

FACTS OF THE CASE:

1. In early 2015, Defendant Bishop contacted Plaintiff Robert G. Shirey in an effort to sell to him certain commercial property known as 2.224 acres located at 242 Power Station Road, Newberry, South Carolina, together with a storage building and a building with office space and garage space, being known as Newberry County TMS No. 294-23. The parties negotiated a price of \$125,000.00. On May 20, 2015, the parties entered into a written Contract of Sale. The Contract provided that the closing shall be held no earlier than August 3, 2015, and no later than August 12, 2015. (Exhibit 2, Paragraph 6)

2. The Contract required that Plaintiff Shirey deliver \$1,000.00 escrow money to the law firm of Pope & Hudgens. The \$1,000.00 earnest money was delivered on May 19, 2015, by way of BB&T official check number 5007524851. (Exhibit 3)

3. On August 12, 2015, Plaintiff Shirey, upon instruction of his attorney Kyle B. Parker, arrived at the office of Pope & Hudgens with a BB&T official check 5007525028 in the amount of \$122,975.92. (Exhibit 3) On August 12, 2015, Defendant Bishop was called and told that the closing would be the next day on August 13, 2015. Defendant Bishop did not object to closing on August 13, 2015.

4. Unbeknownst to plaintiff and his attorney, Defendant Bishop had entered into an earlier written Contract to sell subject property to her niece, Defendant Robinson, on April 25, 2012. This Contract had never been recorded in the office of the Clerk of Court for Newberry County. Pursuant to the April 25, 2012, Contract of Sale, Defendant Bishop agreed to sell subject property to Defendant Robinson if Defendant Robinson paid \$2,080.77 each month starting March 2012 which would be due each month until such time as the entire payment

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amount was satisfied. There would be late fees payable on monthly installments if the payment is late. This contract provided "3. **Default:** If buyer does not pay payments on the note monthly, seller has the right to declare buyer in default on this contract." (Exhibit D1) Defendant Bishop would maintain hazard insurance policy on the property until the completion of the payment plan. (Exhibit D1 Paragraph 5) All taxes on the land were to be the responsibility of Defendant Robinson. (Exhibit D1 Paragraph 6)

5. When asked about the 2012 Land Sales Contract (Exhibit D1) with Defendant Robinson, Defendant Bishop testified that she had forgotten about the Contract with Defendant Robinson (first Contract).

6. The payment records of TD Bank were submitted in evidence. A review of the payment schedule and copies of the checks would indicate the following. There was testimony from Defendant Robinson that a payment had been made prior to April 25, 2012, which is the beginning date of the report from TD Bank, N.A. but April 25, 2012, until March 13, 2015, TR Trucking made nine (9) payments. During that period, there were 16 late payments made. It appears that TR Trucking's last payment was made on December 22, 2013. The next payment was made on December 30, 2013, which was made by Defendant Bishop. She made ten (10) payments until the end of the payment history report. These records clearly provide that Defendant Robinson was serially late in making such payments that she made and never made a payment towards the mortgage after August of 2013. She was plainly, therefore, in default of any contract she claims to have with her aunt, Defendant Bishop. As such, Defendant Bishop was within her rights to enter into the Contract with Plaintiff.

7. There was testimony by the defendants that the reason Defendant Bishop continued to

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make payments to TD Bank was because she was occupying the office and still conducting some business. This amount was agreed between the Defendant Bishop and Defendant Robinson as a reasonable amount of rental that Defendant Bishop should pay to Defendant Robinson. This testimony about a rental agreement was not supported by a written lease agreement. Nor was there testimony of when Defendant Bishop stopped using the real estate she was "renting". There was no testimony when, if ever, Defendant Robinson began making payments to TD Bank after Defendant Bishop vacated the property.

8. There was no evidence submitted to indicate the Defendant Robinson was paying the Newberry County ad valorem real estate property taxes for the years 2012, 2013, 2014, 2015 or thereafter.

