IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY AND
SPECIAL CIRCUIT COURT JUDGE

Appellate Case No.: 2019-000203

Stancel E. Kirkland and
El Cid Holdings, LLC, Respondents,

vs

Robert Wolfson, Appellant

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Stancel E. Kirkland brought this action against Robert Wolfson ("Wolfson" or "Appellant") on April 16, 2018, concerning the enforcement of a contract related to ownership of a company named Old South Properties, Inc. In the Complaint, among other things, Respondents sought a declaratory judgment as to rights of the parties pursuant to the contract, and a judgment against Wolfson for actual and punitive damages related to his alleged breach of the contract. The Respondents did not, and has never, sought "rescission" of the contract as a remedy.

Before Wolfson filed a responsive pleading, on June 29, 2018, Stancel E. Kirkland assigned all of his interest in Old South Properties, Inc. to El Cid Holdings, LLC, ("El Cid" or "Respondents") who thereafter intervened as Plaintiff in this matter.

On July 5, 2018, Appellant filed his initial answer and counterclaim. He later filed an Amended Answer and Counterclaims on October 5, 2018.

On November 5, 2018, the case was tried as a non-jury matter before the Honorable Marvin Dukes, sitting as a Special Circuit Court Judge for the Fourteenth Judicial Circuit. On November 15, 2018, Judge Dukes issued a "Final Judgment," finding that:

(1) The terms of the contract, as set forth in two parts signed on May 21, 2017 and July 5, 2017, were not ambiguous.

(2) Wolfson's failure to make payments by the expiration of the "cure" period was undisputed and unexcused.

(3) Wolfson's default activated the self-executing clause of the contract transferring Wolfson's interest in Old South Properties, Inc., to Kirkland as of April 1, 2018, who later assigned his interest to El Cid on June 29, 2018.

(4) Wolfson and Kirkland each retained other advantages and consideration otherwise provided by the contract.[1]

[1] Though not a part of this appeal, with regard to a fictitious "mortgage" Wolfson gave to his son's company, the Court ordered Wolfson to "take all actions necessary to have the appropriate satisfaction of mortgage filed with the Beaufort County Register of Deeds within fifteen (15) days of the date of this Order. To date, Wolfson has failed to do so.

On November 21, 2018, Wolfson filed a "Motion for New Trial, to Reconsider, Alter or Amend Judgment" under Rule 59, SCRCP.

On January 11, 2019, Judge Dukes held a hearing on Wolfson's motion, which he denied on January 16, 2019.

On February 8, 2019, Wolfson filed his Notice of Appeal, and following several requests for extensions, Wolfson served his Initial Appellate Brief on June 19, 2019.

STANDARD OF REVIEW

Declaratory judgments are neither legal nor equitable. *Felts v. Richland Cnty.*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Bundy v. Shirley*, 412 S.C. 292, 301–02, 772 S.E.2d 163, 168 (2015). The standard of review for a declaratory judgment action is, therefore, determined by the nature of the underlying issue. *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n,* 347 S.C. 642, 557 S.E.2d 670 (2001). An action to construe a contract is an action at law, not equity. *Duncan v. Little,* 384 S.C. 420, 424, 682 S.E.2d 788, 790 (2009); *Middleton v. Eubank*, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (S.C. App. 2010).

In a non-jury action at law, the judge's findings of fact will not be disturbed on appeal unless they are without evidentiary support. *Rickborn v. Liberty Life Ins. Co.,* 321 S.C. 291, 468 S.E.2d 292 (1996); *Hiott v. Guar. Nat. Ins. Co.*, 329 S.C. 522, 528–29, 496 S.E.2d 417, 421 (S.C. App. 1997). The trial court's findings of fact have the same force and effect as a jury verdict unless it committed some error of law leading to an erroneous conclusion or unless the evidence is reasonably susceptible of the opposite conclusion only. *Noisette v. Ismail,* 299 S.C. 243, 384 S.E.2d 310 (S.C. App. 1989), *rev'd on other grounds,* 304 S.C. 56, 403 S.E.2d 122 (1991). Therefore, an appellate court must affirm the trial court if there is any evidence that reasonably supports its decision. *Id.* In reviewing the findings, the appellate court must view the evidence and all its reasonable inferences in the light least favorable to the losing party below. *Id.*

Finally, there is a presumption in favor of the correctness of a decree and that the burden of showing error by the trial judge is on the appellant. *Dicks & Gillam, Inc. v. Cleland*, 295 S.C. 124, 127, 367 S.E.2d 430, 432 (S.C. App. 1988).

