

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2015-CP-10-3389
Appellate Case No. 2018-000084

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SC Court of Appeals

Peter Miller, Mary Alice Miller, Mary Alice Miller, as Trustee of Mary Alice Miller Living Trust,
Miller Group Properties, LLC, and C-Miller Properties, LLC, Plaintiffs,

Of whom C-Miller Properties, LLC is the Appellant,

v.

Marilyn L. Dillon and JLJ, LLC, Respondents,

and

Marilyn L. Dillon, Third-Party Plaintiff, Respondent,

v.

PMC, LLC, Third-Party Defendant.

INITIAL BRIEF OF APPELLANT

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ISSUES ON APPEAL

1. Did the Master-in-Equity err in finding Appellant could not compel enforcement of the Settlement Order where Appellant satisfied the elements of specific performance but the Master relied on nonmaterial considerations to support a decision to the contrary, and to the extent those considerations were proper at all, failed to consider all the facts and circumstances related thereto, particularly mitigating evidence presented by Appellant in her Affidavit and evidence of bad faith on the part of Respondent?
2. Did the Master-in-Equity err in finding the Purchase Agreement was not a ratified contract and therefore did not comply with the terms of the Settlement Order when the missing signature for ratification was the signature of Respondent, who, in an act of self-dealing, chose not to ratify the agreement and instead award herself a significant economic windfall?
3. Did the Master-in-Equity err in finding the Purchase Agreement failed for lack of consideration because no earnest money was put down upon execution when the record shows that the parties to the Purchase Agreement exchanged mutual promises as consideration therefor and, even if the Purchase Agreement lacked adequate consideration, such inadequacy is not grounds for refusing the remedy of specific performance as a matter of law?
4. Did the Master-in-Equity err in finding the Purchase Agreement violated the Settlement Order that any sale of the Property close by a date certain when the Purchase Agreement in fact provided for a timely closing date but also included a provision which would allow—but *did not require*—the parties to close a mere one month later?
5. Did the Master-in-Equity err in balancing the equities in favor of Respondent, when the considerations made by the Master in Respondent's favor were in error, and the Master failed to take into consideration other significant facts tipping the balance of equities in favor of Appellant?

STATEMENT OF THE CASE

Mary Miller (“Mother”) and Peter Miller (collectively, “the Parents”) are the parents of Cynthia Miller, who is the single member owner of Appellant C-Miller Properties, LLC,¹ Respondent Marilyn Dillion,² and Patrease Clarkson³ (hereinafter collectively referred to as “the Sisters”). On June 15, 2015, in order to resolve a dispute regarding a large generational, family-owned commercial property, the Parents and Cynthia filed a Lis Pendens, Summons, and Complaint, seeking a declaratory judgment action against Marilyn. Marilyn filed an Answer, generally denying the allegations in the Complaint and seeking foreclosure of the mortgage in dispute and adding Patrease as a third-party defendant in the action. Thereafter, the parties proceeded to mediation pursuant to the Scheduling Order issued by the Master-in-Equity. Following mediation, the parties entered into a Consent Settlement Order (“the Settlement Order”) filed on September 12, 2016. On April 28, 2017, after a dispute arose as to whether Marilyn adhered to the Settlement Order, the Parents and Cynthia filed a Motion to Enforce Settlement Order. The Master-in-Equity denied the Motion, filing an Order Denying Plaintiffs’ Motion to Enforce the Settlement Order on September 17, 2017 (“Order”). The Parents and Cynthia filed a Motion for Reconsideration, which the Master denied in a Form 4 Order filed on December 20, 2017. This appeal followed.

¹ This brief refers to Appellant C-Miller Properties, LLC as “Cynthia” for ease of reference in identifying the parties.

² Respondent Marilyn Dillion, and her husband, Joe Dillion, are the members of Respondent JJJ, LLC. The Master-in-Equity treated Respondents’ interests as fully aligned, and Respondents arguments before the Master made no distinction between the two parties’ positions. Therefore, for ease of reference, this brief refers to Respondents as “Marilyn” in the appeal before this Court.

³ Petrease Clarkson is the single member owner of PMC, LLC, the Third-Party Defendant in the underlying action. This brief refers to Petrease by first name for ease of reference.

STATEMENT OF FACTS

The Parents owned a large piece of commercial property located at 4213 Savannah Highway, Charleston County, South Carolina (“the Property”). Due to financial difficulties related to the Property in June 2006, the Parents borrowed money from their daughter, Marilyn. The Parents executed a promissory note (“the Note”) promising to pay Marilyn \$360,000.00 by May 31, 2009. (Exhibit A, Compl.). In December 2006, the Parents deeded a 50% ownership interest in the Property to their other daughter, Cynthia,⁴ as compensation for her contribution to the Property as property manager because Cynthia was not paid a salary during the time she worked as manager. (Cynthia’s Aff.). In 2008, the Parents and Cynthia executed a mortgage securing the \$360,000.00 Note from Marilyn. (Exhibit B, Compl.). Thereafter, in May 2011, the Parents deeded certain residential lots not the subject of this appeal to Marilyn to satisfy the accrued interest on the Note. (Exhibit C, Compl.).

On March 23, 2012, Mother executed a modified promissory note and modified mortgage, promising to pay Marilyn \$434,059.00, with a balloon payment due on May 1, 2013. Cynthia did not execute the modified note and mortgage. (Exhibit D, Compl.). On the same day—March 23, 2012—Mother executed a warranty deed transferring a 40% interest in the Property to Respondent JLJ, LLC⁵ and a 10% interest in the Property to PMC, LLC, a single member limited liability company owned by their third daughter, Patrease. (Exhibit E, Compl.). The warranty deed was not provided to Cynthia for execution until May 14, 2012. (Exhibit E, Compl.).

⁴ As noted in footnote 1, *supra*, Cynthia is the sole owner and member of Appellant C-Miller Properties, LLC.

⁵ As noted in footnote 2, *supra*, Respondent Marilyn Dillion, and her husband, Joe Dillion, are the members of Respondent JLJ, LLC, and for ease of reference, this brief refers to Respondents as “Marilyn.”

On June 15, 2015, after a dispute arose among the parties as to the amount of remaining debt on the modified note, the Parents and Cynthia filed a Lis Pendens, Summons, and Complaint, seeking a declaratory judgment, arguing the transfer of the above-mentioned residential lots worth \$102,955.67 and subsequent conveyance of 40% interest in the Property or \$436,000.00 to Marilyn constituted partial satisfaction or payment of the Note. Marilyn filed an Answer, Counterclaim, Cross-Claim, and Third-Party Complaint, seeking foreclosure and alleging the defenses of statute of frauds, statute of limitations, and the doctrines of laches, unclean hands, estoppel, and waiver. The Parents and Cynthia filed a Reply.

