THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS OF NEWBERRY COUNTY
Samuel M. Price, Jr., Special Referee

Appellate Case No. 2017-0001678

Robert G. Shirey,

Respondent,

v.

Gwen G. Bishop
Cassandra Robinson
And TD Bank, N.A

Defendants,

Of whom Gwen G. Bishop
and Cassandra Robinson are,

Appellants.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 10

I. The Lower Court Correctly Found That Respondent Is Entitled to Specific Performance 10

A. The Lower Court Correctly Found That Respondent Fully Performed or is Otherwise Ready, Willing and Able to Perform Under the Contract Between He and Appellant Gwen G. Bishop 11

B. The Lower Court Correctly Found That Appellant Gwen G. Bishop Failed to Perform Under the Contract 13

C. The Lower Court Correctly Found That Appellant Gwen G. Bishop's Own Failure to Perform as Required Under the Contract Renders Her Defense as Argued Below and on Appeal Unavailable 15

D. The Lower Court Correctly Found That Appellants Are Prevented From Raising the Statute of Frauds 16

E. Clardy v. Bodolosky, 383 S.C. 418, 679 S.E.2d 527 (Ct. App. 2009), is Instructive as to the Equities Involved 20

II. The Lower Court Correctly Determined It was Proper to Set Aside the Deed from Appellant Gwen G. Bishop to Appellant Cassandra Robinson 24

III. The Lower Court Correctly Found that Respondent Was Entitled to Protection Against Any Claims of Appellant Cassandra Robinson to the Property Which is the Subject of This Action 26

IV. The Lower Court Correctly Awarded Respondent His Attorneys' Fees and Costs 30

CONCLUSION 31

STATEMENT OF ISSUES ON APPEAL

I. Did the lower court properly determine that the Respondent was entitled to specific performance of the contract between he and Appellant Gwen G. Bishop?

II. Did the lower court correctly find that the deed from Appellant Gwen G. Bishop to Appellant Cassandra Robinson should be set aside in these circumstances?

III. Was the lower court correct in concluding that it was Respondent who was entitled to protection as a bona fide purchaser without notice?

STATEMENT OF THE CASE

Respondent, Robert G. Shirey, filed the complaint on August 20, 2015. The complaint named Appellant Gwen G. Bishop ("Bishop") as the lone defendant. In the complaint, Respondent sought the specific performance of a land purchase agreement between Respondent and Bishop dated May 20, 2015 ("subject contract") wherein Bishop agreed to sell and Respondent agreed to buy a 2.22 acre parcel of real estate in Newberry County known as 242 Power Station Road ("subject property")[1]. (R., pp. 20-33). The complaint alleged that Respondent fully performed under the subject contract and that Bishop had failed and refused to perform her obligations without legal excuse. (R., pp. 20-33). Bishop filed her answer on September 16, 2015. (R., pp. 34-38).

Respondent later learned that Bishop conveyed the subject property to Appellant Cassandra Robinson ("Robinson"). Therefore, on October 8, 2015, Respondent filed a motion to amend the complaint to add Defendant TD Bank, N.A. and Robinson as parties defendant due to their claims of interest in the property. Following a hearing on the motion, the Honorable Frank Addy, Jr., granted Respondent's motion by order dated February 10, 2016. Respondent filed the amended complaint on February 16, 2016. (R., pp. 39-43). The amended complaint alleged that Bishop conveyed the subject property to Robinson in breach of their contract. (R., pp. 39, ¶, 11). No relief was sought against TD Bank, N.A. It was added as a party merely because of the mortgage against the subject property given it by Bishop more than a decade prior to this dispute. Defendant T.D. Bank, N.A. filed its answer on April 7, 2016 praying the court protect its mortgage affecting the subject property. (R., pp. 44-49). Both Bishop and Robinson answers to the amended complaint

[1] The complaint also contained an alternative cause of action for breach of contract.

filed on April 25, 2016 amounted to a general denial. (R., pp. 50-53; R., pp. 54-57). Neither answer of Bishop or Robinson contained any factual allegations or affirmative defenses whatsoever.

Discovery was conducted, including the taking of depositions of both Bishop and Robinson. Respondent's deposition was not taken. Documentary discovery was requested from TD Bank, N.A., including a payoff quote (or balance) and payment history relating to its mortgage. As a result of a failure to obtain a consent protective order relating to Bishop's financial information, these documents were not forthcoming and were provided only several weeks before trial after the depositions of Bishop and Robinson. (See R., pp. 1).

The matter was referred to Samuel M. Price, Jr., as Special Referee, for final adjudication by order of the Honorable Michael G. Nettles dated February 23, 2017. The case was thereafter tried before the Special Referee on March 22, 2017. The Special Referee entered his order on May 18, 2017, in favor of Respondent setting aside the conveyance to Robinson, requiring Bishop to specifically perform her contract with Respondent, and awarding Respondent, as the prevailing party, his attorney's fees and costs as provided in the subject contract. (R., pp. 13-14).

All parties, with exception of Defendant T.D. Bank, filed motions for reconsideration, and all such motions were denied by order of the Special Referee dated July 28, 2017. (R., pp. 16-19). Bishop and Robinson served their notice of appeal on August 8, 2017.

STATEMENT OF FACTS

The case concerns a contract of sale of certain real estate in Newberry County. Plaintiff and Defendant Bishop entered into a Land Purchase Contract on May 20, 2015

(the "subject contract"). The subject contract provides that Defendant Bishop sell the real property described in the complaint free and clear of all liens and similar encumbrances in exchange for $125,000 paid by the Plaintiff. The property is a 2.22-acre commercial tract bounded almost entirely by other lands of Plaintiff (the "subject property"). (R., pp. 119, ln. 22-121, ln. 8; R., p. 278).

The subject property sits at the very back of an industrial park in a corner far removed from Highway 121. (R., p. 278). It is bounded on the northeast by a service road (Power Station Road) and on the northwest by a Duke Power facility. (R., pp. 121, ln. 3-11). It is otherwise bounded by lands belonging to Respondent. (R., pp. 119, ln. 22-121, ln. 8; R. 278). Thinking that Respondent would naturally be interested in purchasing it given its location, Bishop approached Respondent sometime in either the last quarter of 2014 or the first quarter of 2015. (R., p. 121, ln. 15-p. 122, ln. 3). Bishop had previously asked a friend of Respondent for Respondent's phone number. (R., p. 122, ln. 8-22). Bishop operated a burial vault and excavation business at the subject property. (R., p. 122, ln. 23-p. 123, ln. 6). When they first spoke of the matter, she indicated that her business was overwhelming her and she wanted to get out. (R., p. 122, ln. 4-11; p. 123, ln. 13-22). Respondent and Bishop spoke about the sale of the property on several occasions over the span of three or four months. (R., p. 125, ln. 2-5). Initially, Respondent encouraged Bishop to stay in business, that things would get better, and she should think of the employees depending on her. (R., p. 124, ln. 1-22). However, Bishop insisted, and the parties ultimately entered into the subject contract on May 20, 2015 (R., pp. 126, ln. 14-p.127, ln. 20; 279-285).