9. According to the payment history and copies of checks, Defendant Robinson paid a total principal, interest and late fees from April 25, 2012, until November 22, 2013, in the amount of \$41,067.44. Thereafter, commencing December 24, 2013, until July 16, 2014, payments were made by Defendant Bishop.

10. Defendant Bishop testified that someone from Mr. Parker's law office called her on August 12, 2015, and asked her to come on August 13, 2015, for the closing. Defendant Bishop stated, "I just told them, ok." (Transcript page 80, line 17) Defendant Bishop did not come to the August 13, 2015 closing. Instead, she went to Lovelace Family Clinic at 8:30 a.m. The medical notes that day indicated:

"Reported she is 'going through a lot of depression and stress right now and it just doesn't seem like anything is working'. Reported she 'feels the weight of the world is on my shoulders. Im (sic) sad all the time. I cry a lot. I cant (sic) made (sic) good decisions. I make bad decisions.' . . . Reported she is supposed to go to a closing on 08/13/15. She is requesting an excuse letter from LWP stating that

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she does not feel well and cannot attend. She stated 'I just dont (sic) feel like going.'" (Tr. Exhibit 8)

11. It appears from the facts of the case that the telephone call on August 12, 2015, from the law office of Pope & Hudgens triggered a series of events between Defendants Bishop and Robinson which culminated in the signing of a deed from Defendant Bishop to Defendant Robinson (Tr. Exhibit 6) and the execution of a Land Sales Contract executed on August 13, 2015. (Tr. Exhibit 9)

12. In spite of Defendant Bishop's indication that she was too ill to go to the August 13, 2015 closing at Pope & Hudgens law firm, she was well enough to go to a doctor's office visit at 8:30 in the morning and request a letter excusing her from the closing and she was well enough to go to Wilson Funeral Home, Newberry, South Carolina, where she executed the deed to Defendant Robinson (Tr. Exhibit 6) and a Land Sale Contract. (Tr. Exhibit 9)

13. It is clear that Defendant Bishop suffered from some level of anxiety and depression in a sense that she had trouble making good decisions. There is no evidence that Defendant Bishop was mentally incompetent. Neither Defendant Bishop nor Defendant Robinson has alleged the incompetency of Defendant Bishop. However, Defendant Bishop was in a confidential relationship with Defendant Robinson.

14. It is clear from the testimony that in the 2012 Contract of Sale, Defendant Bishop expected Defendant Robinson to make all mortgage payments in the amount of \$2,080.77 to commence with the March 2012 payment. Failure to make payments, buyer would be in default of the contract. Any late fee for making late payments would be added to the monthly payment. It appears that according to the bank records, from April 25, 2012, until November 22, 2013,

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there were 16 late payments indicated by the bank records. It is true that in her testimony, Defendant Robinson indicated that she had made a payment earlier in April or possibly in March that was not reflected on the bank records. Even with this information, however, there were 16 late payments during the time that Defendant Robinson was supposedly "buying" subject property.

15. Subject property was subject to a real estate mortgage held by TD Bank. Defendant Bishop admitted at trial that she never provided a payoff quote to Plaintiff or to his attorney as to the TD Bank mortgage. This information was readily available to Defendant Bishop because in the Deed from Defendant Bishop to Defendant Robinson the amount of the debt, to wit: \$122,939.37, was set forth on the face of the Warranty Deed dated August 13, 2015. (Tr. Exhibit

6). Because of Defendant Bishop's failure to provide the mortgage payoff information, the closing was delayed.

16. Plaintiff claims to have lost rental income in the amount of \$6000.00 per month from the date of closing to date for a total of \$108,000.00. Although Plaintiff is a very successful business man, there was no supporting testimony by real estate experts to corroborate the monthly rental value. This Court finds the loss of rental value as not substantiated by the evidence.

FINDINGS OF LAW:

1. 2012 Contract: That the Contract between Defendant Bishop and Defendant Robinson dated April 25, 2012, was not recorded in the office of the Clerk of Court for Newberry County with other land transfer documents. Plaintiff had neither actual notice nor constructive notice of this Contract. Plaintiff was an innocent bona fide purchaser in good faith.