Following mediation ordered by the Court, the parties entered into the Settlement Order filed on September 12, 2016. (Settlement Order⁶). The Settlement Order provided in pertinent part that within 180 days of the filing of the Order, the Parents and Cynthia would provide either of the following: (1) a ratified contract to sell the Property for \$850,000.00 or more; *or* (2) an unqualified loan commitment letter from a reputable lender for a loan on commercially reasonable terms in an amount sufficient to pay the debt owed to Marilyn. (Settlement Order). Further, the sale or refinance of the Property must be closed within 270 days of the entry of the Settlement Order, and in the event a sale of the Property generated more funds than necessary to repay the debt owed to Marilyn, then Marilyn would also receive 40% of the profits, which reflected her percentage ownership in the Property overall, with Cynthia receiving 50% and Patrease receiving 10% of the profits too. Accordingly, the Settlement Order required a contract to sell or loan commitment by March 11, 2017, and a sale or refinance of the Property to close by June 9, 2017, with any profit in excess of the debt owed to Marilyn being apportioned among the sisters in proportion to their respective ownership interests in the Property.

⁶ The Settlement Order is not paginated.

Additionally, the Settlement Order (1) appointed real estate agent, Reid Davis, as the broker to list the Property for sale; (2) made the Parents and Cynthia responsible for managing the Property and paying taxes, insurance, and maintenance costs; (3) required Petrease to loan \$9,000.00 and Marilyn to loan \$6,000.00 for payment of taxes, insurance, and maintenance fees; (4) provided the parties would execute a deed in lieu of foreclosure which would be held in trust and would not be recorded unless the Parents or Cynthia breached the terms of the Settlement Order; and (5) provided the action would remain pending during compliance with the terms of the Settlement Order.

On March 8, 2017, pursuant to the Settlement Order, Cynthia sent Marilyn a Real Estate Purchase Agreement (“the Purchase Agreement”), agreeing to purchase the Property for \$850,000.00, with a closing date of on or before June 9, 2017. (Exhibit B, Motion to Enforce). Cynthia’s company, CRM Agency, LLC, was the purchaser. (Exhibit B, Motion to Enforce). On March 10, 2017, in response to the Purchase Agreement, counsel for Marilyn sent a letter to counsel for Cynthia, “expressly reject[ing]” the purchase offer (“the Rejection Letter”), alleging the Settlement Order required the use of Reid Davis as the broker to list the property and Cynthia purportedly did not provide to Davis information necessary to list the property. Additionally, the Rejection Letter alleged that “[e]ven if it does not so expressly state, it was clearly the parties’ intent that [the Property] be listed and sold” to a third-party purchaser. Further, the Rejection Letter contended the Purchase Agreement was not commercially reasonable for the following reasons: (1) it did not include a pre-qualification letter; (2) there was no earnest money; (3) “the financing contingency provides for proof of financing to be proven seven (7) days prior to closing which is absolutely unacceptable”; (4) the sellers—which included Cynthia, Marilyn, and

Patrease—would be responsible for some closing costs and Cynthia would receive a commission; and (5) the purchase price was “well beneath” the appraised value. (Exhibit C, Motion Enforce).

Without any further negotiation, on April 7, 2017, Marilyn executed and recorded a deed in lieu of foreclosure, foreclosing upon the Property. (June H.T. p. 13, 15-17). On April 26, 2017, Marilyn transferred the property to her company, Miller Bridge Capital, LLC, for \$5.00, by warranty deed, title not examined. (June H.T. 25; Cynthia’s Aff.).

On April 28, 2017, the Parents and Cynthia filed a Motion to Enforce Settlement Order, arguing they complied with the heart of the Settlement Order by providing the Purchase Agreement to Marilyn before the March 11, 2017 deadline, the performance of which would have further complied with the terms of the Settlement Order to close on the sale of the Property within 90 days thereafter or June 9, 2017. They maintained Marilyn wrongfully rejected the agreement without negotiating in good faith.

In her affidavit in support of the Motion, Cynthia confirmed she complied with the terms of the Settlement Order, acting in good faith throughout the process. (Cynthia’s Aff. ¶ 5). She stated she presented the Purchase Agreement on March 8, 2017, and that while Patrease agreed with the Purchase Agreement, Patrease was unable to sign the Purchase Agreement until the following Monday, March 13, 2017. (Cynthia’s Aff. ¶ 7). Cynthia noted too that she revised the agreement to respond to Marilyn’s objections thereto outlined in the Rejection Letter. (Cynthia’s Aff. ¶ 7). She confirmed Marilyn nonetheless rejected any negotiation of the terms of the Purchase Agreement. (Cynthia’s Aff. ¶ 8). Cynthia also averred that Reid Davis, the broker appointed to list the Property, only contacted her once and had all the information necessary to list the property for sale. (Cynthia’s Aff. ¶ 12). As to the 2016 property taxes, Cynthia stated that the sisters routinely paid the taxes at the end of the year instead of in January. (Cynthia’s Aff. ¶ 13). Cynthia

stated she, the Parents, and Patrease believed the 40% interest the Parents deeded to Marilyn in March 2012 was to satisfy a portion of the debt owed. (Cynthia's Aff. ¶ 14). The parties proceeded to a hearing on June 14, 2017, wherein Cynthia's Affidavit was accepted by the Master to the extent it bore on the Motion to Enforce the Settlement Order. (June H.T. 6; Order 5.). During the hearing, counsel for the Parents and Cynthia reiterated their arguments that the heart of the Settlement Order required a contract to purchase the Property for a price of at least \$850,000.00 or more (which would pay off the debt to Marilyn) be ratified by a time certain, and then that the sale on the Property for that minimum price or more close by a date certain. (June H.T. 8). Counsel argued that the Purchase Agreement ratified by Cynthia and Patrease provided for these essential and material terms and any alleged breaches by Cynthia were "collateral matters." (*Id.*).

The Master denied the motion by an Order Denying Plaintiffs' Motion to Enforce the Settlement Order ("Order") filed on September 27, 2017. The Order first recounts the facts underlying the dispute leading to the Parents, Cynthia, Marilyn, and Patrease's execution and entry of the Settlement Order. (Order at 1-3.). The factual section curiously laid out none of the terms of the Settlement Order itself. (*Id.*) The enforcement of the Settlement Order, however, was the issue before the Master. (*Id.* at 3) ("Plaintiffs seek to compel the performance of the Settlement Order to require Defendants to execute a Real Estate Purchase Agreement . . .").