The agreement provided that the purchase price to be paid by Respondent was $125,000. Under the subject contract, Respondent's sole obligation was to pay the

purchase price. Appellant Bishop acknowledged this in her trial testimony. (R., p. 210, ln. 17-24; 62 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p.13, ln. 7-17]). The subject contract provided that the closing was to occur between August 3, 2015 and August 12, 2015. (R., p. 280). The agreement further provided that time was of the essence. (R., p. 282). Despite the argument set forth in her brief, Bishop admitted at trial that Respondent fulfilled his singular obligation by paying the purchase price on August 12, 2015. (R, p. 210, ln. 25-p. 211, ln. 3).

As to her obligations under the subject contract, Bishop acknowledged at trial that she was required to deliver a deed conveying the subject property to Respondent free and clear of any liens such as the TD Bank mortgage. (R., p. 64 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p.21, ln. 24-p. 23, ln. 8]; 199, ln. 13-18). She never presented a deed for delivery to Respondent. (R., p. 214, ln. 14-16). Equally problematic, Bishop further admitted she understood that to fulfill her obligations in this case would require her to provide a payoff quote relative to the mortgage. (R., p. 64 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 23, ln. 14-p.24, ln. 10]). She further understood that, in the absence of a payoff quote, Respondent would not know whether the purchase price he paid would be enough to satisfy the TD Bank mortgage, and, therefore, would have no way of knowing whether any deed Bishop were to deliver would be clear of that lien. (R., p. 201, ln. 6-11). She was asked to provide a payoff quote. (R., p. 128, ln. 21-p. 129, ln. 5). As the lower court found, she requested and received a payoff quote by at least August 12, 2015[2]. Yet, Bishop never provided a payoff quote to Respondent or

[2] As explained below, the payoff information was recited in the deed that Robinson drafted on August 12, 2015.

anyone else. (R., pp. 198, ln. 14-15, 201, ln. 12-13)[3]. It was, therefore, Bishop's failure to provide a payoff quote that prevented the closing of the subject contract on or before August 12, 2015.

Respondent was clear: Bishop needed an extension to the subject contract beyond August 12, 2015. (R., pp.130, ln. 25-131, ln. 7; 152, ln. 6-9; 156, ln. 20-25). She did not appear for closing on August 12, 2015. (R., pp. 132, ln. 10-19; 149, ln. 11-16). She had provided no payoff quote, presented no deed, and otherwise failed to perform in any meaningful way.[4] Nevertheless, Bishop acknowledged that she could have closed with Respondent on August 12, 2015, had she chosen to (and provided a payoff quote). (R., p. 62 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 13, ln. 18-p. 15, ln. 14]).

When it was clear that she was not gong to provide the necessary documents by August 12, 2015, she was asked to appear on August 13, 2015[5]. (R., p. 193, ln. 6-20). She acknowledged her responsibilities and agreed to appear for closing on August 13, 2015.

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[3] Bishop also never gave any authority to anyone else to obtain a payoff quote for her. (R., p. 214, ln. 20-23).

[4] The subject contract required Bishop to clean the property of all personal property as a condition of closing. (R., p. 280). Respondent observed Bishop cleaning the property prior the time provided for closing, which caused him to believe that she was performing as required in preparation for closing, and Respondent was never told anything to the contrary. (R., pp. 135, ln. 1-p. 137, ln. 9).

[5] Bishop attempts to deflect blame for this circumstance both at trial and in her brief by indicating that Respondent's attorney's office asked her to appear for closing on August 13, 2015; however, she was very clear in her testimony that she did not fulfill her obligations by August 12, 2015 as required by the subject contract. As argued herein, she actually prevented the closing. Therefore, of course, where Respondent still desired to purchase the subject property, Bishop would have been asked to appear for closing the following day; however, one cannot fail to perform under a contract (or in doing so further prevent the closing of it) and then thereafter claim to be relieved of it. As set forth herein, the law of contracts simply does not work that way.

(R., pp., 61 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 9, ln. 20-p. 12, ln. 16];193, ln. 12-20; 210, ln. 1-16). Bishop testified that Respondent had every right to rely on her agreement to perform and close on August 13, 2015. (R., p. 61 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 12, ln. 13-16]). However, instead of living up to her word and her obligations under the subject contract by appearing at the appointed time for closing, Bishop sent a doctor's excuse saying her absence was "medically advised". (R., 288).

On August 13, 2015, at the very time she was, according to the doctor's note, so ill as to be unable to attend the closing of the subject contract, she was conveniently able to manage going before a notary to sign a deed conveying the subject property to her niece, Robinson. (R., pp. 171, ln. 6-10; 288). She was also asked to sign a separate document which Robinson claims is a new contract for the purchase of the subject property ("2015 Contract"). (R., pp. 295-296). Robinson drafted the documents. (R., pp. 224, ln. 6-15; 247, ln. 20-22; 252, ln. 17-p. 253, ln. 8). However, Bishop testified that she remained so distraught at the time she was asked to sign these documents that she did not even understand what she was signing. (R., 71 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 49, ln. 15-p. 52, ln. 20]).

While Robinson maintains that she had her own contract to purchase the subject property, that agreement is irrelevant to the instant appeal. This alleged agreement provides that Robinson was to assume and pay the outstanding mortgage payments of $2,080.77 per month beginning in March of 2012 (the "2012 contract"). TD Bank never knew about or consented to any assumption of the mortgage. (R., p. 98 [Rule 32, SCRCP, Deposition of Cassandra Robinson Designated, p. 84, ln. 9-22]). The 2012 contract was an executory contract, meaning that it was only if she were to payoff the mortgage as agreed that she

would be entitled to a deed. (R., pp. 297-298). Importantly, the purported agreement was never recorded, (R., p. 258, ln. 7-9), and states that if Robinson were to fail to make the payments as agreed, "[Bishop] has the right to declare [Robinson] in default." (R., p. 297).

