

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Samuel M. Price, Jr., Special Referee

Case No. 2017-001678

RECEIVED
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SC Court of Appeals

Robert G. Shirey Respondent,

v.

Gwen G. Bishop,
Cassandra Robinson,
and T.D. Bank, N.A. Defendants,

of whom
Gwen G. Bishop
and Cassandra Robinson are Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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REPLY

Shirey's brief does not adequately address the central issue before this Court: is the application of specific performance equitable under these circumstances? Put another way, Shirey does not explain why a successful businessman, represented by counsel, and armed with a contract that gives him every possible advantage,¹ deserves the courts' intervention to enforce a contract he failed to comply with. Shirey's brief also never squarely addresses or explains the most important fact in the record: it was Shirey, not Bishop or Robinson, who requested an improper extension to the contract in question.² Finally, Shirey's challenge to Bishop's capacity undermines Shirey's entire argument to affirm the Special Referee. For all of these reasons, and others set forth below, this Court must reverse the decision of the Special Referee and issue a decision denying Shirey's requested relief.

I. Shirey does not effectively address Bishop and Robinson's evidence that the equities favor them.

In balancing the equities, Bishop and Robinson presented evidence of the significant disparity in experience, representation, and capacity between Shirey and Bishop. (Init. App. Brief pp. 11-12). This evidence proves that Bishop was less able to protect herself and thus the equities favor her; therefore, Shirey is not entitled to Specific Performance. See King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (Ct.App. 1984); Shepard

¹ Particularly one-sided provisions can be found in sections 9, 11, and 14 of the Shirey Contract. (Tr. Ex. P2).

² Shirey does not controvert the fact that it was his attorney's office, not Bishop, who requested an extension to the contract. (Resp. Init. Brief p. 6 n. 5; 5/18/17 Order p. 4).

v. First American Mortgage Co., 289 S.C. 516, 519-20, 347 S.E.2d 118 (Ct.App. 1986).

A court may easily deny Specific Performance for inequity; one commentator has noted:

Equity is said to operate on a higher moral plane than law; it demands more meticulous conduct and a greater degree of altruism between contracting parties, and it will not assist one party in taking unfair advantage of the other. As a result, a court may deny specific performance on the basis of "hardship," or "sharp practice," although the defect in the transaction is not concrete enough to establish a defense at law.

Emily L. Sherwin, Law and Equity in Contract Enforcement, 50 Md. L. Rev. 253, 254-55

(1991) (citing, *inter alia*, Hodge v. Shea, 252 S.C. 601, 168 S.E.2d 82 (1969)). The

principle that Specific Performance must be equitable is ancient and well-settled in South

Carolina:

...the rule is stated to be "that every agreement, to merit the interposition of a Court of Equity in its favor, must be fair, just, reasonable, *bona fide*, certain in all its parts, mutual, useful, made upon a good or valuable consideration, not merely voluntary; consistent with the general policy of a well regulated society, and free from fraud, circumvention, surprize; [sic] or at least such an agreement must, in its effect, ultimately tend to produce a just end."

Cabeen v. Gordon, 10 S.C. Eq. (1 Hill Eq.) 51 (1833) (quoting 2 John Joseph Powell,

Essay Upon the Law of Contracts and Agreements 221 (1802)),³ see also McChesney v.

Smith, 105 S.C. 171, 176, 89 S.E. 639, 641 (1916) ("A Court of equity will not decree

specific performance, unless the contract is fair, just and equitable, nor if it fails to

express the true agreement of the parties, by reason of fraud, accident, or mistake.").

Instead of presenting evidence that would tip the scales of equity in his favor,

Shirey argues that Bishop and Robinson's evidence "should either not be a part of the

³ Available at <https://books.google.com/books?id=HFtJAQAAMAAJ> (last visited January 1, 2018).

record⁴] before this Court or are wholly irrelevant to this Court's consideration of this appeal". (Init. Resp. Brief p. 23). This argument is without merit, both because Shirey appeals to equity five pages earlier in his brief (Init. Resp. Brief p. 18), and because a review of the evidence shows its relevance to balancing the equities:

Shirey's Business Sophistication: The Special Referee, in his findings of fact, stated that Shirey was a "very successful business man". (05/18/17 Order p. 6, ¶ 16).

