THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY

Court of Common Pleas

Honorable Maite Murphy

Case No.: 2010-CP-18-2127

Burbage Smoak.....Respondent

v.

George Mitchell.....Appellant

FINAL BRIEF OF RESPONDENT

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II. Did the Appellant fail to preserve the issues raised before this Court by failing to raise them and have them ruled upon by the Trial Court?

III. Do the Appellant's own admissions and evidentiary submissions at trial preclude him from seeking any relief for 'equitable redemption' as well as show that, factually, he is unable to redeem the property even if given the opportunity?

IV. Is Appellant's argument that Respondent's claim may be barred by waiver or laches without merit?

V. If not affirmed on the basis of the above arguments, should this Court affirm the ruling of the Trial Court on other grounds appearing in the Record on Appeal pursuant to Rule 220(c), SCACR?

STATEMENT OF THE CASE

Pursuant to Rule 208(b)(2) of the South Carolina Appellate Court Rules, Respondent chooses to adopt the Statements of the Case made by Appellant in his Brief.

ARGUMENT

I. Appellant has waived his right to present the arguments set forth in his Appeal as they were affirmative defenses which had to be pled in his responsive pleading but were not so included.

Rule 8(c), SCRCP, states that the defenses of "accord and satisfaction", "laches", "payment", "waiver", "and any other matter constituting an avoidance or affirmative defense" must be pled in a party's responsive pleading. The failure to plead an affirmative defense is deemed a waiver of the right to assert it. *See* Adams v. B & D, Inc., 297 S. C. 416, 377 S.E.2d 315 (1989). In his Brief Appellant appears to alternatively argue that Respondent has been paid by the Appellant, that the Respondent has waived his right to enforce the plain terms of the Bond for

Title, and that the Respondent's alleged delay in enforcing the terms of the Bond for Title should prevent him from the relief sought due to the doctrine of laches. (R. pp. 83-84) All of these issues are affirmative defenses which were required to be raised in the Appellant's responsive pleading, but which were not. (R. pp.15-16) Additionally, none of these issues were tried by consent of the parties, either expressly or implicitly. As such, Appellant waived his right to argue and assert these defenses at trial by not raising them in his Answer, and he is consequently therefore now barred from raising them for the first time on the Appellate level.

II. Appellant has waived his right to present the arguments set forth in his Appeal as they were not properly raised and ruled upon by the Trial Court.

Where an issue is not raised at trial it is not preserved for review. The Linda McCompany v. James G. Shore, 390 S.C. 543, 703 S.E. 2d 499 (2010), *citing* In re Michael H., 360 S.C. 540, 602 S.E.2d 729, (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712, (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."). In this case, Respondent would argue that none of the issues raised in Appellant's Brief are preserved for review as they were not raised in the pleadings or at trial.

Assuming *arguendo*, however, that Appellant did properly raise the issues before the Court by reason of a liberal construction of his Answer, or by the testimony presented at trial, the issues were not ruled upon by the trial judge. As such, since there was no ruling on these issues they are not preserved for appeal. As stated in South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001):

> An issue must be raised to and ruled on by the trial court for an appellate court to review the issue. Tupper v. Dorchester County, 326 S.C. 318,487 S.E.2d 187 (1997). Although SECURE raised the issue of whether the SECURE policy affords coverage only for those operations which are identified on the list of classifications and in the description of hazards, it was never ruled on by the trial court and SECURE failed to file a motion to alter or amend. *See* Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (issue was not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e), SCRCP, motion to alter or amend the judgment).

In the case *sub judice*, Judge Murphy did not rule in either the announcement of her decision at trial or in her written decision on the issues currently raised by Appellant. In fact, Appellant's own statement of the Issue on Appeal is whether Judge Murphy's *failure to address* elements of Appellant's claims is grounds for reversal. Additionally, in Appellant's Argument he states:

> "In the present case the only finding of the court was that the respondent has meet (sic) his burden of breach of the Bond for Title by contract by a preponderance of the evidence. There was no analysis of these factors by the court even in light of the testimony of both parties..."