The payment records of TD Bank were submitted in evidence. (R., pp. 299-335)[6]. These records clearly show that she was serially late in making what payments she claims to have made and never made a payment towards the mortgage after August of 2013. (R., pp. 177, ln. 4- p. 179, ln. 24; 182, ln. 22-183, ln. 25; 232, ln. 13-p. 239, ln. 17). The alleged 2012 contract required Robinson to make mortgage payments "on the due date". (R., p. 297). She failed to do so and stopped making payments altogether for the two years prior to Bishop entering the subject contract with Respondent. She was plainly, therefore, in default of the purported 2012 Contract. In fact, no payment at all was made on the mortgage for eight or nine months. (R., pp., 182, ln. 22-p. 183, ln. 25; 299-302). It is, therefore, no wonder that Bishop entered into the Contract with Plaintiff. What is more, Robinson knew she was in default which explains her drafting the 2015 Contract. (R., pp. 242, ln. 13-p. 243; 252, ln. 17-p. 253, ln. 8).

It is undisputed that Plaintiff had no notice, actual or constructive, of any alleged contract between the defendants. (R, pp. 143, ln. 17-21; 258, ln. 1-3)[7]. On the other hand, Robinson admitted that she had actual knowledge of Respondent's contract with Bishop on August 12, 2015. (R., pp. 91-92 [Rule 32, SCRCP, Deposition of Cassandra Robinson

[6] These records were submitted into evidence by stipulation as referenced by Respondent's counsel on page 63 of the transcript and as recited on page 3, paragraph 6 of the May 18 Order.

[7] In fact, the subject contract contains a representation and warranty by Bishop that her execution and closing thereof will not result in a breach of another contract concerning the subject property. (R., p. 281).

Designated, p. 56, ln. 18-p. 57, ln. 6; p. 87, ln. 4 -p. 88, ln. 7]; 242, ln. 13-p. 243, ln. 12; 275, ln. 25-p. 277, ln. 6)[8]. She and Bishop discussed the closing of Bishop's contract with Respondent. (R., p. 92 [Rule 32, SCRCP, Deposition of Cassandra Robinson Designated, p. 57, ln. 7-p. 58, ln. 7]). With that knowledge, she drafted the 2015 Contract and the deed and convinced Bishop to forget about her obligations under the subject contract and convey the property to her rather than Respondent. (R., p. 101-102 [Rule 32, SCRCP, Deposition of Cassandra Robinson Designated, p. 96, ln. 13-p. 97, ln. 6]; 224, ln. 6-15; 242, ln. 13-p. 243, ln. 12; 252, ln. 17-p.253, ln. 8). That Robinson understood the inequitable nature of her conduct in this regard is plain for the Court to see. She included a paragraph in the 2015 Contract which states, "[t]he Seller [Bishop] also agrees to indemnify the Buyer [Robinson] of any and all issues and of ***illegality or fraud concerning this transaction***." (emphasis added). (R., p. 297).

STANDARD OF REVIEW

An action for specific performance lies in equity. Clardy v. Bodolosky, 383 S.C. 418, 679 S.E.2d 527 (Ct. App. 2009). On review of a proceeding in equity, the Court of Appeals has authority to find facts based on its own view of the preponderance of the evidence; however, this broad scope of review does not require the Court to dispense with the findings of the trial court particularly where the trial court was in a better position to evaluate the credibility of the witnesses. Id.; Wright v. Trask, 329 S.C. 170, 495 S.E.2d

[8] In addition to her testimony, her attorney stipulated that she started drafting the 2015 Contract on August 12, 2015 on the record just before the trial was adjourned, (R., p. 275, ln. 25-p. 277, ln. 6). Given that she testified both at trial and in the designated portions of her deposition that she began drafting these documents after she learned of Bishop's contract with Respondent, it is plain that she had actual knowledge of the contract on August 12, 2015.

222 (Ct. App. 1997). Moreover, the decision to grant or refuse specific performance of a contract to sell real estate is within the sound discretion of the trial judge. *e.g.*, Amick v. Hagler, 286 S.C. 481, 334 S.E.2d 525 (Ct. App. 1985). The decision must not be arbitrary or capricious and must be exercised according to the rules and practices of equity as applied to the facts and circumstances of the particular case. Id. It is well settled that the courts of South Carolina will enforce a contract to sell land that is fair and was entered into openly and aboveboard. Id.

ARGUMENT

The primary distinction that the lower court understood and that has been lost on the Appellants is that the subject contract is one for the sale of land. These contracts are considered under different principles than contracts dealing with personalty. For example, the fact that a party may have an adequate remedy at law is no ground to deny the specific performance of a written contract for the sale of land. Belin v. Stikeleather, 232 S.C. 116, 101 S.E.2d 185 (1957). In short, the Court's analysis of a request for specific performance relating to real estate is markedly different than that suggested by Appellants.

I. The Lower Court Correctly Found That Respondent Is Entitled to Specific Performance.

The Special Referee granted Respondent specific enforcement of the subject contract. This decree is proper in light of the facts and circumstances of this case and should be affirmed.

In Clardy, *supra*, this Court outlined what is necessary to grant specific performance:

> "In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had 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." Clardy, at 531, *citing* Ingram v. Kasey's Assocs., 340 S.C. 98, 531 S.E.2d 287 (2000).

The presence of each of these elements is found in the record of this case. Here, it is undisputed that the subject contract was entered into openly and aboveboard[9]. Neither Appellant plead, argued or even intimated any defect, inequities, or other unfairness in the formation of the subject contract in the lower court. It was Bishop that pursued the agreement with Respondent for "three or four months". (R., p. 125, ln. 2-23). Ultimately, Respondent and Bishop came to terms and entered into the subject contract. (R., p. 279-285). Respondent has performed under it. Bishop has not.

A. The Lower Court Correctly Found That Respondent Fully Performed or is Otherwise Ready, Willing and Able to Perform Under the Contract Between He and Appellant Gwen G. Bishop.

After tendering the earnest money deposit when signing the agreement, the subject contract places but one obligation upon Respondent: pay the purchase price. (R., pp. R., p. 210, ln. 17-24; 62 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p.13, ln. 7-17]; 279-285). Under the agreement, Respondent was required to deposit the earnest money with his attorneys, Pope & Hudgens, P.A., in the amount of $1,000. (R., p. 279). Respondent complied with this requirement on May 20, 2015, the day he signed the

[9] Appellants, in their brief, have made references to items designated to be in the record on appeal that are not properly before the is Court. For example, Appellants cite an affidavit of Bishop which was was a part of a pre-trial pleading, along with portions of her deposition, both for the proposition that Bishop was not represented at the time of the contract and that Respondent's attorney told her to "go ahead and sign the contract". (Appellant's Brief, p.5). Never mind that the proposition is irrelevant, neither the affidavit or the portions of her deposition should be considered by this Court on appeal. These items were not presented or argued below and are not properly before this Court. Rule 210(c), SCACR.

agreement. (R., p. 129, ln. 10-p. 130, ln. 1; 286). There is no dispute about Respondent's performance in this respect.