STATEMENT OF FACTS

This case involves a contract entered into by Stancel E. Kirkland and Robert Wolfson, who were at one time business associates. Indeed, from the mid-1900s through the mid-2000s, they

were involved together in various real estate development projects in Beaufort County. Among their ventures, Kirkland and Wolfson were, at one time, equal owners of Old South Properties, Inc., a real estate firm that conducted business in Beaufort County.

The relationship between Kirkland and Wolfson was often troubled. In one instance, Kirkland sued Wolfson in *Bindon Plantation, LLC v. Robert Wolfson*, C.A. No.: 2012-CP-07-354, which was ultimately heard in the Beaufort County Court of Common Pleas. (Trial Transcript, pp. 34-35). In that case, the Court found that (1) Wolfson had suggested that Kirkland lie to a business associate about the disposition of funds, which Kirkland refused to do, (2) Wolfson presented testimony to the Court that was "highly suspect," and (3) Wolfson wrongfully diverted funds in violation of his obligations he owed to Bindon Plantation, LLC. As a consequence, on March 21, 2017, Wolfson was found personally liable for a judgment in the amount of $28,500.00. (Trial Transcript, pp. 36-37; Exhibit 4).

On May 8, 2017, pursuant to the judgment in *Bindon Plantation*, S. Jahue Moore, Esq., the plaintiff's counsel, filed a motion for a receiver to be appointed "in order to seize the bank accounts, business interests and other assets of the Defendant [Robert Wolfson]. The Receiver should be ordered to liquidate so much of the Defendant's assets as are necessary to satisfy the Final Order for Judgment in this case." (Trial Transcript, p. 37; Exhibit 5).

Thereafter, on May 21, 2017, Wolfson met with Kirkland and Moore to resolve matters. As a result of that meeting, the parties negotiated a Contract that included several provisions. (Trial Transcript, pp. 38-41; Exhibits 1 & 2).

The contract at issue was made in two parts: (1) an agreement dated May 21, 2017, and (2) a Note of Security Agreement dated July 5, 2017. By their own terms, they are meant to act and be construed in conjunction with one another and as a single contract. In fact, the parties admitted

that the two parts are meant to act and be construed in conjunction with one another and as a single contract. (Trial Transcript, pp. 181-182). Moreover, Wolfson himself specifically confirmed in his deposition that the Security Agreement dated July 5, 2017 was a part of the Contract dated May 21, 2017. (Wolfson Deposition, p. 20, lines 20-25; p. 21, lines 1-7).

In fact, Wolfson specifically bargained for terms that benefited him, and only him. Among other things, the Contract provided as follows:

a. The Contract provided that the "Bindon Judgment against Wolfson shall be satisfied." Pursuant to this provision, Moore actually filed a Satisfaction of Judgment with the Court pursuant to the Contract.

b. The Contract provided that Kirkland would withdraw his then-pending request for the Receiver. When Moore filed a Satisfaction of Judgment with the Court, the motion to have the Receiver appointed was terminated.

c. Wolfson agreed to purchase Kirkland's 50% interest in Old South Properties, Inc. by paying Kirkland $80,000 on or before March 1, 2018, with a 30-day period to cure default in the case of non-payment.[2] Wolfson was also required to pay Kirkland another $10,000 on or before January 1, 2019, with a 30-day period to cure default in the case of non-payment. The "interest" in Old South Properties, Inc., was for shares in a corporation, not any specific piece of property owned by Old South Properties, Inc.

d. Following any such default, there was a self-executing consequence for the default, by which Wolfson's interest in Old South Properties, Inc. "shall be the exclusive property of Stancel E. Kirkland."

(Trial Transcript, pp. 38-46; Exhibit 1 & 2).

Neither party claimed any ambiguity to any part of this contract, nor did the trial court find that any existed. Further, the contract included no representation clauses (such as a clause addressing encumbrances or liens), and no special "notice" provisions as to a party's default. In that regard, the default provisions were "self-executing." (Trial Transcript, pp. 46-52).

[2] It is undisputed that the Contract addressed the sale of Kirkland's ownership interest in Old South Properties, Inc., not any particular piece of property owned by Old South Properties, Inc. (Trial Transcript, pp. 84-85).

It is undisputed that Wolfson failed to make the $80,000 payment to Kirkland on or before March 1, 2018, and it is undisputed that Wolfson failed to cure this default within the 30-day grace period. Although Wolfson's reason for not complying with the payment schedule involved his concern about a 3rd party's lien on real estate owned by Old South Properties, Inc., nothing in the contract allowed for any extensions or modifications under such circumstances. Further, there was no agreement or modification that altered or extended the payment period. Indeed, although the Court allowed certain extrinsic evidence into the record, the Court's ruling was based solely on the four corners of the unambiguous contract and upon Wolfson's undisputed and unexcused failure to pay.