As such, based upon Appellant's own arguments and Brief the trial court did not rule upon the issues he raises on appeal. Additionally, Appellant had a means to have the trial court specifically address and rule upon these issues so as to preserve them for appeal, by virtue of Rule 59(e), SCRCP, but he failed to do so. Based upon the foregoing this Court should not consider the issued raised by Appellant, and the appeal should be dismissed.

III. Even assuming Appellant has somehow preserved his right to present the issues raised on appeal, which Respondent contests, Appellant's own testimony and the evidence presented at trial would not entitle him to any relief sought.

Appellant argues that he is entitled to redeem his property under the theory of 'equitable redemption' as he has made some payments towards the purchase of the property. Appellant bases

his theory upon language in the case of Cody Discount, Inc. v. Merritt, 386 S. C. 570, 629 S.E.2d 697 (Ct. App. 2005) which indicates that the penalties are disfavored. Cody quotes Lewis Premium Inv. Corp., 351 S. C. 167, 568 S. E.2d 361 (2002), which says "a provision in an installment land contract declaring forfeiture in the event of purchaser default can, in particular circumstances, constitute a penalty." Respondent would suggest, however, that the operative phrase of the above-cited quote is 'in particular circumstances.' The facts in the current case are very inapposite of the facts in Cody Discount, and the facts in the current case certainly do not rise to a point of being sufficient to allow Appellant to redeem the property.

In Cody Discount the debtor initially signed an obligation to pay the sum of $44,500.00 on a land sales contract in 1987. The facts of the case indicated that while Ms. Merritt was occasionally delinquent in her payments she always made them and that no party ever held her in default. The facts further state that Ms. Merritt made affirmative attempts to pay off the debt in early 2002, and that she eventually received a payoff statement from Cody Discount indicating a payoff amount of only $793.17 (down from the original $44,500.00), with a late fee of $20.00 per pay period. The facts also indicate that Ms. Merritt had a present ability to pay off the entirety of the loan based upon proceed received, or to be received, following the death of her husband. The trial court then found, and this Court accepted, the facts that Ms. Merritt actually tendered payment in the amount of $833.17, but that said amount was rejected. Based upon the totality of the evidence this Court found that due to the fact that Ms. Merritt was so close to paying off the entire note, due to the fact that she actually attempted to tender payment and due to the fact she was never placed in default that such special, and unusual, circumstances should afford her the right to redeem the property. Such factors are not present here.

In the present case the original Bond for Title sales price between the parties was in the

principal amount of $34,500.00, to be paid in monthly installments with a final balloon payment due in April, 2006. (R. p. 83.) Interest was to accrue at 12% per annum, and attorney's fees and collection costs were to be incurred should the Defendant go into default. (R. pp. 83-84.) The testimony indicates that Defendant was repeatedly delinquent, and Respondent eventually held Appellant in default in 2006 when Appellant failed to make the required balloon payment. (R. p. 32, lines 4-25; R. p. 33, lines 1-5.) Respondent then brought suit against Appellant in Case No.: 2006-CP-18-1510. On July 6, 2007, in said action a Consent Order was entered into by the parties to this action (both of whom were represented by counsel) in which the Appellant agreed that, at the time, he was still indebted to the Respondent in the amount of $34,000.00 out of the original $34,500.00 sales price. (R. p. 2.) Appellant also agreed to quit the premises with forty-five (45) days of the Consent Order. (R. p. 2.)

In an apparent attempt to circumvent the Consent Order Appellant filed bankruptcy to stay all proceedings, and under the Bankruptcy Court approved plan Respondent was named a creditor with an amount owing to him of $34,503.20. While Appellant made some payments to Respondent under the bankruptcy plan, Appellant's bankruptcy was fully dismissed, not discharged, by Order of John E. Waites, Chief Bankruptcy Judge, on January 21, 2010. (R. p. 79) At the time of dismissal (according to the Bankruptcy Court documents submitted at trial by Appellant himself) there was left due and owing Respondent monies in an amount between $15,000.00 and $16,000.00, and when asked at trial if he still owes the Respondent between $15,000.00-$16,000.00 Appellant admitted that "if you go by these documents (the bankruptcy payment ledger submitted by Appellant), yes."(R. p. 67, lines 21-23.)