Clardy, *supra*, was an action for specific performance of a contract to sell real estate. There, the purchaser, Clardy, entered a contract to purchase property comprised of two motels from the Seller, Bodolosky. Clardy tendered the required earnest money deposit by check payable to the trust account of the attorney for the Bodolosky as instructed. The trial court determined that Clardy, by doing so, had performed all of Clardy's pre-closing obligations, and was, therefore, entitled to specific performance. This Court affirmed and found that Clardy had performed under the contract with Bodolosky's consent and remained ready, willing and able to buy the motels.

Here, Respondent paid the earnest money deposit in the precise manner set forth in the subject contract, which is, by definition, performing with Bishop's consent. Moreover, Respondent went one step further than Clardy. He paid the balance of the purchase price on August 12, 2015, the appointed time for closing pursuant to the contract. (R., pp. 129, ln.10-p. 130, ln. 9; 286). Bishop admits that Respondent's only obligation was to pay the purchase price and that Respondent did so on August 12, 2015. (R., pp. 62 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p.13, ln. 7-17]; p. 210, ln. 17-24). Respondent further remains ready, willing and able to carry out any further actions, whatever they may be, to carry out the subject contract and acquire the property (R., p. 148, ln. 15-22)[10]. Accordingly, the lower court was correct to find that Respondent has fully performed under the contract.

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[10] Appellants argue in their brief that Respondent did not specifically allege in his complaint that he was capable of performing under the subject contract at the time of filing. Irrespective of the fact that this argument was not raised to or ruled upon by the Special

Despite Bishop's own testimony, Appellants have argued in their brief that Respondent had additional obligations to produce proof of title insurance and "likely to prepare the deed". This is patently false. First and foremost, these are arguments were not presented to or ruled upon by the lower court. Therefore, these arguments have not been preserved and are not properly before this Court. Malloy v. Thompson, 409 S.C. 557, 762 S.E.2d 690 (2014).

Even if these arguments were preserved on appeal, they would fail. The provision of the subject contract that speaks of title insurance is a contingency or condition precedent to Respondent's obligation to close which can be waived by Respondent (though it has not). (R., p. 279-280). The title insurance provision does not amount to an obligation of Respondent. Instead, it is describing the nature of the title insurance required to satisfy the contingency. Furthermore, nowhere in the subject contract does it provide that Respondent is required to prepare a deed. On the contrary, paragraph 8 of the subject contract provides, "[a]t Closing, Seller shall convey good and marketable fee simple title to the property pursuant to a recordable General Warranty Deed." (R., p. 280). Therefore, the deed is clearly Bishop's responsibility. As a result, even if these arguments were preserved, they are without merit.

Accordingly, the lower court appropriately found that Respondent fulfilled his lone obligation under the subject contract on August 12, 2015.

B. The Lower Court Correctly Found That Appellant Gwen G. Bishop Failed to Perform Under the Contract.

Referee, it is axiomatic that if Respondent paid the balance of the purchase price on August 12, 2015, which is admitted by Bishop, he was necessarily capable of performing at the time of filing (and remains so at present).

The Special Referee found that Bishop failed to perform her obligations under the subject contract. Based on Bishop's own admissions contained in the record, this finding is correct. In fact, there is no other conclusion to draw.

The subject contract requires Bishop to convey good and marketable fee simple title to the subject property. (R., pp. 279-280). Bishop admits she has not tendered a deed to Respondent whether on August 12, 2015 or otherwise[11]. (R., p. 214, ln. 14-16). What is more problematic, is the issue of the TD Bank mortgage. Bishop acknowledged that it is a lien against the subject property. (R., p. 198, ln. 7-11). The "good and marketable title" required to be conveyed is defined in the agreement to mean "fee simple title that is free and clear of all liens..." (R., p. 280). Bishop acknowledges this obligation meant she had satisfy the TD Bank mortgage. (R., p. 199, ln. 13-18). She further admits this provision of contract imposes an obligation upon her to provide a payoff quote from TD Bank disclosing the amount necessary to satisfy the lien. (R., p. 64 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 21, ln. 24-p. 24, ln. 10]). She also concedes that, in the absence of a payoff quote, Respondent (and, by extension, his attorneys) would have no idea whether the purchase price would be sufficient to do so. (R., pp. 200, ln. 9-p. 201, ln. 13). A payoff was requested of Bishop, (R, p. 128, ln. 21-p. 129, ln. 5), and she apparently obtained one. As found by the Special Referee, the amount of the payoff was clearly known

[11] Appellants argue in their brief that her failure to present a deed is somehow excused because Respondent never presented Bishop with one to sign. However, the subject contract does not place an obligation on Respondent to provide a deed for Bishop. Instead, the obligation is Bishop's to convey "pursuant to a recordable General Warranty Deed". (R., p.280). It is, therefore, Bishop's obligation, as the Seller, to present a "recordable" deed just as it is in every real estate closing. It is for this reason the subject contract provides that Bishop is responsible for the costs associated with the preparation of the deed and the "state transfer tax". (R., p. 280).

to her on August 13, 2015 as this information is shown on the face of the deed to Robinson. (R., p. 289). Nevertheless, she never provided anyone with a payoff quote, (R., pp. 64 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 23, ln. 14-p. 24, ln. 7]; 198, ln. 14-15; 201; ln. 12-13), nor did she ever give anyone else the authority to obtain one on her behalf[12]. (R., p. 214, ln. 20-23). Therefore, Bishop clearly failed to perform.

C. The Lower Court Correctly Found That Appellant Gwen G. Bishop's Own Failure to Perform as Required Under the Contract Renders Her Defense as Argued Below and on Appeal Unavailable.

Appellants argue in their brief that Respondent is not entitled to specific performance based on the proposition that the subject contract provides that the closing occur no later than August 12, 2015, and, because the agreement provides that time is of the essence, where the closing did not occur on August 12, 2015, Bishop had no obligation to sell to Respondent beyond that date. This argument is without merit.