The record also reflects that, long before these payments were due to Kirkland, Wolfson simply repudiated his obligations to make the payments. In fact, he did so on several occasions:

- In December 2017, months before the first payment was due, Wolfson contacted attorney Moore and stated flatly that he (Wolfson) was not going to make the payment due under the Agreement, and instead wanted Kirkland and Moore to assist him in other litigation. (Trial Transcript, pp. 52-55).

- On March 1, 2018, Wolfson again "unequivocally" indicated, this time by e-mail that he was not going to make any payments pursuant to the Contract. (Trial Transcript, pp. 58-61, 62-66; Exhibit 9).

- Wolfson actually met again in person with Moore and Kirkland, again stated that he would not make the payments due under the Contract, and again attempted to convince Moore and Kirkland to join his litigation effort against William Gavigan. (Trial Transcript, pp. 66-69).

Following the expiration of the "cure" period, Moore filed this lawsuit on behalf of Kirkland on April 16, 2018. (Trial Transcript, pp. 69-71). Notably, the Complaint did not request "rescission" as a remedy.

On this issue of "anticipatory repudiation," the Court heard the following testimony from Mr. Moore:

Q. Now, I note for the record that this lawsuit was filed by you on April 16, 2018. Was that after you had had your meeting with Mr. Wolfson?

A. I am fairly certain the answer to that question is, yes. I know that it was after he had told us in March -- March the 1st that he was not going to make the payment. As far as I was concerned, he had 30 days by the self-effectuating dates of the contract.

He didn't need any more notice because he had all the notices and I didn't have to give him a notice. He had 30 days from, I believe, March 1st of 2018 to pay $80,000. When he told us March the 1st of 2018, which happens to be the exact day the money was due, that he was going to repudiate his obligation. As far as I was concerned, there had been an anticipatory repudiation of the agreement.

He basically had told us he was going to breach. There was nothing else left to do. We gave him the 30 days to basically pay the money.

Q. Cure the default?

A. To cure the default. Which he knew – he knew about the default to begin with. He had anticipatorily repudiated the agreement, secondly. Thirdly of all, it was a self-effectuating right to cure. He had done none of those things as far as April the 1st. The forfeiture of the interest had taken place. He was in total default. He had repudiated the agreement. He had done, consistent with classic Bob Wolfson, violated the terms of his payment obligations. And I filed this lawsuit basically asking the court to give us some relief from what he had obviously breached.

(Trial Transcript, pp. 71-72).

In response to questions from Wolfson's counsel regarding whether the C ontract declared that "time was of the essence," Moore responded as follows:

Q. There is nothing in either one of these two agreements that says time is of the essence; is that correct?

MR. MATTHEWS: Objection. That's irrelevant. The dates are clearly stated. The consequences of missing dates is clearly stated.

JUDGE DUKES: Well, I'll allow the question. I mean, I can read it. It says what it says what it says.

THE WITNESS: The words time is of the essence are not written in the document. But the document has spelled out very clearly a due date for $80,000 and the repercussions of the self effectuating cure period. The cure period is

specifically stated as 30 days. There is no notice required to kick in the cure period.

As I understand it, when the law has a specific date and a self-effectuating cure period, the words time is of the essence is unnecessary because the document speaks for itself as to the efficacy of a default with a self-effectuating cure period being ignored.

(Trial Transcript, pp. 95-96).

Following Wolfson's failure to meet the terms of the Contract, Kirkland assigned all of his rights in Old South Properties, Inc., and the Contract at issue in this case, to El Cid Holdings, LLC. (Trial Transcript, pp. 81-82). Wolfson made no effort to cure his default prior to the assignment of Kirkland's interest in Old South Properties, Inc. to El Cid Holdings, LLC. (Trial Transcript, pp. 87-88).

As to "notification," other than the lawsuit itself, Moore testified under cross-examination as follows:

Q. Was a notice of default ever sent to Mr. Wolfson?

A. No, sir. And there are two reasons. A, it didn't have to be under the language of the agreement. It was a self-effectuating default period. And, second of all, the man repudiated the obligation to pay in March. The law does not require the doing of a vain act. When a person repudiates his obligations and expresses a clear intent in writing not to honor his commitment, even if the contract had had a requirement of a written notification, which it doesn't, you wouldn't have had to give written notification under the law in South Carolina.

(Trial Transcript, p. 112).