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That the Contract of April 25, 2012, between Defendant Bishop and Defendant Robinson had been breached by Defendant Robinson. Although she had paid \$41,067.44 toward principal, interest and late fees, Defendant Robinson did stop making payments on the mortgage which required Defendant Bishop to make payments to the bank. It is true that Defendant Robinson indicated that Defendant Bishop's payments to TD Bank were simply rental for the use of the premises by Defendant Bishop. There was no written lease agreement. The testimony that the monthly rental payments (which were the exact amount of the mortgage payment) is not credible to the fact finder.

2. Confidential Relationship: That Defendant Bishop was in a special confidential relationship with Defendant Robinson. Testimony of both parties indicated that Defendant Bishop had faith, trust and confidence in representations made by Defendant Robinson. Both Defendants testified that there was much contact between each other, much visitation, and much talking. It is apparent that on the weekend prior to this transfer of real estate, there was some type of family dispute. Thereafter, without explaining to Plaintiff or his attorney, on the advice and counsel of Defendant Robinson, Defendant Bishop signed a deed and another contract of sale which was the direct result of counsel and advise of Defendant Robinson.

3. 2015 Contract: That Defendants Bishop and Robinson have argued that the closing was not on August 12, 2015, it violated Plaintiff's contract and he lost any rights he had under the contract. This Court makes the finding that Plaintiff's contract on May 20, 2015, provided that this matter should "close no earlier than August 3, 2015, and no later than August 12, 2015." It is clear from the testimony that the full purchase price was delivered by way of bank check on August 12, 2015. When Defendant Bishop was called from Pope and Hudgens law office to

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discuss closing the next day, that was tantamount to an extension of the contract. If the contract was not to be extended one day, then Defendant Bishop had a duty to indicate that "I'm selling it today, August 12th or I'm not selling it at all", which she did not do.

The Contract provided that the closing was to take place on or before August 12, 2015. It further provided that time was of the essence. Defendant Bishop testified that Plaintiff's only obligation under the contract was to pay the purchase price and admitted that he did so on August 12, 2015. Therefore, Plaintiff timely complied with his obligations under the contract. However, Defendant Bishop apparently contends that because she did not fulfill her obligations on August 12, 2015, she can avoid the Contract altogether. This contention is without merit. A party to a contract cannot avoid her obligations under it through her own conduct, breach or repudiation.

17A Am Jur.2d., *Contracts* § 644; see also, Retailers Service Bureau v. Smith, 165 S.C. 238, 163 S.E. 649 (1932) (holding that a party who first breaches a contract may not claim liquidated damages); Smith v. First Provident Corp., 245 S.C. 509, 141 S.E.2d 646 (1966) (holding that right to rescind contract on ground of failure of performance does not extend to party who has substantially broken the contract herself).

Moreover, even if Plaintiff had not tendered payment on August 12, any such failure would have been excused. The Contract called for Defendant Bishop to convey marketable title free and clear of all liens including the TD Bank mortgage. Defendant Bishop testified candidly at trial. She admitted that she never provided Plaintiff or his counsel with a payoff quote relating to the mortgage. In the absence of a payoff statement from TD Bank, it was impossible for Plaintiff to know whether the purchase price was sufficient to satisfy the mortgage or whether Defendant Bishop would have to contribute funds to the closing. It is settled that a party who

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precludes the other from performing under the contract cannot avail herself of such non-performance. Continental Mortgage Investors v. Quail Run Associates, 280 S.C. 409, 312 S.E.2d 272 (1984). As a result, even if Plaintiff failed to tender payment of the purchase price on August 12, 2015, the end result is the same: Defendant Bishop cannot avoid the Contract.