First, Respondent paid the balance of the purchase price on August 12, 2015, and otherwise stands ready to perform any other actions necessary to consummate the transaction. So, that the closing did not occur on August 12, 2015, is not the result of of any failure to perform on the part of Respondent; rather, it is Bishop's failure to provide a payoff quote from TD Bank that prevented the closing. Paragraph 5 of the subject contract provides, "[Respondent's] obligation to close on the purchase of the Property is contingent on the following: ...[Bishop] shall be ready, willing, and able to deliver good and marketable title..." free and clear of all liens. In other words, given the presence of TD Bank's mortgage, Bishop must be prepared to satisfy the debt thereby secured. She was

[12] Federal law prohibits the disclosure by any financial institution of consumer financial information without the consent of the consumer.

not. Consequently, the condition to Respondent's obligation to close was never discharged. Again, Bishop admits that in the absence of a payoff quote Respondent would have no way of knowing whether the purchase price is sufficient to cover the debt or whether, instead, Bishop would also have to contribute funds to the closing[13]. The failure to provide a payoff quote prevented the satisfaction of contingencies contained in paragraph 5. As both a practical and legal matter, it prevents the closing from ever occurring.

The record contains no evidence that Respondent waived the contingencies provided in paragraph 5 of the subject contract. As a result, because Bishop never provided a payoff, Respondent had no duty to close on August 12, 2015 or anytime since. One who prevents a condition of a contract cannot rely on the other party's resulting non-performance in an action on the contract. *e.g*, Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984). Therefore, any defense based on alleged nonperformance by Respondent is unavailable to Appellants.

The Special Referee was, consequently, correct in finding that Bishop could not avoid the subject contract because of her own nonperformance.

D. The Lower Court Correctly Found That Appellants Are Prevented From Raising the Statute of Frauds.

Bishop admits throughout the record that when she was asked to appear for closing on August 13, 2015, she agreed to do so. (R., pp. 61 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 9, ln. 20-p. 12, ln. 16]; 193, ln. 6-20; 210, ln. 1-16). Appellants argue in their brief that her agreement in this respect is unenforceable. The lower court

[13] TD Bank provided a payoff quote as required by the Special Referee's May 18, 2017 order, which showed a balance, as of June 1, 2017, of $96,999.63. Again, the purchase price was $125,000.

held that her agreement was binding to the extent that it was relevant to the question at all given her nonperformance. This Court should affirm.

Appellants' primary argument is based upon the Statute of Frauds.[14] Such a defense is not available in this case. First and foremost, it must be noted that neither Appellant plead the Statute of Frauds in their answers. The Statute of Frauds is an affirmative defense that must be plead in a responsive pleading in order to be available as a defense. Rule 8(c), SCRCP; Parker v. Shecut, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), *overruled on other grounds by* Parker v. Shecut, 349 S.C. 226, 562 S.E.2d 620 (2002); American Wholesale Corp. v. Mauldin, 128 S.C. 241, 122 S.E. 576 (1924). Appellant's failure to plead the statute constitutes a waiver of it.

Even if Appellants had properly raised the defense, it would have been without merit. Bishop admits that she agreed to appear for closing on August 13, 2015. (R., pp. 61 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 9, ln. 20-p. 12, ln. 16]; 193, ln. 6-20; 210, ln. 1-16). Bishop further testified that Respondent had every right to rely on her agreement. (R., p. 61 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 12, ln. 13-16]).

In Florence Printing Co. v. Parnell, 178 S.C. 119, 182 S.E. 313 (1935), our Supreme Court held that a party to a written agreement who orally agrees to extend the time for performance of a written contract within the Statute of Frauds will be estopped to claim the benefit of statute where the other party, acting in reliance on the extension, fails to

[14] The Appellants erroneously argue in passing that the subject contract could not be orally modified because the contract itself prohibits oral modifications. *c.f., e.g.*, ESA Servs., LLC v. SCDOR, 392 S.C. 11, 707 S.E.2d 431 (Ct. App. 2011) (parties to a written contract may orally modify the agreement even if the agreement itself prohibits such modifications).

exercise any rights provided in the contract. There, two parties entered an agreement concerning the sale and purchase of stock in a certain corporation. The contract was held to be within the Statute of Frauds. The contract provided a limit on the time in which the buyer may exercise his rights. However, the seller verbally extended the time in which the buyer may purchase the stock. The buyer, therefore, allowed the time limit provided in the written contract to pass. The Supreme Court held that the seller was estopped from claiming the protection of the statute noting that it was not a matter of the technicalities of the statute, but rather a question of waiver and estoppel, stating,

> "*Equity will not allow the statute of frauds to be used as an instrument of fraud*, and where a party to a contract within the statute induces the other to waive some provision thereof upon which he is entitled to insist and to change his position to his disadvantage with respect thereto, the party so acting will be estopped to claim the benefit of the statute. This principle of law is peculiarly applicable to oral extensions for performance of written contracts, where one party has acted upon the extension and failed to exercise rights as provided by the written contract." (emphasis added). Id. at 316.

Just as in Parnell, Bishop, the seller, admits she orally agreed to extend the time limits provided in the subject contract to August 13, 2015 and that Respondent, the buyer, had every right to rely on her agreement. It is important to note in the analysis of this question that Bishop admits that had she insisted on closing on August 12, 2015, she would have been able to (assuming she would have provided a payoff quote) because Respondent timely paid the purchase price. Had Respondent known that she would later claim that he failed to timely perform he could have acted in some further way to protect himself. For the very reasons articulated by the Parnell court, equity cannot allow Bishop to now use the protection of the statute to perpetrate fraud upon Respondent. Accordingly, even if the Appellants had properly plead the Statute of Frauds, they are estopped from raising the statute as a defense.

In their brief, Appellants seem to assert that Bishop is not estopped because they claim there is not "competent proof of the existence of the oral" extension. While it is true that Bishop briefly attempted to qualify her admission that she agreed to appear to close on August 13, 2015, by challenging the definition of "okay", she ultimately unequivocally admitted her agreement. (R., pp. 193, ln. 6-20; 210, ln. 1-16). She was much more forthright in the designated portions of her deposition. (R., p. 61 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 9, ln. 20-p. 12, ln. 16]). What more competent proof than Bishop's own admissions the Appellants would suggest is required is unknown.