The Master concluded the Parents and Cynthia failed to comply with the terms of the Settlement Order because the Purchase Agreement presented by Cynthia (1) was not a ratified contract as Marilyn did not sign it and Patrease did not sign it on time; (2) failed for lack of consideration; and (3) allowed for the parties thereto to close on the Property beyond the time agreed to by the Parents and the Sisters. (Order 3-5). Because Cynthia delivered an allegedly noncompliant Purchase Agreement to Marilyn, moreover, the Master concluded the Parents and

Cynthia were in breach of the Settlement Order and Marilyn was entitled to record the deed in lieu of foreclosure. (*Id.* at 5). The Master further concluded the Parents and Cynthia could not compel performance because Marilyn had set forth sufficient evidence to demonstrate she had fulfilled her obligations under the Settlement Order while the Parents and Cynthia had consistently failed to fulfil their obligations. (Order 6.). To this end, the Master concluded Cynthia had failed to cooperate with the broker designated as the listing agent in the Settlement Order, failed to pay the 2016 property taxes in April of 2017, and Cynthia delivered the deed in lieu documents after the time the ratified contract was due. (Order 6-7.). Finally, the Master concluded that in all, because of the long time in which Marilyn had allegedly waited to have her debt repaid, and because of the difficulties associated with undoing Marilyn's filing of the deed in lieu of foreclosure and subsequent property transfers, Marilyn would be unduly prejudiced in granting the Motion to Enforce the Settlement. (*Id.* at 7-8.).

Cynthia filed a Rule 59(e), which was denied after a hearing on December 18, 2017, by a Form 4 Order filed December 20, 2017. This appeal timely followed.

STANDARD OF REVIEW

“A suit for declaratory judgment may be legal or equitable, and is characterized as such by the nature of the underlying issue outlined in the complaint.” *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct. App. 2001). Appellate courts must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of relief sought to determine whether the claim is legal or equitable. *Gordon v. Drews*, 358 S.C. 598, 604, 595 S.E.2d 864, 867 (Ct. App. 2004).

Here, the pleadings and evidence indicate the Parents' and Cynthia's primary purpose in asserting their claim to enforce the Settlement Order was to prohibit Marilyn from foreclosing on

the Property and allow the three sisters to realize their proportional share of ownership in the large, generational family-owned commercial property. Because their primary purpose in asserting the motion to enforce the settlement order was injunctive relief, the action is equitable in nature. *See Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006) (“The character of an action as legal or equitable depends on the relief sought.”). Moreover, actions for foreclosures are actions in equity. *Wilder Corp v. Wilke*, 324 S.C. 570, 576, 479 S.E.2d 510, 513 (Ct. App. 1996), *aff'd*, 330 S.C. 71, 497 S.E.2d 731 (1998). Actions for specific performance are also actions in equity. *Ingram v. Kasey's Assoc.*, 340 S.C. 98, 105, 531 S.E.2d 387,290 (2000).

In equity action on appeal from a Master, the court may find facts in accordance with its own view of the preponderance of the evidence. *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). “However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial [court] is in the better position to assess the credibility of the witnesses.” *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). “Moreover, the appellant is not relieved of his burden of convincing the appellate court [that] the trial [court] committed error in his findings.” *Id.* at 387-88, 544 S.E.2d at 623.

ARGUMENT

This action involves an equitable dispute between the Parents, Cynthia, and Patrease against Marilyn, the Parents' other daughter and Cynthia and Patrease's sister, over a large, generational family-owned commercial property. The underlying dispute over the amount of the debt owed to Marilyn relating to the Property and the Sisters' proportional ownership of the same was settled by all and memorialized in the Settlement Order. The heart of the Settlement Order validated the three sisters' significant ownership interests in the Property so long as the debt to

Marilyn was paid through the sale of the Property at a minimum price and within a specified timeframe. This appeal focuses on whether it was an abuse of discretion for the Master to circumvent the timeframe agreed to by the parties in the Settlement Order and provide Marilyn a large economic windfall to the significant prejudice of Cynthia and Patrease, when in doing so the Master erred in finding (1) Cynthia could not compel enforcement of the Settlement Order; (2) the Purchase Agreement was not ratified; (3) the Purchase Agreement failed for lack of consideration; (4) the Purchase Agreement violated the Settlement Order's term requiring the sale of the Property to close before a date certain; and (5) the equities favored Marilyn. Because of these errors, this Court should reverse the Master's Order, and remand for the Master to set aside the Marilyn's wrongfully recorded deed in lieu of foreclosure and subsequently tainted conveyance of Property to a limited liability of her own making and enter judgment in favor of the Parents' and Cynthia's Motion to Enforce the Settlement Order. A reversal would allow the Sisters to fulfil the contractual opportunity afforded to them in the Settlement Order to close on the sale of the Property for a minimum price within a specified time, repaying the debt owed to Marilyn and realizing the profits thereon in proportion to their relative ownership interest in the Property gifted to them by the Parents.

I. The Master-in-Equity erred in finding Cynthia could not compel enforcement of the Settlement Order when Cynthia satisfied the elements of a claim for specific performance.

The Master errantly found Cynthia could not compel specific performance of the Settlement Order. The parties had a valid contract to which Cynthia had substantially satisfied the material terms thereunder, and was ready, willing, and able to complete her part. In evaluating the propriety of specific performance in the instant case, the Master, however, erred in considering and weighing so heavily Cynthia's alleged nonmaterial deviations from the Settlement Order.

Even if Cynthia's alleged nonmaterial deviations from the Settlement Order were a proper consideration of and weighed appropriately by the Master, the Master also erroneously and prejudicially failed to consider the entire set of facts relating to those issues, including the mitigating evidence presented by Cynthia in her Affidavit and the unclean hands of Marilyn.

“Settlement agreements are viewed as contracts between the parties.” *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001). “General contract principles are applied in the construction of a settlement agreement because . . . a settlement agreement is a contract.” *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241-42, 672 S.E.2d 799, 803 (Ct. App. 2009). “Specific performance is an equitable remedy” in contract disputes. *King v. Oxford*, 282 S.C. 307, 314, 318 S.E.2d 125, 129 (Ct. App. 1984). “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.” *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000). “[S]pecific performance of a contract to sell real property will be ordered where the contract ‘is fair and was entered into openly and aboveboard.’” *Amick v. Hagler*, 286 S.C. 481, 485, 334 S.E.2d 525, 527 (Ct. App. 1985).