Finally, Defendant Bishop's conduct in agreeing to appear at the closing on August 13th, is the nail in the coffin of her attempts to avoid the Contract. Again, she freely admits that she agreed to appear at the closing on August 13th. She also admits that Plaintiff had every right to rely on her agreement. Had she insisted on the 12th, Defendant further admits she would have received payment at that time. She did not, but, instead, agreed to extend the closing to the 13th. She cannot now avoid the consequences. This is true even where the Contract is within the statute of frauds. A party who orally extends time for performance of a written contract within statute of frauds will be estopped to claim the benefit of the statute where the other party, acting in reliance on the extension, fails to exercise his rights as provided by the written contract. Florence Printing Co. v. Parnell, 178 S.C. 119, 182 S.E.2d 313 (1935). Therefore, Defendant Bishop was, and continues to be, obligated to carry out the Contract.

4. Bona Fide Purchaser: Defendant Robinson had no interest in the subject property under the alleged 2012 contract. As is shown by the mortgage payment records submitted into evidence, she was clearly in default in that she failed to make a single payment since August of 2013. In Davis v. Monteith, 289 S.C. 176, 345 S.E.2d 724 (1986), the Supreme Court held where a purchaser under a contract to purchase land fails to perform as provided in the agreement, the purchaser has "no legal right to the property."

Furthermore, where a seller enters into successive contracts on the same property, each of

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which would have been effective if it were the only contract, the purchaser under the second contract who purchases without notice of the first prevails when the first contract is voidable as the seller's entry into the second is a manifestation of her intent to avoid the first. See Restatement (First) of Contracts §173. Here, the purported 2012 contract between the defendants is subject to revocation by Defendant Bishop where it states that she could declare Defendant Robinson in default in the event she failed to make the payments as agreed. As a result, Defendant Robinson has no legal interest in the property and Defendant Bishop was within her rights to enter into the Contract with Plaintiff. By Defendant Bishop's act of entering into the 2015 Contract with Plaintiff, she de facto declared the 2012 Contract with Defendant Robinson in default and void. Defendant Bishop now has no legal excuse to avoid her obligations under the 2015 Contract.

At most, Defendant Robinson may have had an equitable right of redemption enforceable against Defendant Bishop arising from any payments made under the executory contract.

However, any such equitable interest is not enforceable against Plaintiff. Generally, one who is entitled to protection as a bona fide purchaser takes the property free from any outstanding equitable interest of others. See, e.g., Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d. 420 (Ct. App. 2008). Since a purchaser under an executory contract has only an equitable interest in the land, a subsequent grantee from the vendor will take free from such equity if such subsequent grantee is a bona fide purchaser for value without notice. 77 Am. Jur.2d, *Vendor Purchaser* § 353. Again, it is undisputed that Plaintiff had no actual or constructive knowledge of any claimed interest of Defendant Robinson. Both Defendants testified in their depositions that Plaintiff was never told about the alleged 2012 contract. The 2012 contract was not recorded, nor was it ever

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provided to Plaintiff at any time. Consequently, Plaintiff is an innocent purchaser without notice who takes the subject property free from any claims of Defendant Robinson.

Furthermore, it cannot be disputed that Defendant Robinson knew of Plaintiff's Contract with Defendant Bishop and her inferior position prior to convincing her aunt to convey the subject property to her. Defendant Robinson testified that she could not precisely say when she learned of the Plaintiff's contract; however, it is clear that she knew about it prior to drafting and securing Defendant Bishop's signature on the aforesaid deed. She is not, therefore, under any view of the facts, a bona fide purchaser. Instead, it is Plaintiff that has the better claim to title and is entitled to the fruit of his bargain. As equity regards done what ought to be done, Defendant Bishop's aforesaid deed to Defendant Robinson in breach of her agreement with Plaintiff should be set aside.

5. Attorney's Fees and Costs: Pursuant to the 2015 Contract:

16. General Provisions. In the event of any litigation between Buyer and Seller regarding this Contract, the losing party shall promptly pay the prevailing party's attorneys' fees and expenses and costs of litigation.