Shirey attempts to dismiss this finding as "extraneous" and lacking factual support, but the record shows that Shirey is the owner of a business that leases heavy equipment to contractors across the United States and Canada for use at "power plants, wind farms, coliseums, bridges, lock and dam work, and hydroelectric work." (Init. Resp. Brief p. 23;

Tr. Trans. p. 6). Shirey also owns nearly every lot in the block of the property in question.

(Tr. Ex. P1). This is a fact of consequence to the balancing of equities, and Shirey's argument that it is somehow "irrelevant" is without merit. See Rule 401, SCRE.

Bishop's Lack of Business Sophistication: The record reflects that Bishop had considerable difficulty operating her business after the death of her husband in 2010 and the suicide of her son in 2013, and she consequently shut the business down in early 2015. (Bishop Dep. pp. 7-9, 20, 55, 56, 68; Tr. Ex. D8). Shirey does not contradict this fact. Further, prior to the execution of the Shirey Contract in 2015, Shirey testified he was

⁴ Shirey argues that Bishop and Robinson reference portions of their deposition transcripts that Shirey did not designate for trial. (Init. Resp. Brief pp. 11, 23, 24). However, the Special Referee reviewed the entire deposition transcripts of Robinson and Bishop, not just Shirey's designations: "...what he's done is listed page numbers and lines of the deposition, rather than submit the whole thing. But I will read the whole thing, also reading these designations, okay?" (Tr. Trans. p. 49). "I'm going to look at these depositions and read them all..." (Tr. Trans. p. 164). Likewise, Shirey argues that the January 6, 2016, Affidavit of Gwen Bishop was not part of the record, but the face of the affidavit shows that it was filed of record with the Newberry County Clerk of Court on May 9, 2016 (Aff. of Bishop p. 1). See Rule 210(c), SCACR.

aware Bishop was overwhelmed with operating her late husband's business, was experiencing considerable stress, and wanted to close the business. (Tr. Trans. pp. 10-11). Shirey argues that Bishop "disputed" his statement, but Bishop's actual testimony was that she did not remember telling Shirey this information. (Init. Resp. Brief p. 24; Tr. Trans. p. 62). Bishop's lack of sophistication (and Shirey's awareness of it) is a fact of consequence to the balancing of equities, and Shirey's argument that it is somehow "irrelevant" is without merit. See Rule 401, SCRE.

Bishop's Capacity: Bishop's struggles with her mental health are well-documented within the record. (Bishop Dep. Tr. pp. 7-9, 20; Tr. Trans. pp. 10, 55-57, 62, 68, 103; Tr. Ex. D8; Aff of Bishop p. 1). Further, Bishop specifically disputes her capacity to enter the Shirey Contract in her verified Answer to the original complaint: "[Bishop] neither understood the terms of the Land Purchase Contract nor the magnitude of her actions." (Bishop Ans. p. 3 ¶¶ 15-16). As set forth above, even if this evidence is not concrete enough to support a legal defense for incapacity, it is sufficient to be considered in balancing of the equities. Bishop's capacity is a fact of consequence to the balancing of equities, and Shirey's argument that it is somehow "irrelevant" (Init. Resp. Brief pp. 23-24) is without merit. See Rule 401, SCRE. Shirey's irrelevance argument is especially specious in light of the fact that *three pages later* in his brief Shirey advances an incapacity argument. (Init. Resp. Brief p. 26 n. 17).

Shirey's influence over Bishop: Bishop's January 6, 2016, affidavit implies that she was present without counsel to sign the Shirey Contract on May 20, 2015. (Aff. of Bishop). Further, Shirey's attorney's office communicated with Bishop directly before suit was filed; this would have not occurred if she were represented. (Tr. Trans. pp. 59-

60, 80, 81, 91, 95; Tr. Ex. P5). Thus, Shirey's assertion that there is not a "shred of...evidence" supporting Bishop and Robinson's contention that Bishop was unrepresented during the negotiation of the Shirey Contract is incorrect.⁵ (Init. Resp. Brief p. 23). As no witnesses signed the Shirey Contract, it is safe to presume that Bishop was signing it alone and without the benefit of counsel. Bishop's verified Answer to the original complaint also addresses duress and undue influence: "Due to exigent circumstances and [Bishop's] close relationship with [Shirey, Bishop] felt obligated to sell her land to [Shirey]." (Bishop Ans. p. 4 ¶¶ 17-18). Shirey does not contradict the assertion that the earnest money deposit was uncustomarily low (he only argues that it was not preserved). (Init. App. Brief p. 12; Init. Resp. Brief p. 23). Bishop, depressed, stressed, alone, and unrepresented by counsel, is subject to undue influence by Shirey; this is a fact of consequence to the balancing of equities (regardless of whether it supports a legal defense or not), and Shirey's argument that it is somehow "irrelevant" (Init. Resp. Brief pp. 23-24) is without merit. See Rule 401, SCRE.