Here, the Parents and Sisters had a valid agreement—the Settlement Order. The Settlement Order had been materially carried into execution when Cynthia delivered to Marilyn a Purchase Agreement for the sale of the Property at the minimum price and within the time provided in the Settlement Order. The Purchase Agreement thereby presented the parties an opportunity to realize the essential aims of the Settlement Order—to repay the debt owed to Marilyn before June 9, 2017, and apportion any additional profits relating to the sale in proportion to the ownership interests in

the Property gifted by the Parents to the Sisters. (Exhibit B, Motion to Enforce) (providing for the purchase of the Property for \$850,000 by June 9, 2017). Further, the record indicates Cynthia was ready, willing, and able to move forward with the agreement as provided for in the Settlement Order; that is, Cynthia was positioned to pay the purchase price for the Property on or before the expiration of time allotted in the Settlement Order. (Exhibit B, Motion to Enforce.) Pursuant to the elements necessary for specific performance outlined in *Ingram*, all the elements for specific performance had therefore been met in this case, and it was error of law for the Master to deny the Parents and Cynthia's Motion to Enforce the Settlement Order.

A. In concluding otherwise, the Master erred in considering Cynthia's alleged nonmaterial deviations from the Settlement Order.

In finding that Cynthia could not compel enforcement of the Settlement Order, the Master improperly considered and gave undue weight to nonmaterial issues in this case. The Master found relevant that Cynthia (1) allegedly did not cooperate with Reid Davis, the real estate broker appointed to list the Property for sale in the Settlement Order; (2) failed to pay the 2016 property taxes in April; and (3) did not provide the deed in lieu documents to Marilyn until after the deadline to produce a ratified contract or loan commitment. These alleged deviations from the Settlement Order on the part of Cynthia, however, if required at all, were nonmaterial aspects of the agreement. The issues did not affect the essential terms of the Settlement Order which aimed to repay the debt to Marilyn within a specified time frame and provide all the sisters an opportunity to realize their proportional ownership interest in the generational, family-owned commercial property. Wherein Cynthia had otherwise satisfied the essential, material elements of the Settlement Order by timely delivering a Purchase Agreement which promised to close on the sale of the Property for the price and within the time frame agreed to by the Sisters in the Settlement

Order, it was error of law for the Master to consider and weigh so heavily alleged nonmaterial deviations from the Settlement Order on the part of Cynthia.

South Carolina courts have held that a party's technical or nonmaterial deviation from a contract should not preclude that party, who has otherwise substantially complied thereunder, from compelling performance of the contract. In *Clardy v. Bodolosky*, the perspective purchasers of commercial real estate, the Clardys, filed an action against the seller for declaratory judgment, specific performance, and breach of contract. *Clardy v. Bodolosky*, 383 S.C. 418, 423, 679 S.E.2d 527, 529 (Ct. App. 2009). Under the terms of the real estate contract, the Clardys were required to pay earnest money. *Id.* The Clardys paid the money by writing a check to Bodolosky's attorney instead of directly to Bodolosky. *Id.* Thereafter, Bodolosky attempted to rescind the contract and sell the property to a different party. *Id.* "The trial court found the Clardys complied with the terms of the real estate contract 'as they understood them to be' and 'simply performed as they were instructed.' Thus, the trial court held there was a meeting of the minds between the parties, and the Clardys performed their pre-closing obligations." *Id.* at 424, 679 S.E.2d at 530. "The trial court granted the Clardys' request for specific performance and ordered Bodolosky to deliver title of the real property to the Clardys." *Id.*

On appeal, Bodolosky argued the trial court erred in finding the Clardys were entitled to specific performance because the contract was clear on its face, requiring the Clardys pay him directly rather than write a check to his attorney's trust account because the parties did not intend to use an escrow agent. *Id.* at 426, 679 S.E.2d at 531. This Court affirmed the grant of specific performance, finding the Clardys satisfied the elements of the *Ingram* test, had substantially complied with the terms of the agreement, and were found to be credible. *Id.* at 427, 679 S.E.2d at 531. *See also Elliott v. Snyder*, 246 S.C. 186, 190-91, 143 S.E.2d 374, 376 (1965) (finding

where buyer tendered an installment check which was returned marked “drawn against uncollected funds,” seller was on notice that the check was not worthless but that the funds drawn upon had not been collected at that time and buyer’s substantial compliance with the terms of the contract was sufficient to prevent forfeiture, and seller not entitled to rescind).

As in *Clardy*, the heart of the Settlement Order required that a contract to sell the Property be ratified by March 11, 2017, and that the sale of the Property be closed by June 9, 2017, with any profit over the debt owed to Marilyn apportioned among the sisters in proportion to their respective Property ownership interests. Cynthia substantially complied with the Settlement Order by timely delivering the Purchase Agreement to Marilyn which would have achieved these essential aims. Other aspects of the Settlement Order, such as cooperation with any real estate agent, payment of taxes by a particular month, and the delivery of deed in lieu documents within a certain time, to the extent these actions were required by the Settlement Order at all, were all nonmaterial, technical issues. Under *Clardy* and other similar cases, it was error of law for the Master to focus on these nonmaterial terms in an equity matter to conclude that Cynthia could not seek specific performance of the Settlement Order.

B. Even if Cynthia’s alleged nonmaterial deviations from the Settlement Order were a proper consideration of the Master, the Master failed to weigh them appropriately and consider the entire set of facts relating to those issues, including the mitigating evidence presented by Cynthia in her Affidavit and the unclean hands of Marilyn.

As noted above, the Master erroneously considered relevant to the propriety of the Parents and Cynthia’s Motion to Enforce the Settlement Order certain alleged nonmaterial deviations from the Settlement Order on the part of Cynthia. To the extent it was appropriate for the Master to consider these nonmaterial deviations, the Master failed to weigh these considerations properly within the totality of the circumstances, including consideration of mitigating evidence regarding

these alleged deviations presented by Cynthia in her Affidavit and the unclean hands of Marilyn. “The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case.” *Time Warner Cable v. Condo Servs., Inc.*, 381 S.C. 275, 281, 672 S.E.2d 816, 819 (Ct. App. 2009). “[S]pecific performance is not an absolute right, and a court granting it must follow established principles and *carefully consider* all the circumstances of the particular case.” *Id.* at 282, 672 S.E.2d at 819 (emphasis added).