Plaintiff's counsel submitted an affidavit in support of Plaintiff's request for an award of these fees and costs. Taking into consideration the nature, extent, and difficulty of the services, and the time and labor devoted to the prosecution of this action, professional standing, the manner of compensation, beneficial results obtained, and customary fees charged for similar services, the sum quoted in the affidavit is a fair and reasonable fee to compensate Plaintiff's counsel for the services identified in his statement as having been performed. Accordingly, the Plaintiff is further entitled to an award of \$20,086.07 for his attorney's fees and cost as provided in the Contract.

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IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of Plaintiff against Defendant Gwen G. Bishop in the total amount of \$20,086.07 (attorney's fees and legal costs).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that loss of rental value during the 20 months of litigation claimed by Plaintiff is denied.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that the aforementioned deed to Defendant Robinson is hereby cancelled, set aside and declared void and of no effect. The Newberry County Clerk of Court shall delete both the Grantee and Grantor of this Deed from the indexes and mark the Deed recorded in Record Book 1841 at pages 287-289 as "Null and Void" and refer to Civil Action number 2015CP36-00443 on the face of such Deed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant TD Bank, N.A. shall provide a payoff statement to Plaintiff's counsel evidencing the total amount necessary to satisfy and/or cancel its mortgage against the subject property. Said payoff statement shall be "good through" the date which is 20 days following the date of this order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall, within 10 days of receiving a payoff statement from Defendant TD Bank, N.A., tender to Plaintiff's counsel the total purchase price of \$125,000, less only an amount representing the prorated portion of the ad valorem taxes assessed against the subject property as provided in the Contract. Said proration shall be made as of the date of this order and will be final and calculated utilizing the total tax assessed against the property for the previous tax year as is also set forth in the Contract.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Bishop

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shall, within 10 days of receiving a payoff statement from Defendant TD Bank, N.A., execute and deliver to Plaintiff's counsel a general warranty deed conveying the subject property to Plaintiff, along with such affidavits as may be required for the issuance of an owner's title insurance policy, as required by the Contract. Said deed shall be drafted by Plaintiff's counsel describing the subject property in the same manner as it is described in the deed whereby Defendant Bishop acquired title. Defendant Bishop shall further deliver such sums, if any, as may be necessary to satisfy her obligations under the Contract in the event the said sales proceeds are insufficient to satisfy the mortgage. Provided, if Defendant Bishop fails or refuses to execute the Deed to Plaintiff as set forth in this Order for a period of 35 days after the date of this Order, the Newberry County Clerk of Court is hereby authorized to sign such Deed transferring subject property to plaintiff. Provided further, the Newberry County Clerk of Court is authorized to sign any documents normally signed at closing such as closing statements, affidavits as may be required for the issuance of an owner's title insurance policy and the like.

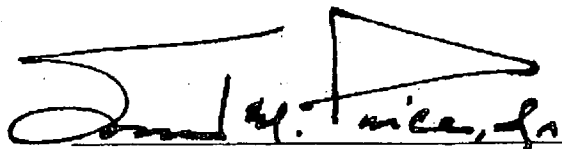
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon delivery of the deed and affidavits, Plaintiff's counsel shall pay to the order of Defendant Bishop the excess proceeds, if any, of the purchase price reduced by the ad valorem tax proration, the mortgage payoff, transfer taxes assessed (formerly known as "deed stamps") in connection with the recording of the deed, and the amounts awarded herein to Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Special Referee's fees to be paid to Samuel M. Price, Jr. in the amount of \$1,800.00 to be paid 50% (\$900.00) by Plaintiff Robert G. Shirey and 50% (\$900.00) by Defendant Gwen G. Bishop. These fees shall be paid at and from the closing of subject property. If the closing takes longer than 60 days from

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the date of this Order, these fees shall be paid directly to the Law Office of Samuel M. Price, Jr.
within 65 days of the date of this Order.

IT IS SO ORDERED.



SAMUEL M. PRICE, JR.
Special Referee for Newberry County

Newberry, SC
May 18th, 2017