Taken as a whole, the above facts tip the scales of equity in favor of Bishop and Robinson; this Court must reverse the Special Referee and issue a decision denying Shirey relief.

II. Shirey's citation of Clardy v. Bodolosky supports Bishop and Robinson's argument that Specific Performance is unwarranted.

Shirey's analysis of this appeal under Clardy (Init. Resp. Brief pp. 20-22) omits analysis under one of Clardy's critical holdings: *if a contract expressly requires strict compliance with its terms, substantial compliance is not sufficient for specific*

⁵ Note also that Shirey does not deny this assertion; he argues the record contains no evidence to support it. (Init. Resp. Brief p. 23).

performance. Clardy v. Bodolosky, 383 S.C. 418, 427, 679 S.E.2d 627, 531-32 (Ct. App. 2009) (citing Coastal Seafood Co. v. Alcoa South Carolina, 298 S.C. 466, 468, 381 S.E.2d 502, 503 (Ct. App. 1989)). The Shirey Contract expressly requires strict performance with its terms:

Closing shall be held no earlier than August 3, 2015 and no later than August 12, 2015.

(Tr. Ex. P2 p. 2 ¶ 6).

Time is of the essence in the occurrence of all events, the satisfaction of all conditions and the performance of all obligations hereunder.

(Tr. Ex. P2 p. 4 ¶ 16.b).

It is explicitly agreed that any waiver of any provision hereof must be specifically stated in a writing delivered to the other party.

(Tr. Ex. P2 p. 4 ¶ 16.f).

This Contract may not be modified or amended except by a writing signed by both Buyer and Seller.

(Tr. Ex. P2 p. 5 ¶ 16.h).

As set forth above, the Shirey Contract explicitly requires closing to take place “no later than August 12, 2015”, and time is of the essence. It also, in two separate provisions, explicitly requires a writing in order to modify the contract’s terms (as does the Statute of Frauds). These are terms of strict performance. Shirey did not strictly comply with the terms of his contract; instead, he violated the terms of his own contract. Under Clardy, Shirey is not entitled to specific performance. While this may appear to be a harsh and technical result, bear in mind that the Shirey Contract, which repeatedly and explicitly required written modifications (along with South Carolina law), was drafted by Shirey and should thus be construed against him. (Tr. Ex. P2 p. 5 ¶ 16.i) See Chassereau

v. Global Sun Pools, Inc., 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) (“[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.”).

Shirey cites ESA Servs., LLC v. SCDOR, 392 S.C. 11, 707 S.E.2d 431 (Ct. App. 2011) to argue that a contract could not be orally modified because the contract prohibits oral modifications. However, ESA Servs. is an action involving an employment contract, and the ESA Servs. contract does not contain multiple sections requiring strict compliance with the requirement of a modification in writing. It is thus inappropriate to apply ESA Servs. to the facts of this case.

III. Shirey does not address Bishop and Robinson’s arguments regarding the lack of a “confidential relationship”.

The Special Referee held that “much contact...much visitation, and much talking” was sufficient to support a finding that Bishop and Robinson had the prerequisite “confidential relationship” to void the 2015 Deed between Bishop and Robinson. (05/18/17 Order p. 7). “[M]uch contact...much visitation, and much talking” at best describes a family relationship, which Bishop and Robinson showed in their brief was not dispositive of a “confidential relationship” without proof of something more (Init. App. Brief pp. 13-15). Hudson v. Leopold, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986). Shirey does not address this argument and only re-incorporates the analysis of the Special Referee. (Init. Resp. Brief p. 24). This Court may treat Shirey’s failure to respond as a confession that Bishop and Robinson’s position is correct. Turner v. SCDHEC, 377 S.C. 540, 661 S.E.2d 118 (Ct. App. 2008).