Notwithstanding the large outstanding balance, and notwithstanding his now-stated desire to remain on the property, Appellant testified at trial that he has made no payment or attempted

payments to Respondent since the dismissal of the bankruptcy. (R. p. 67, lines24-25; R. p. 68, line 1.)

Appellant argues that he wants to redeem the property and pay off the indebtedness to Respondent, and he asks this Court to give him that right, but to date he has taken no affirmative steps to do so. He testified that after the institution of this lawsuit in August, 2010, he 'thinks' his attorney may have made contact with counsel for Respondent to make an offer of payment, but Appellant testified that he did not know what amount he was going to offer so "there was no amount to offer." (R. p. 65, lines 15-16.) Appellant further testified that he had attempted to get financing to pay off the amounts owed Respondent. Upon further questioning, however, Appellant admitted that he had only sought financing through Clayton Mobile Homes *before* the Consent Order judgment of 2007 and that he had not sought any financing close in time to the trial of this matter. Appellant further admitted that there is a judgment of record against him from October 15, 2003, in favor of South Carolina Federal Credit Union in the principal amount of $15,833.60, accruing interest at the rate of 15.99% since 2003, along with an additional taxation of attorney's fees in the amount of $2,375.00. (R. p. 72, lines 4-25; R. p. 73, lines 1-3.)

Based upon the evidence and testimony presented at trial, Appellant's claim for relief under the doctrine of equitable redemption as discussed in Cody Discount, *supra*, clearly fails even if he has preserved that issue for consideration by this Court. The Appellant in Cody Discount was within 'approximately $1,000.00 of paying off an original contract price of $44,500.00." In Cody Discount the Appellant was never held in default; she attempted a payoff to Respondent that was rejected; and she demonstrated a present ability to pay.

In the present case, the Appellant, by his own admissions, owes Respondent in excess of $15,000.00 as of his Bankruptcy dismissal in January, 2010, not including the accruing interest

and attorney's fees, late fees and costs (all of which are contemplated by and called for in the Bond for Title). (R. p. 67, lines 21-23; R. p. 83) As the original sales price was $34,500.00 the Appellant has only managed to pay approximately one-half the total payment due despite the original payoff date being in 2006. Appellant further admitted he has not attempted to send any payments to Respondent since the Bankruptcy dismissal, and he also admitted that the only time he sought financing to pay off Respondent was before 'the judgment', presumably meaning the July 6, 2007, judgment. (R. p. 67, lines24-25; R. p. 68, line 1; R. p. 72, lines 4-25; R. p. 73, lines 1-3; R. p. 2.) Further, Appellant failed to provide any means of being able to make payment to Respondent, and between the 2010 Bankruptcy case dismissal and the large judgment owed to SCFCU it appears unlikely that Appellant could receive any financing on a lot and an older mobile home even if he actively sought it. As such, even if this Court were to entertain Appellant's arguments of equitable redemption under the factors set forth in Cody Discount, the facts of his particular case would clearly not merit any relief.

Additionally, the equitable defense of "unclean hands" would also prevent any assertion of Appellant's equitable claim. Generally where a party "acted unfairly in a matter that is the subject of the litigation to the prejudice of the [other party]" he would not be entitled to equitable relief for matters arising out of the same facts or transaction. *See* Wilson v. Landstrom, 281 S.C. 260, 315 S.E.2d 130 (Ct.App.1984). In the current case, Appellant has defaulted on a Bond for Title to Respondent. (R. pp. 83-84.) Appellant then entered into a Consent Order with Respondent to resolve a prior lawsuit wherein he admitted he owed Respondent $34,000.00 and wherein he agreed to vacate himself from the subject premises within forty-five (45) days. (R. pp. 2-3.) Instead of following through with his obligations under the Consent Order, Appellant instead filed bankruptcy to stay enforcement of the terms of the Order. (R. p. 79) Appellant then failed to make

the required payments to Respondent under the bankruptcy plan and has failed to make any payments or attempted payments to Respondent since. (R. pp. 81-82) Based upon these actions towards unfair and inequitable actions towards Respondent, "unclean hands" would bar any relief to Appellant.