- 1. The Master’s reliance on the statements in Reid Davis’s Affidavit without regard to the countervailing statements of Cynthia was plain and prejudicial error.**

Marilyn submitted the Affidavit of Reid Davis in support of her argument that Cynthia failed to fulfill her obligations under the Settlement Order and should not in equity be entitled to enforce the same. The Master specifically noted Davis claimed Cynthia failed to return his attempts to contact her to obtain information necessary to listing the Property, and that Cynthia refused to execute a listing agreement too. Cynthia’s Affidavit,⁷ however, directly contradicts Davis’s version of the story, and the Order makes no mention of Cynthia’s countervailing testaments. (Order 6-7.). Cynthia attested that she had complied with the terms of the Settlement Order and acted in good faith throughout the process. (Cynthia’s Aff. ¶5). Cynthia stated Davis only contacted her once and to her knowledge, Davis had all the information that was necessary to list the Property for sale. (Cynthia’s Aff. ¶12).

Cynthia’s statements regarding her cooperation with Davis should have been considered when the Master evaluated Davis’s contradictory statements on the same point. In plain error, the

⁷ Cynthia’s Affidavit was offered in response to Marilyn’s opposition to the Motion to Enforce the Settlement Order. Marilyn’s opposition included the submission of the Affidavit of Reid Davis. (Order at 5.).

Master failed to consider Cynthia's Affidavit on the point at all though. *L & W Wholesale, Inc. v. Gore*, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991) (noting that affidavit submitted in support of another motion should have also been considered on motion for summary judgment in matter). Moreover, it is black letter law that when two affidavits are pitted against one another, a Master may not make credibility determinations without hearing direct testimony from the affiants. *Id.* (noting that at the summary judgment stage of litigation, the judge cannot weigh conflicting evidence with respect to a disputed material fact or make credibility determinations with respect to statements made in affidavits); *see also Raynor v. Pugh*, 817 F.3d 123, 130 (4th Cir. 2016) (holding where "affidavits present conflicting versions of the facts which require credibility determinations," summary judgment cannot lie).

In addition, the Master fails to consider well the Settlement Order's plain language. The Settlement Order simply states: "Reid Davis and the firm of Lee & Associates are hereby appointed as the broker to list the Property for sale as indicated by the consent of the parties." (Settlement Order ¶ 5.). Pursuant to this provision, Cynthia complied with the Settlement Order and granted Davis permission to list the Property for sale when she executed the Settlement Order. The Settlement Order does not outline or require any party to provide any additional assistance to Davis to list the property. Nor is there any evidence that Marilyn raised concern over Davis's failure to list the Property because of some act or omission of Cynthia before defending against the Parents' and Cynthia's Motion to Enforce the Settlement Order. For all the above reasons, it was error for the Master to conclude that Cynthia had failed to honor her obligations under the Settlement Order regarding the appointment of Davis to serve as broker to list the Property. Moreover, the Master's error was prejudicial as it served as one of the grounds upon which the Master determined that Cynthia could not compel specific performance of the Settlement Order.

- 2. Without regard to the countervailing statements in Cynthia's Affidavit, the Master plainly erred in concluding that Cynthia's failure to pay the 2016 Property taxes in April disregarded her obligations under the Settlement Order. Because such conclusion served as one of the grounds upon which the Master determined Cynthia could not compel specific performance, the Master's error was prejudicial too.**

The Master concluded Cynthia's failure to pay the 2016 Property taxes in April violated the Settlement Order, and Cynthia's deviation from the Settlement Order in this respect supported the Master's ultimate determination in equity that Cynthia should not be able to seek specific performance thereunder. In plain error, however, the Master failed to consider Cynthia's countervailing statements in her Affidavit. *Gore*, 305 S.C. at 253, 407 S.E.2d at 659. Cynthia averred that to maintain the Property during the pendency of this action, the maintenance and insurance expenses took priority over the payment of the taxes. Further, the parties routinely paid the taxes at the end of the year instead of in April. (Cynthia's Aff. ¶13). Like the Clardys, Cynthia's statements provide evidence that her treatment of the 2016 Property taxes was in substantive compliance with the Settlement Order, and in any event not a material violation of the Settlement Order as any remaining tax debt could have been easily addressed at the closing of the sale of the Property on June 9, 2017 and come out of Cynthia's end of the profits too if necessary. For all the reasons provided above, as to the propriety of the Parents and Cynthia's ability to seek specific performance, the Master plainly and prejudicially erred in considering and weighing against Cynthia, without regard to the countervailing statements in her Affidavit, Cynthia's treatment of the 2016 Property taxes, a nonmaterial term of the Settlement Order.

- 3. Cynthia's delivery of the deed in lieu of foreclosure was not in violation of the Settlement Order. Marilyn's recording of the deed in lieu, however, was in bad faith and in breach of the Settlement Order and it was plain, prejudicial error for the Master to conclude otherwise.**

The Master considered the timing of Cynthia's delivery of the deed in lieu of foreclosure to Marilyn's attorney to be in disregard of Cynthia's obligations under the Settlement Order. The Settlement Order, however, provided no timeframe for Cynthia's delivery of the deed in lieu. (Settlement Order ¶¶ 13-14.). In addition, the deed in lieu was to be held in trust by Marilyn's attorney during the pendency of the action. The deed in lieu specifically could not be recorded unless the Parents/Cynthia breached the terms of the Settlement Order. (Settlement Order ¶ 14.). Thus, the delivery of the deed in lieu of foreclosure to Marilyn's attorney was of no import to the parties unless and until the Parents/Cynthia breached the terms of the Settlement Order. Neither the Parents nor Cynthia had breached the terms of the Settlement Order at the time the deed was delivered to Marilyn's attorney. Thus, any delay on the part of Cynthia in delivering the deed in lieu was inconsequential and it was plain and prejudicial error for the Master to find otherwise in support of the decision to deny the Parents and Cynthia's Motion to Enforce the Settlement Order.

In addition, the Master failed to consider that Marilyn acted in bad faith and with self-dealing when she speedily recorded the deed in lieu when neither the Parents nor Cynthia had breached the terms of the Settlement Order, or, at the very least, when the Parents and Cynthia's compliance with the Settlement Order was still very much at issue. "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). "He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief." *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)).