IV. Shirey's inchoate purchase does not eliminate Robinson's equitable interest in the subject property.

Regardless of whether Bishop held Robinson in default of the 2012 Contract or not, it is undisputed that Robinson made substantial payments on the property's mortgage. Whether this gives rise to an "equitable right of redemption" or "equitable lien" or "constructive trust", Robinson's contributions create an equitable interest in the property in question (Init. App. Brief pp. 15-16). Southern Pole Bldgs., Inc. v. Williams, 289 S.C. 521, 347 S.E.2d 121 (Ct.App. 1986). Shirey's only defense to Robinson's equitable interest is his purported status as a bona fide purchaser for value. However, a bona fide purchaser must acquire legal title to the property before he can assert this defense. Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). Shirey never took legal title to the property in question and thus cannot be a bona fide purchaser for value.

A bona fide purchaser must also purchase "bona fide, i.e., in good faith and with integrity of dealing, without notice of a lien or defect." Id. Shirey testified that he was aware of Bishop's mental and financial condition before entering into the Shirey Contract (Arg I, *supra.*) and Shirey has likewise asserted that Bishop lacked legal capacity on his chosen closing date of August 13, 2015 (Arg. V, *infra.*). Such behavior does not evidence integrity of dealing, and thus Shirey cannot be considered a bona fide purchaser, even if he had acquired legal title.

V. Shirey's assertion of Bishop's legal incapacity demands reversal of the Special Referee.

Shirey opens the door to consideration of Bishop's legal capacity in his brief: "The [2015] deed [from Bishop to Robinson] could be further set aside as invalid based

on Bishop's mental state. She testified that she was so distressed at the time she signed the deed that she did not understand what she was signing." (Resp. Init. Brief p. 26 n. 17). Assuming, *arguendo*, that Shirey is correct about Bishop's capacity, this Court has wide-ranging powers to protect the rights of Bishop in this matter. "Appellate courts enjoy a broad scope of review where the rights of persons under a legal disability are at issue. Courts have held that the duty to protect the rights of such individuals takes precedence over procedural rules otherwise limiting the scope of review, and consequently, matters affecting the rights of these persons can be considered by appellate courts *ex mero motu*." Jean Toal, et al. Appellate Practice in South Carolina 191 (3rd ed. 2016) (citing Galloway v. Galloway, 249 S.C. 157, 160, 153 S.E.2d 326, 327 (1967)). "Persons of unsound mind, like infants, are under the special protection of the courts of equity with respect to their persons, property, and legal transactions." Shepard, 289 S.C. at 518, 347 S.E.2d at 119.

Shirey argues that Bishop lacked capacity on August 13, 2015 to execute the 2015 Deed to Robinson.⁶ (Init. Resp. Brief p. 26 n. 17). If Bishop lacked the capacity to execute a deed to Robinson on August 13, 2015 (as alleged by Shirey), then Bishop also lacked the capacity on *the exact same day* to execute a deed to Shirey (as he requested).

Even if Shirey had not breached the Shirey Contract first (See Init. App. Brief p. 16), any nonperformance by Bishop is excused by the very legal incapacity Shirey alleges.

Shirey's incapacity argument also raises questions regarding other transactions that must be explored. Shirey's argument is based on Bishop's August 11, 2016, deposition testimony where she had little recollection of the execution of the 2015 Deed

⁶ Presumably Shirey also argues that Bishop lacked the capacity to execute the 2015 Contract with Robinson, which was executed the same day as the 2015 Deed. (Tr. Ex. P9 p. 2).

to Robinson and also testified that she did not understand what she was signing that day. (Init. Resp. Brief p. 26 n. 17; Bishop Dep. Trans. pp. 49-52). If Shirey is correct that this evidence raises questions Bishop's capacity on August 13, 2015, then there is similar evidence Bishop lacked capacity less than 24 hours earlier to enter into an extension of the 2015 Contract: Bishop could not recall the content of the alleged oral extension of the Shirey Contract (Tr. Trans. p. 95).

There is an even greater amount of evidence that supports a finding that Bishop lacked capacity on May 20, 2015, to enter into the Shirey Contract: Bishop did not recall the 2012 Contract with Robinson when signing the Shirey Contract (Tr. Trans. pp. 55, 57, 62; Bishop Dep. Trans. pp. 27, 59); she could not recall the terms of the Shirey Contract at trial on March 22, 2017 (Tr. Trans. pp. 79-80; Bishop Dep. Trans. pp. 65-66); she was unable to recall the terms of the Shirey Contract (or how long it took to negotiate) at her August 11, 2016, deposition (Bishop Dep. Trans. pp. 44, 66), and she alleges in her verified Answer to the original complaint that she did not understand the terms of the Shirey Contract. (Bishop Ans. p. 3 ¶¶ 15-16). If this Court follows Shirey into the legal incapacity rabbit-hole, then it must reverse the Special Referee and void the Shirey Contract and/or its purported oral extension for Bishop's lack of capacity. See Shepard, 289 S.C. at 518, 347 S.E.2d at 119.