In any event, it would be a seemingly difficult task to deny her agreement to close on August 13, 2015. After all, Bishop went so far as to have her doctor send a "doctor's excuse" advising that her absence from the closing was "medically advised". (R., p. 287). It should go without saying that there would be no need to send a "doctor's note" to excuse your absence from an event you did not commit to attending. Moreover, Bishop also admitted she told her doctor on the morning of August 13, 2015 that she was "supposed to be at a closing". (R., pp. 61 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 9, ln. 20-p.11, ln.2]; 196, ln. 5-8). It would seem there is not any better evidence of Bishop's agreement to appear to close the subject contract on August 13, 2015, than her own testimony. And, to the extent her passing attempts to quibble about the meaning of the term "okay" could possibly be construed to create a question of fact, that question was resolved by the Special Referee who saw her testify and weighed her credibility.

Appellants further argue that Bishop cannot be estopped from raising the Statute of Frauds because, they claim, "it is not sufficient to show merely that [Respondent] has lost an expected benefit under the contract." In making this assertion, Appellants cite the case

of Springbob v. University of South Carolina, 407 S.C. 490, 757 S.E.2d 384 (2014). The principals set forth in Parnell define the matters required to be shown in so far as the Statute of Fraud relates to oral extensions of a contract. On the other hand, Springbob has no application to the instant matter and does not stand for the proposition for which it is cited in Appellant's brief. There, the question was whether USC was bound by alleged oral representations that purchasers of special seating would be required to continue to pay additional fees for these seats beyond the initial five years following the purchase. In that case, the Supreme Court reversed the trial court's grant of summary judgment to USC on the issue of equitable estoppel finding that the appellants presented sufficient evidence to show an issue of material fact as to whether they suffered substantial and detrimental change of position in reliance on the alleged oral representations.

The question in Springbob (which was not ultimately decided) was not whether the purchasers got to keep the special seating altogether; rather, it was whether there was to be an additional fee. Here, assuming the question of the oral extension is even relevant given Bishop's nonperformance, if Bishop is not estopped in these circumstances from raising the statute as a defense, then Respondent is not in danger of losing a mere benefit under the subject contract, but is, instead, in danger of losing the entire contract itself. It is that injury that the very principals of equity outlined in Parnell seek to protect.

The lower court, therefore, was correct to determine that Appellants cannot raise the defense of the Statute of Frauds.

E. Clardy v. Bodolosky, 383 S.C. 418, 679 S.E.2d 527 (Ct. App. 2009), is Instructive as to the Equities Involved.

Clardy, *supra*, involves an action for specific performance brought by the purchaser (Clardy) of a contract to purchase two motels in Myrtle Beach. The behavior on the part

of the seller (Bolodosky) in that case is instructive in this matter. After the parties had a binding contract, Bolodosky transferred title to the motels to an LLC he formed for the express purpose of purchasing and developing the motels to the exclusion of Clardy. Only two weeks after entering the contract, Bolodosky sent Clardy a letter claiming that no contract was in effect between the parties and he instructed his attorney to return the earnest money. He, thereafter, abandoned his plans to develop the property and instead sold the property to a third party.

Clardy filed suit seeking specific performance and sought an award of attorneys fees and costs as provided in the contract. Bolodosky sought to avoid enforcement of the contract by claiming that Clardy was required to pay the earnest money directly to him as opposed to Bolodosky's attorney. The trial court found that Clardy's delivery of the earnest money to the attorney was all Clardy was required to do prior to closing. The court accordingly ordered specific performance and entered an award against Bolodosky for Clardy's attorney's fees and costs.

On appeal, this Court affirmed on both counts. The Court found that if paying the earnest money directly to Bolodosky was material to him, he should have made that known to Clardy. The Court stated that contracts and the performance thereof are not based on the secret purposes or intention of one the parties. Clardy, at 531, *citing*, Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989).

In Clardy, this Court found that specific performance was equitable between the parties. The same is true in this case. Respondent did not seek out Bishop for the purchase of the land. Rather, Bishop pursued Respondent for 3 or 4 months. From the very instant Bishop approached Respondent, she knew Robinson claimed some interest in the subject property; yet, she never disclosed this to him. Respondent paid the earnest money deposit

precisely as the subject contract provided. Bishop even began to clean the property and dispose of debris, which was a condition of closing. This only cemented for Respondent that the contract was progressing towards closing.

However, Bishop became non-responsive. She was asked for a payoff quote for the TD Bank mortgage and never provided one. August 12, 2015, the date required for closing, came and went without a payoff quote to allow for the closing to proceed. Bishop then agreed to close the following day, and, once more, failed to appear. Instead, she had her doctor send a "doctor's note" excusing her absence, which only led Respondent to believe that nothing was wrong and the closing would take place when she felt better. (R., p. 134).

The truth was something different altogether. Bishop, rather than convalescing as allegedly advised by her physician, secreted away to sell the property to her niece, who, with full knowledge of Respondent's contract, hurried to draft documents meant to dispense with any of his claims to the property. There is nothing equitable about these facts.

If specific performance was equitable under the facts of Clardy, it is certainly equitable under the facts of this case. In both cases, the seller attempted to rescind the contract without excuse and attempted to sell the properties to third parties. The facts here argue even more compellingly for enforcement of the contract. In Clardy, there was no indication that the third party knew anything of Clardy's contract. Nevertheless, specific performance was ordered. Here, Bishop and Robinson conspired with the specific intent of defeating Respondent's contract. (R., pp. 101-102 [Rule 32, SCRCP, Deposition of Cassandra Robinson Designated, p. 96, ln. 13-p. 97, ln. 6, p. 98, ln. 10 -p. 99, ln.10]). The

lower court was correct to find that specific performance is equitable among the parties and should be affirmed.

Appellants point to several items they contend mitigate or reverse the equities arising under the facts of this case. (Appellants' Brief, p. 11-12). The items mentioned should either not be a part of the record before this Court or are wholly irrelevant to this Court's consideration of this appeal. There is reference to an affidavit of Bishop. This affidavit, along with portions of Appellants' depositions (not designated by Respondent pursuant to Rule 32, SCRCP), were not presented to the trial court, and, therefore, cannot be a part of the record before this Court. Rule 210(c), SCACR. The same is true as it relates to the argument concerning the amount of the earnest money deposit. (Appellant's Brief, p. 12). This was not raised below, and was, consequently, not preserved for consideration by this Court. e.g, Malloy, *supra*. Appellants further make reference to Respondent being a "very successful business man". This is based on an extraneous statement by the Special Referee. There is no evidence of any kind to this effect appearing in the record.

The remainder of the items listed by Appellants addressing the equities involved in this case are irrelevant. Appellants indicate that Bishop was not represented until suit was brought against her. There is not the first shred of testimony or evidence in the record that would support this contention. Even if there were, Respondent certainly has no control over whether Bishop consults an attorney or not[15]. There is no indication in the record that she was prevented from seeking out representation. That she did not do so is of no import here.