For the reasons above, the Master erred in finding the time of Cynthia's delivery of the deed in lieu of foreclosure material to whether Cynthia could seek specific performance. The time of Cynthia's delivery of the deed in lieu was of no material import to the parties' performance under the Settlement Order. Nonmaterial deviations to a contract in any event should not preclude a party, who has otherwise substantially complied, from seeking specific performance of a contract under South Carolina law. *Clardy*, 383 S.C. at 423, 679 S.E.2d at 529; *Elliott*, 246 S.C. at 190-91, 143 S.E.2d at 376. In addition, the Settlement Order only permitted Marilyn to record the deed in lieu when the Parents or Cynthia were in breach of the Settlement Order. The Master overlooked that Marilyn prematurely, in bad faith, and with self-dealing recorded the deed in lieu at a time when the Parents and Cynthia's relative performance under the Settlement Order was very much in dispute.

II. The Master-in-Equity erred in finding the Purchase Agreement was not a ratified contract when the signature missing for ratification was the signature of Marilyn, who, in an act of self-dealing, chose not to ratify the agreement and award herself a significant economic windfall instead.

The Master erred as a matter of law in finding the Purchase Agreement did not comply with the Settlement Order because the Purchase Agreement was not ratified by all the sisters. "With practical unanimity (sic), the courts have held that it is not necessary that the contract shall be signed by both parties to give it mutuality. It is sufficient if it be signed by the party to be charged." *Speed v. Speed*, 213 S.C. 401, 412, 49 S.E.2d 588, 593 (1948). It is undisputed that Cynthia and Patrease had ratified the Purchase Agreement at the time it was delivered to Marilyn. Cynthia provided in her Affidavit that Patrease consented to the Purchase Agreement and was simply unable to sign the it until Monday, March 13, 2017. (Cynthia's Aff. ¶7). During the hearing, counsel for Marilyn conceded too that counsel for Cynthia provided a revised Purchase Agreement with Patrease's signature dated March 13, 2017. (June H.T. 11). The revised copy

also included the signatures of the Parents. (Cynthia's Aff. Ex. 1). The Settlement Order, moreover, does not require that the sisters sign to "ratify," and Patrease's consent to the delivery of the Purchase Agreement to Marilyn should have been sufficient in equity. *See Clardy*, 383 S.C. at 426, 679 S.E.2d at 531 ("If writing an earnest money check directly to Bodolosky was material to him, Bodolosky should have made it known to the Clardys."); *Pee Dee Stores, Inc.*, 381 S.C. at 241, 672 S.E.2d at 802; (holding "[t]he court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed").

Marilyn's failure to sign the Purchase Agreement, moreover, cannot serve in equity as the corresponding failure of Cynthia and Patrease to deliver a ratified Purchase Agreement in compliance with the Settlement Order. In an act of complete self-dealing, Marilyn summarily rejected the Purchase Agreement and failed to negotiate in good faith any of the terms she found allegedly objectionable. (Exhibit C, Motion Enforce). Marilyn refused to ratify the Purchase Agreement, even though the Purchase Agreement promised to timely repay the debt owed to her. By recording the deed in lieu of foreclosure instead of honoring the Settlement Order, Marilyn profited Cynthia's 50% interest and Patrease's 10% interest in the profits of the sale of the Property plus any undervaluation in pricing the Property at \$850,000.00. In equity, Cynthia was not required to take any action that would have otherwise been futile. "Equity will not require the doing of a futile task, nor foreclose the rights of a party from obtaining specific performance for failure to do something which in view of all the facts would have been useless." *Elliott v. Dew*, 264 S.C. 40, 46, 212 S.E.2d 421, 423 (1975).

For the reasons above, the Master erred in finding that Cynthia failed to deliver to Marilyn a ratified contract when Marilyn was the only sister left to ratify and any attempt to obtain her

ratification was by all record evidence futile. *See id.* at 47, 212 S.E.2d at 424 (finding holder of purchase option's insufficient in amount tender offer to landowner immaterial to option holder's right to specific performance where landowner would have refused any tender no matter what the amount).

III. The Master-in-Equity erred in finding the Purchase Agreement failed for lack of consideration because no earnest money was put down upon execution as the record shows the parties to the Purchase Agreement exchanged mutual promises as consideration therefor and, even if the Purchase Agreement lacked adequate consideration, such inadequacy is not grounds for refusing the remedy of specific performance as a matter of law?

The Master erred as a matter of law in finding the Purchase Agreement was not supported by valuable consideration and therefore failed to satisfy the requirements set forth in the Settlement Order. "The necessary elements of a contract are an offer, acceptance, and valuable consideration. A valid offer 'identifies the bargained for exchange and creates a power of acceptance in the offeree.'" *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003) (quoting *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993)). Pursuant to the Purchase Agreement, Cynthia agreed to purchase the Property from the Sisters at the price of \$850,000.00, the minimum price the Sisters had agreed to sell the Property in the Settlement Order. Pursuant to the Purchase Agreement, Cynthia also agreed to close on the Property within the time the sisters specified in the Settlement Order. Thus, the Sisters set forth the criteria for sale of the Property in the Settlement Order, and Cynthia in turn agreed to the Sisters' criteria for sale of the Property. Such agreement is equivalent to a bilateral contract, which "exists when both parties exchange mutual promises." Accordingly, the Purchase Agreement was not unenforceable for lack of consideration simply because Cynthia did not put forth earnest money. *Sauner*, 354 S.C. at 405, 581 S.E.2d at 166; *see also Rickborn v. Liberty Life*

Ins. Co., 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) (acknowledging “there was a meeting of minds, and the exchange of promises qualified as consideration”).

The Master does not cite any law, furthermore, to support the legal requirement that earnest money be provided as consideration for a contract of sale. Nor has the undersigned counsel found any law to support that requirement either. In fact, “[a] contract may be based on a verbal understanding to which both parties have mutually assented and upon which both are acting.” *Rickborn*, 321 S.C. at 303, 468 S.E.2d at 300. The Settlement Order does not require earnest money as consideration either. *See id.* at 426, 679 S.E.2d at 531 (“If writing an earnest money check directly to Bodolosky was material to him, Bodolosky should have made it known to the Clardys.”).

Finally, and perhaps most importantly, even if this Court found the Purchase Agreement lacked adequate consideration, such finding does not support the Master’s denial of the Parents and Cynthia’s Motion to Enforce the Settlement Agreement. “Mere inadequacy of consideration is not a ground for refusing the remedy of specific performance; in order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud.” *Clardy*, 383 S.C. at 426-27, 679 S.E.2d at 531. Here, Marilyn failed to present evidence of other inequitable material incident or fraud on the part of Cynthia. The evidence shows Cynthia made a good faith effort to adhere to the essential aims of the Settlement Order and resolve this dispute in favor of all the Sisters.