VI. All of Bishop and Robinson's arguments are preserved.

Throughout his brief, Shirey asserts that various arguments of Bishop and Robinson are unpreserved. (e.g. Init. Resp. Brief pp. 12-13, 17, 29, 30). Generally, the arguments in question refer to Shirey's inability to meet his burden of proof. This appeal is reviewed *de novo*; the issue of failure of proof is central to this Court's review; it is

impossible to *not* preserve this argument. For example, Shirey argues that Bishop and Robinson did not preserve the argument that Shirey failed to specifically allege that he was capable of performing under the subject contract at the time of filing. (Init. Resp. Brief p. 12 n. 10). Ability to perform is not a defense that must be pled; it is an element of the cause of action that Shirey must prove. E.g. Clardy, supra. A review of the pleadings and the transcript (particularly Tr. Trans. p. 35, which was cited by Shirey) shows that Shirey never met his burden of proof for this element.

Shirey also argues that Bishop and Robinson's Statute of Frauds argument was not preserved. (Init. Resp. Brief p. 17). However, the Record reflects that Bishop and Robinson raised this issue at trial without objection and again in their Motion to Reconsider. This argument is preserved. (Tr. Trans. p. 91; Motion to Reconsider). See Rule 15(b), SCRCP: ("When issues not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.")

Shirey argues that Robinson has not preserved any argument regarding her equitable interest in the property. (Init. Resp. Brief p. 29 n. 18). However, the Special Referee ruled on this issue in his order, thus preserving it for appeal. (05/18/17 Order p. 10).

Shirey contends that because Bishop and Robinson made no request for attorneys' fees and costs, they should not be allowed to make such a request. (Init. Resp. Brief p. 30 n. 19). Bishop and Robinson were not the prevailing parties below and thus were unable to make such a request; should this Court reverse the Special Referee, they would be considered prevailing parties and would be entitled to their attorneys' fees and costs

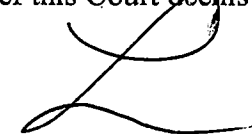
pursuant to section 16 of the Shirey Contract. (Tr. Ex. P2 p. 5). See Rule 54(c), SCRCP (“...every final judgment shall grant the relief to which the party in whose favor it is render is entitled, even if the party has not demanded such relief in his pleadings.”)

Even if Bishop and Robinson’s preservation of error is questionable, their arguments must still be considered. If Bishop is incapacitated, as Shirey contends, then error preservation is unnecessary because this Court must investigate the record to protect her rights. (Arg. V, *supra*). Further, our Supreme Court has observed “it may be good practice for us to reach the merits of an issue when error preservation is doubtful.” Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012). “[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.” Id. at 333; 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part).

CONCLUSION

For the arguments set forth above, Respondents Gwen Bishop and Cassandra Robinson ask this Court to reverse the Special Referee and issue a decision denying Shirey his requested relief, awarding the Respondents attorneys’ fees and costs, and granting Respondents all such other and further relief this Court deems just and proper.

Dated: 01/08/2018



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Samuel M. Price, Jr., Special Referee

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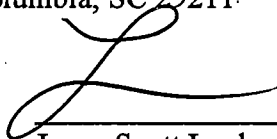
CERTIFICATE OF SERVICE

I certify that I served the Initial Reply Brief on the persons set forth below by depositing a copy of it in the United States Mail, postage prepaid, on the date set forth below:

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JAN 10 2018

SC Court of Appeals

RE: *Robert Shirey v. Gwen G. Bishop, Cassandra Robinson, and T.D. Bank, N.A.*
Court of Appeals Case No.: 2017-001678
Our File No.: 20170165

Dear Ms. Kitchings:

Enclosed please find the following documents: Initial Reply Brief of Appellants and Certificate of Service in reference to the above matter.

Please do not hesitate to contact our office should you need additional information.

Sincerely,



Marilyn Hunt
Legal Assistant

Enclosures

/meh

cc: Kyle B. Parker, Esquire

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