[15] The subject contract plainly states in paragraph 16(i) that it was drafted by Respondent's attorneys in the course of their representation of him. (R., p. 283). So, it was made clear that she would need to consult her own attorney.

Appellants also reference evidence relating to Bishop's health conditions. Until now, Appellants have not indicated within this proceeding that Bishop's health has any bearing on any question involved in this case. Moreover, the reference to Bishop's hospitalization makes the relevancy (or the lack thereof) of this point all the more clear. Bishop testified that the hospitalization, to the extent it did occur, was in 2014, a year before she and Respondent entered the subject contract. (R., p. 169, ln. 17-24).

Appellants contention that Respondent was aware of Bishop's problems related to her business is likewise of no consequence[16]. Respondent testified that Bishop told him the reason she wanted to sell the property, nothing more, nothing less. (R., p. 123, ln. 13-25). In fact, Bishop disputes that she told Respondent about any of her alleged problems. (R., p. 175, ln. 2-10). Therefore, what bearing this has on the questions before this Court is not readily clear.

Finally, according to their brief, Appellants contend there is some significance in whether a document is signed before witnesses or not. No party to this proceeding has denied signing any document involved in this case. Therefore, the relevancy of this contention is likewise unknown.

The lower court appropriately found that specific performance was equitable between the parties. This Court should affirm.

II. The Lower Court Correctly Determined It was Proper to Set Aside the Deed from Appellant Gwen G. Bishop to Appellant Cassandra Robinson.

[16] Again, to support this suggestion, Appellants cite to portions of Bishop's Deposition which was not designated for use at trial and therefore is not properly before this Court.

The Special Referee correctly set aside the deed from Bishop to Robinson dated August 13, 2017, and ordered specific performance of the subject contract. The analysis of the lower court on this question is incorporated herein and should be affirmed.

The lower court's decision to set the deed aside should further be affirmed pursuant to Rule 220(c), SCACR. It appears to be settled law that where a purchaser is entitled to specific performance of a contract to sell land and the seller has conveyed the land to a third party with notice of the purchaser's claim, it is proper to set the conveyance to the third party aside. See, *e.g.*, Mims v. Chandler, 21 S.C. 480, 1884 WL 4601 (1884) (holding that a deed to a third party having full knowledge of a contract between parties for the sale of land who purchases from the seller in consideration of a past due debt owed to him by seller must be set aside as fraudulent and void); Cape Fear Lumber Co. v. Evans, 69 S.C. 93, 48 S.E. 108 (1904) (knowledge by a third party of the contract between parties to a contract concerning the purchase of real estate demands that a conveyance of the property to the third party in contravention of the contract must be set aside). This is true even if the grantee may have paid valuable consideration. Mims, *supra*; Evans, *supra*; Coe-Mortimer Co. v. Briggs, 105 S.C. 86, 89 S.E. 553 (1916).

In both Mims and Evans, the courts specifically enforced contracts for the sale of land between a buyer and seller where the seller had already conveyed the land to a third party. In both cases, the third party had knowledge of the interest of the buyer arising from the contract prior to the conveyance. The Mims and Evans courts set the deeds aside and, in doing so, emphasized the prior knowledge of the third party as the determining factor.

As is more fully set forth above, Robinson had full knowledge of Respondent's contract on the subject property. She and Bishop discussed the subject contract, and together resolved to make the conveyance to her in an effort to defeat Respondent's interest

in the property. (R., pp. 101-102 [Rule 32, SCRCP, Deposition of Cassandra Robinson Designated, p. 96, ln. 13-p. 97, ln. 6]). That Robinson had such knowledge cannot be credibly denied. She admitted having such knowledge on August 12, 2015. (R., pp. 91-92 [Rule 32, SCRCP, Deposition of Cassandra Robinson Designated, p. 56, ln. 18-p. 57, ln. 6]; 99 [Rule 32, SCRCP, Deposition of Cassandra Robinson Designated p. 87, ln. 4 -p. 88, ln. 7]; 224, ln. 6-15; 242, ln. 13-p. 243, ln. 12; 252, ln. 17-p.253, ln. 8; p. 275, ln. 25-p. 277, ln. 6). Robinson also knew that the conveyance to her came tainted by fraud. The 2015 Contract that she drafted lays this point bare where it states, "[t]he Seller [Bishop] also agrees to indemnify the Buyer [Robinson] of any and all issues and of ***illegality or fraud concerning this transaction***." (emphasis added). (R., p. 295). For that reason, the deed from Bishop to Robinson must be set aside[17]. The lower court's ruling should be affirmed.

III. The Lower Court Correctly Found that Respondent Was Entitled to Protection Against Any Claims of Appellant Cassandra Robinson to the Property Which is the Subject of This Action.

The Special Referee found that Respondent was entitled to protection against the claims of Robinson arising from the purported 2012 Contract because he occupied the position of an innocent purchaser for value without notice. This is unquestionably true.

To claim the status of bona fide purchaser, the party must show: (1) actual payment of the purchase price of the property; (2) acquisition of legal title to the property, or the

[17] The deed 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. (R., p. 71 [Rule 32, SCRCP, Deposition of Gwen G. Bishop Designated, p. 49, ln. 15-p. 52, ln. 20]).

best right to it; and, (3) a bona fide purchase without notice of the adverse claim of title. Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008).

As recounted above, Respondent paid the purchase price on August 12, 2015, and, as an equitable matter, has the best claim to title. It is undisputed that Respondent had no knowledge, actual or constructive, of the 2012 Contract. It was not recorded, (R., p. 258, ln. 7-9), and neither Bishop nor Robinson ever told Respondent about it. (R., pp. 143, ln. 17-21; p. 258, ln. 1-3). Therefore, Respondent is entitled to protection against Robinson's claims.

Appellants argue that Respondent must plead his status as a bona fide purchaser. They are, again, mistaken. Appellants must remember Respondent is the Plaintiff. They are the defendants. It is true that status as a bona fide purchaser for value without notice is an affirmative defense, which under Rule 8(c), must be plead. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006). However, Appellant's asserted no counterclaims, affirmative defenses, or affirmative allegations whatsoever in their respective answers. As a result, Respondent had no opportunity, much less an obligation, to plead asserting his status as a bona fide purchaser. And, Robinson has asserted no claim in this proceeding.