For all the reasons provided above, the Master erred in finding the Purchase Agreement failed for lack of consideration and was therefore in violation of the Settlement Order.

IV. The Master-in-Equity erred in finding the Purchase Agreement violated the Settlement Order’s requirement for a sale of the Property to close by a date certain when the Purchase Agreement in fact provided for a timely closing date but also

included a provision which would allow—but did not require—the parties to close a mere one month later.

The Master erroneously concluded the Purchase Agreement was in violation of the Settlement Order's requirement that a sale of the Property close no later than 270 days from the date of filing the Settlement Order. The closing date listed in the Purchase Agreement was June 9, 2017—270 days from the date of filing the Settlement Order. (Exhibit B, Motion to Enforce). Thus, the Purchase Agreement complied with the Settlement Order's time to close.

Section 4 of the Purchase Agreement also provided that “either Party may unilaterally delay closing for any reason, but in no event will closing occur more than 30 days after the Closing date specified herein.” (Exhibit B, Motion to Enforce). Section 4 of the Purchase Agreement therefore would have allowed—but did not require—the parties to close a mere one month later than the time provided for in the Settlement Order. It was error for the Master to focus in on Section 4, and read it so strictly in support of Marilyn's position. There was no evidence in the record that any party intended to take advantage of Section 4, or that any party would not close on June 9, 2017, the date provided for closing in the Purchase Agreement. In addition, as discussed above, had Marilyn negotiated any objection to the Purchase Agreement in good faith, Section 4 could have been removed from the Purchase Agreement. Cynthia stated in her Affidavit, “As for Section 4 of the Purchase Agreement violating the terms of the [Settlement] Order, Section 4 is minute at best and can be taken out of the contract.” (Cynthia's Aff. ¶10).

When looking at the totality of facts, the Master plainly erred in finding Section 4 negated the actual closing date provided in the Purchase Agreement to the prejudice of Cynthia. There is no evidence the Property would not have closed within the time provided for closing in the Purchase Agreement, June 9, 2017. Nor is there evidence that any party would have taken advantage of Section 4 of the Purchase Agreement either. In addition, had Marilyn negotiated in

good faith for the removal of Section 4 of the Purchase Agreement, Cynthia's Affidavit makes clear that the provision could have been removed. The Master, however, to fail to consider Cynthia's affidavit in this regard. Nonetheless, the Master relied upon this erroneous conclusion in denying the Parents and Cynthia's Motion to Enforce the Settlement Agreement.

V. The Master-in-Equity erred in balancing the equities in favor of Marilyn, when the considerations made by the Master in Marilyn's favor were in error, and the Master failed to take into consideration other significant facts tipping the balance of equities in favor of Cynthia.

As a last justification, the Master concluded Marilyn, as opposed to the Parents and Cynthia, would suffer the most prejudice in any grant or denial of the Motion to Enforce the Settlement Order. The Master's consideration of equities in Marilyn's favor, however, were in error. The Master also failed to consider other significant facts tipping the balance of equities in the Parents and Cynthia's favor. First, the Master erroneously focused on Marilyn's relative wait to have an alleged debt repaid to her when the time in which Marilyn agreed to be repaid had not yet passed. Second, the Master erroneously concluded it would be improper to undo Marilyn's premature, bad faith recording of the deed in lieu of foreclosure and subsequently tainted conveyance of the Property to a limited liability company of which she was an owner. Finally, the Master erred in failing to consider the significant economic windfall to Marilyn and corresponding economic prejudice to Cynthia and Patrease, all in violation of the Parents' wishes for their daughters in deeding them each a particular percentage of ownership in the Property. For the above reasons, the equities were not in Marilyn's favor, and it was prejudicial error for the Master to conclude otherwise.

A. The Master erred in considering Marilyn's relative wait to have an alleged debt repaid to her as an equity in her favor when the time in which Marilyn agreed to be repaid had not yet passed.

The Master erroneously found the equities favored Marilyn in part because the debt owed to her had allegedly been due and owing for a long time. The Master discussed at some length the time in which Marilyn had allegedly been without payment. (Order 7-8). In the Settlement Order, however, Marilyn agreed for the alleged debt to be repaid to her on or before June 9, 2017. In accordance therewith, the Purchase Agreement provided that the closing of the sale on the Property would take place on June 9, 2017. The length of time Marilyn allegedly “ha[d] been without payment” was therefore irrelevant to determining the equities in granting the specific performance of a contract which agreed to repay the debt allegedly owed to Marilyn within the timeframe agreed to by Marilyn.

B. The Master erroneously concluded that it would be improper to undo Marilyn’s premature, bad faith recording of the deed in lieu of foreclosure or subsequently tainted conveyance of the Property to her own limited liability company.

The Master noted a hesitancy to set aside a recorded deed and further conveyance of the Property. Were the Motion to Enforce the Settlement Order granted in the Parents and Cynthia’s favor, the Master considered this necessary remedial action as an equity in Marilyn’s favor.

Courts of equity, however, routinely set aside conveyances where necessary. In fact, the Master noted that he had set aside deeds in previous cases. (June H.T. p. 22). Furthermore, the Master overlooked facts demonstrating that Marilyn had acted in bad faith by swiftly recording the deed in lieu before the resolution of the pending action. The parties agreed the deed in lieu would not be recorded unless the Parents/Cynthia breached the Settlement Order. (Settlement Order ¶14). Yet, Marilyn recorded the deed in lieu and further conveyed the property to a limited liability of which she was a member before the rights of the parties to this action were determined with finality. (June H.T. p. 13, 15-17, 25, Cynthia’s Aff.); Marilyn’s bad faith provides ample justification to set aside the deed in lieu and the subsequently tainted conveyance of the Property

to Marilyn's limited liability company, Respondent JLJ, LLC, too. Under these circumstances, the Master's failure to take into consideration all the facts including Marilyn's unclean hands was clearly prejudicial error to the Parents and Cynthia.

C. The Master erred in failing to consider the significant economic windfall to Marilyn and corresponding economic prejudice to Cynthia and Patrease, all in violation of the Parents' wishes for their daughters, Cynthia, Marilyn, and Patrease, in deeding them each a particular percentage interest in the Property.