Lastly, equity follows the law. *See* C & S Nat'l Bank v. Modern Homes Constr. Co., 248 S.C. 130, 149 S.E.2d 326 (1966). In the current case the trial court ruled that there was a clear legal breach of contract. Law therefore demands that Appellant is not entitled to any relief. As equity must follow the law, equity would not afford Appellant any relief either.

IV. Any argument that Respondent waived his right to the relief sought in the underlying action, or that Respondent's claim is barred by laches, is without merit.

Appellant argues that Respondent's claim is barred by laches. Laches is an equitable doctrine, which "arises upon the failure to assert a known right." Ex parte Stokes, 256 S.C. 260, 182 S.E.2d 306 (1971). Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195. An argument of laches, even if properly preserved by Appellant, is without merit under the facts and evidence presented in this case.

The facts in the record are that in the present case the Bond for Title called for Appellant to make a final balloon payment to Respondent in April, 2006. (R. p. 83-84.) When Appellant failed to make said payment, Respondent brought an action in the Dorchester County Court of Common Pleas to address the default. Said action was filed in mid-2006, given Case No. 2006-CP-18-1510, wherein Appellant acknowledged his default, and came to conclusion in July 6, 2007,

when the parties entered into a Consent Order. (R. pp. 1-3) Before abiding by the terms of the Consent Order to remove himself from the subject premises, however, Appellant filed Bankruptcy which obviously, by law, stayed any further collection attempts by Respondent. Said Bankruptcy filing was made in 2007, but the Bankruptcy was not fully and finally dismissed until January 21, 2010. (R. pp. 2-3; R. p. 79.) Upon receipt of notice of the Bankruptcy dismissal Respondent then brought the current action in August, 2010, only after affording counsel an opportunity to first provide a demand to Appellant. (R. pp. 9-13.)

Based upon the above, and how quickly Respondent has attempted to enforce his rights after the balloon payment default and after the Bankruptcy dismissal, it is unfathomable that he could be guilty of any 'unnecessary, unreasonable or unexplainable" delay which would lead to any finding of laches. Additionally, Appellant would not have been prejudiced even if Respondent had delayed enforcement of the Bond for Title as Appellant has been, essentially, living on Respondent's property for numerous years without payment of rent, installment payments, taxes or anything else to Respondent.

Appellant's argument of waiver also fails. Waiver is "the intentional relinquishment of a known right." Gibbs v. Kimbrell, 311 S.C. 261, 428 S.E.2d 725 (Ct.App.1993). Other than counsel's stipulation that Respondent was no longer seeking a monetary judgment from Appellant, at no point in the record is there any evidence or testimony that Respondent has ever intended to waive or relinquish his rights to enforce the very clear terms of the Bond for Title. In fact, as stated above, and as the record reflects, Respondent has been diligent, although compassionate, in the enforcement of his rights. As such, any assertion of waiver must fail.

V. If not affirmed on the basis of the above arguments, this Court should affirm the ruling of the Trial Court on other grounds appearing in the Record on appeal pursuant to Rule 220(c), SCACR.

Pursuant to Rule 220(c), SCACR, Respondent would ask that this Court affirm the trial court's ruling and Order for any other basis appearing in the Record of Appeal.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the Record on Appeal, Respondent would respectfully request that this Honorable Court affirm the decision and ruling of the trial court in this matter.

Respectfully submitted,

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December 10, 2012

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent filed herewith complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Designation of Matter and Final Brief of Appellant on all counsel of record by depositing copies of the same in the United States Mail postage prepaid, on December 10, 2012 addressed as follows:

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