What is more, Robinson forfeited any interest in the subject property arising under the alleged 2012 contract. That contract required Robinson to make the TD Bank mortgage payments monthly when due. (R., p. 297). 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."

Robinson admitted that she failed to make the payments as required by the 2012 Contract. (R., pp. 237, ln. 11-p. 240, ln. 10). There were spans where payments were

missed for 4 or 5 months in a row. (R., pp. 178, ln. 22-p. 179, ln. 10; 299-302). In fact, there was one period where payments were not made for 8 to 9 months. (R., p. 183; 299-302). Robinson, therefore, was in default of the 2012 Contract. This fact is further borne out by the mortgage payment records submitted into evidence, (R., pp. 299-302), which Bishop concedes show she was in default. (R., pp. 179, ln. 19-24, 185, ln. 18-p. 186, ln. 14). Robinson was serially late in making payments and failed to make a single payment since August of 2013. (R., p. 239, ln. 7-17; 299-312). Thereafter, the payment records indicate that Bishop was forced to begin making the payments. (R., pp. 312-335).

Appellants claimed in their trial testimony that at some point Bishop began making the payments again and that these payments served as "rent". (R, pp. 166, ln. 16-p.167, ln. 13; 222, ln. 12-23). Bishop explained that her business occupied the subject property from the inception of the 2012 Contract (R., pp. 181, ln. -182); however, Robinson was making the payments and was not charging her "rent" at that time. (R., pp. 181, ln. 10-25). It was only when her business improved that the "rent" payments began. (R., pp. 182, ln. 1-15). However, Bishop could not recall when Robinson's obligation to make the payments stopped and when her payments of "rent" began. (R., pp. 184, ln. 9-12). Of course, because the 2012 Contract required Robinson to pay nothing more than the amount of mortgage payments and the "rent" just so happened to be the exact amount of these payments, if their testimony is to be believed, Bishop was not receiving the consideration she allegedly bargained for at all.

Despite discussing her claim of payments towards the mortgage, Robinson failed to mention these "rent" payments in her deposition testimony. (R., p. 229, ln. 5-23). Both Appellants admit there is no writing concerning Bishop's payment of "rent". (R., pp. 188, ln. 6-8; 229, ln. 24-25). When asked why Bishop was not charged "rent" from the outset

of the 2012 Contract since she occupied the subject property throughout the relevant period, Robinson could only reply, "...initially, I did not charge her rent." (R., p. 230, ln. 1-13). If she had the right to charge Bishop "rent" from the very beginning (as they now claim) and Appellants' construction of the 2012 Contract is to be given any weight, Robinson would have paid nothing and yet still claim an interest in the property. It is for this reason, among others, that the Special Referee rightly found Appellants' testimony in this regard not credible. (R., p. 8).

The truth is that Robinson was in default of the purported 2012 Contract, and she knew it. This is why she did not know if Bishop would sign the deed when she presented it to her on August 13, 2015. (R., p. 255, ln. 13-21). After all, if there were no default of the 2012 Contract, there would have been no need for Robinson to draft the 2015 Contract. Instead, Bishop had been forced to take up the TD Bank mortgage payments that were supposed to be covered by Robinson. Having to do this was causing Bishop stress. Therefore, she sought out Respondent in the hopes that he would purchase the subject property and relieve her of this burden. It is Respondent with the best claim to title.

Appellants argue in their brief that only Bishop could declare a default under the 2012 Contract. That she did. There is no better manifestation of such a declaration than her seeking out and obtaining the subject contract with Respondent. Where a seller enters into successive contracts on the same property, each of 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 (discusses successive assignments but has application to contracts in general).

While it is too late to do it in this proceeding, Robinson may have claimed an equitable right of redemption arising from what payments she actually made under the executory 2012 Contract[18]. This equitable claim, however, 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, *supra*. Since a purchaser under an executory contract has only an equitable interest in the land, a subsequent grantee from the vendor will take free of such equity if such subsequent grantee is a bona fide purchaser for value without notice. 77 Am. Jur.2d, *Vendor Purchaser* § 353. For the reasons set forth above, Respondent is entitled to protection as a bona fide purchaser without notice. Therefore, Respondent takes the subject property free from any claims of Robinson. The lower court should be affirmed.

IV. The Lower Court Correctly Awarded Respondent His Attorneys' Fees and Costs.

The lower court entered an award of Respondent's attorneys' fees and costs. This was a proper award. The subject contract provides that the "prevailing party" is entitled to his attorneys' fees and costs. (R., p. 283). As the order of the Special Referee dated May 18, 2017 clearly indicates, Respondent was the "prevailing party". Appellants contend in their brief that Respondent should not have prevailed and, consequently, should not have

[18] Appellants ask this Court to make any enforcement of the subject contract subject to an equitable interest claimed by Robinson. Again, neither Appellant plead any affirmative allegations or counterclaims in their respective answers. Furthermore, this claim of an equitable interest was not raised nor ruled upon below. As a result, this issue is not properly before this Court. Malloy, supra.

been received the award[19]. For the reasons set forth above, this argument is without merit and the lower court should be affirmed.

CONCLUSION

The lower court's correctly determined that the subject contract should be specifically enforced and that Respondent takes title free of any claims of Robinson. Respondent fully and timely performed his singular obligation under the contract by paying the purchase price. It is, instead, Appellant Bishop's failure to provide a payoff quote relative to the TD Bank mortgage that prevented the closing of the contract.

For the reasons laid out above, specific performance is equitable among the parties in this case, and Robinson's knowledge of Respondent's interest in the property prior to the conveyance to her demands the conveyance be set aside.

Finally, the lower court's award of Respondent's attorneys' fees and costs was proper under the subject contract as he was the "prevailing party". This Court should affirm the order of the Special Referee in its entirety.

Respectfully submitted,

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February 6, 2018

[19] Appellants also request to be awarded their attorneys fees and costs. This Court should note that the Appellants made no such request below (in their pleadings or otherwise) and should not be allowed to make it for the first time on appeal. Malloy, *supra*.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS OF NEWBERRY COUNTY
Samuel M. Price, Jr., Special Referee

Appellate Case No. 2017-0001678

RECEIVED
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SC Court of Appeals

Robert G. Shirey,

Respondent,

v.

Gwen G. Bishop
Cassandra Robinson
And TD Bank, N.A

Defendants,

Of whom Gwen G. Bishop
and Cassandra Robinson are,

Appellants.

CERTIFICATE OF COUNSEL

I certify, pursuant to Rule 211(a), SCACR, that the Respondent's final brief complies with the requirements of Rule 211(b), SCACR.

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