Equity acts to prevent injustice and windfalls. *See Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 427, 746 S.E.2d 35, 39 (2013) (Justice Pleicones, dissenting) ("In my view, equity exists to correct mistakes and prevent windfalls."). For example, in *McMaster v. Strickland*, 322 S.C. 451, 452, 472 S.E.2d 623, 625 (1996), our Supreme Court reversed the portion of a final order in an action for specific performance because that portion of the order provided a windfall to one of the parties. *See also Sweeney v. Sweeney*, 420 S.C. 69, 87, 800 S.E.2d 148, 157 (Ct. App. 2017) (reversing the portion of an equitable distribution of property by the family court which resulted in a windfall to the husband); *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 371 S.C. 365, 377, 638 S.E.2d 109, 116 (Ct. App. 2006), *rev'd on other grounds*, 382 S.C. 295, 676 S.E.2d 700 (2009) ("Additionally, it *flies in the face of equity to grant Palmetto a windfall* benefit by allowing it to take credit against any sums Lea Ann received from other sources." (emphasis added)); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998) (finding unjust enrichment and implementing a constructive trust used to recover money from innocent third party where the third party would be unjustly enriched by a windfall actually owed to the plaintiff); *Edwards v. Columbia, S.C., Teachers Fed. Credit Union*, 276 S.C. 89, 91, 275 S.E.2d 879, 880 (1981) (reversing the denial of subrogation, finding "to give Mrs. Edwards credit for the payment of the second mortgage with insurance proceeds on the life of the decedent gives to her a windfall to which she is not entitled").

There is no dispute that the sale of the Property for at least \$850,000.00 on or before June 9, 2017, pursuant to the Purchase Agreement would have satisfied the heart of bargain made by the Sisters in the Settlement Order. Specific performance of the Purchase Agreement would have repaid the debt owed to Marilyn within the time in which she agreed to be repaid and allowed the three sisters the opportunity to realize their relative ownership interests in the Property as gifted to them by the Parents. By summarily objecting to the Purchase Agreement without any good faith negotiation, Marilyn awarded herself a significant economic windfall—Cynthia’s and Patrease’s percentage ownership interests in the Property and the profits associated therewith to be gotten from the sale of the Property as well as any undervaluation of the Property related to the \$850,000.00 purchase price.

The Master’s failure to consider the inequity of allowing Marilyn to realize this windfall due to her own act of self-dealing was in error. In equity, any windfall is a proper and material consideration. In equity, any windfall begotten by self-dealing is particular appropriate. The Master’s failure was clearly prejudicial to the Cynthia and Patrease, moreover, who lost their percentage interest in the profits of the sale of the Property over and above the debt owed to Marilyn, and to the Parents who had wished for their daughters to benefit from their Property interest gifts.

CONCLUSION

The Order of the Master-in-Equity should be reversed, and judgement entered in favor of the Parents’ and Cynthia’s Motion to Enforce the Settlement Order so that the Sisters may fulfill the contractual opportunity afforded to them in the Settlement Order. In the Settlement Order, the Sisters agreed to close on the sale of the Property for a minimum price within a specified time, repaying the debt owed to Marilyn and realizing the profits thereon in proportion to their relative

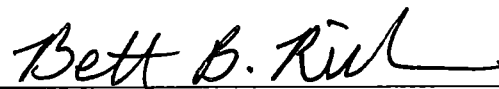
ownership interests gifted to them by the Parents. The Purchase Agreement, which Cynthia delivered to Marilyn, would have satisfied these material terms. Cynthia thus satisfied the elements for a specific performance claim.

In denying the Motion to Enforce, the Master abused his discretion and relied on conclusions that were plain error, either at law or in fact. The Master erred in focusing on alleged nonmaterial deviations from the Settlement Order, when evaluating Cynthia's claim for specific performance. The Master erred in weighing any issue, without regard to the mitigating statements made in Cynthia's Affidavit or a plain reading of the Settlement Order's requirements. The Master erred when, without hearing any direct testimony, the Master adopted the statements made in the affidavit of Reid Davis which were contradicted by the statements made in Cynthia's affidavit. The Master erred in failing to consider the effect of Marilyn's unclean hands or the economic windfall to her in evaluating the equities, and specifically regarding the ratification of the Purchase Agreement and any hesitance to set aside a recorded deed and conveyance. The Master erred in finding that there was no consideration or that any lack thereof would have been an obstacle to specific performance. The Master erred in considering that Marilyn had allegedly waited a long time to be paid, when the time to which she agreed to be paid in the Settlement Order had not yet passed.

For these reasons and the others discussed in more detail above, Cynthia respectfully requests that the Order of the Master-in-Equity be reversed and this Court enter judgment in favor of the Parents and Cynthia's Motion to Enforce the Settlement Order.

[Signature on following page]

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Beth B. Richardson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Beth Burke Richardson, S.C. Bar No. 69552

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2015-CP-10-3389
Appellate Case No. 2018-000084

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SC Court of Appeals

Peter Miller, Mary Alice Miller, Mary Alice Miller, as Trustee of Mary Alice Miller Living Trust,
Miller Group Properties, LLC, and C-Miller Properties, LLC, Plaintiffs,

Of whom C-Miller Properties, LLC is the Appellant,

v.

Marilyn L. Dillon and JLJ, LLC, Respondents,

and

Marilyn L. Dillon, Third-Party Plaintiff, Respondent,

v.

PMC, LLC, Third-Party Defendant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Respondents Marilyn L. Dillon and JLJ, LLC by depositing a copy of it in the United States Mail, postage prepaid, on May 9, 2018, addressed to their attorney of record, Ian D. McVey, Esquire, Turner Padgett Graham & Laney, PA, PO Box 1473, Columbia, SC 29202-1473.



Beth Burke Richardson
SOWELL GRAY ROBINSON STEPP &
LAFFITTE, LLC
Attorney for Appellant



**SOWELL GRAY
ROBINSON**

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May 9, 2018

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MAY 09 2018

SC Court of Appeals

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Calhoun Building
1220 Senate Street
Columbia, South Carolina 29201

Re: Peter Miller, et al. v. Marilyn L. Dillion, et al. and Marilyn L. Dillon v. PMC, LLC
Appellate Case No.: 2018-000084
SGSL File No. 7151/1500

Dear Ms. Armstrong:

Enclosed for filing in the above-referenced case are an original and one copy of the Initial Brief of Appellant and the Designation of Matter to be Included in the Record on Appeal. Please file the named documents as appropriate and return a filed-stamped copy of each via our courier.

By copy of this letter and as evidenced by the Proof of Service, same has been served upon counsel for the Respondents. Thank you for your assistance, and please let me know should you have any questions.

Very truly yours,

Beth Burke Richardson

BBR:kmw

Enclosures

cc: Ian D. McVey, Esquire
Cynthia Miller (via email)