferro are entitled to recover damages against Respondents in an amount to be proven at the trial of this matter, plus pre-judgment interest at the rate allowed by law.

Respectfully submitted,



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January 31, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEALS FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis
Master of Equity

Appellate Case No. 2014-002633

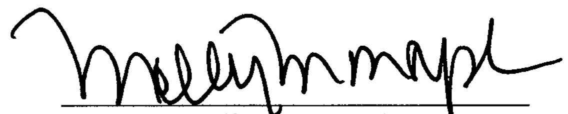
Molly M. Morphew, Thomas M. Ferro and Lorraine B. Ferro....... Appellants

v.

Stephen Dudek and Doreen Cross.. Respondents

CERTIFICATE OF COUNSEL

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



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April 21, 2015