Following the taking of evidence and further argument on the matter, on November 15, 2018, Judge Dukes issued a "Final Judgment," finding in pertinent part that:

- The terms of the contract, as set forth in two parts signed on May 21, 2017 and July 5, 2017, were not ambiguous.

- Wolfson's failure to make payments by the expiration of the "cure" period was undisputed and unexcused.

- Wolfson's default activated the self-executing clause of the contract transferring Wolfson's interest in Old South Properties, Inc., to Kirkland as of April 1, 2018, who later assigned his interest to El Cid on June 29, 2018.

- As to the other provisions of the contract, Judge Dukes found that (1) Kirkland and El Cid Holdings, LLC each waived any further claims under the Agreement by reason of the forfeiture and declared the same to be satisfied, and said satisfaction shall be the Order of the Court, and (2) the mutual releases between Kirkland and Wolfson under the contract were not challenged and remain binding on Kirkland and Wolfson.

(Final Judgment, p. 2-4).

This appeal followed.

ARGUMENT

I. JUDGE DUKES CORRECTLY APPLIED SOUTH CAROLINA LAW CONCERNING THE CONSTRUCTION OF CONTRACTUAL LANGUAGE, AND THERE WAS AMPLE EVIDENCE IN THE RECORD TO SUPPORT HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This case involved the Court's declaratory judgment as to the interpretation of the contract. (Trial Transcript, p. 14). There is no dispute that the terms of the contract are unambiguous. (Final Judgment, p. 2).

As set forth above, there was plenty of evidence to support the Court's conclusion that the two parts of the contract "were meant to act and be construed with one another and as a single agreement," including the testimony of both Moore and Wolfson, and the language in the two documents themselves. (Trial Transcript, p. 91; pp. 181-182).

As set forth above, there was also plenty of evidence to support the Court's conclusion that the contract was supported by consideration provided by, and to, both parties to the contract. (Trial Transcript, pp. 38-46; Exhibit 1 & 2).

It is not disputed that Wolfson failed to make the $80,000 payment on or before the expiration of the cure provision (April 1, 2018). It also cannot be disputed that "nothing in the contract allowed for any extensions or modifications" that would excuse non-payment, including the excuses that Wolfson offered for his non-payment. The contract unambiguously set forth the consequences for Wolfson's breach, and that the transfer of Wolfson's interest in Old South Properties, Inc. to Kirkland was that unambiguous consequence.[3]

Further, as stated in the Court's Final Judgment, although Wolfson's reason for not complying with the payment schedule involved his concern about a third-party's lien on real estate

[3] Indeed, the evidence in the record supported the conclusion that Wolfson affirmatively repudiated his duty to make payment.

owned by Old South Properties, Inc., nothing in the contract allowed for any extensions or modifications under such circumstances. Further, there was no agreement or modification that altered or extended the payment period.[4]

On the basis of the language in the contract, and the evidence before him, Judge Dukes correctly applied the law regarding construction of contractual language, and could rely on ample factual evidence in the record to support his legal and factual findings.

In so holding, Judge Dukes followed the well-established principles of construing the contractual language before him, which required him to ascertain and give legal effect to the intentions of the parties as expressed in the language of the contract. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (S.C. App. 1992); *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). Unremarkably, he found that the contract's language was clear and capable of legal construction. *Smith-Cooper v. Cooper,* 344 S.C. 289, 543 S.E.2d 271 (S.C. App. 2001). His ruling was based on the clear and explicit terms of the contract, and he gave them their plain, ordinary, and popular meaning. *Sphere Drake Ins. Co. v. Litchfield,* 313 S.C. 471, 438 S.E.2d 275 (S.C. App. 1993); *Gilbert v. Miller*, 356 S.C. 25, 30–31, 586 S.E.2d 861, 864 (S.C. App. 2003).

As set forth below, Wolfson's exceptions to Judge Dukes' ruling have no merit, and his appeal must be dismissed.

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[4] Wolfson's argument that his failure to make the $80,000 payment should be excused because of a "physical" inability is as ridiculous as it is self-serving. It is undisputed that Wolfson's accident occurred on May 13, 2018. (Trial Transcript, p. 197, lines 6-8). This date is over two months after the $80,000 payment was due, and over one month after the 30-day "grace" period had ended. Further, Wolfson went to great lengths to point out that he actually borrowed over $90,000 from his son in early March 2017, but Moore testified, instead of paying the money to Kirkland as the contract required, Wolfson simply refused to make the payment, instead attempting to force Kirkland and Moore to assist him in other litigation.

II. JUDGE DUKES' ORDER DID NOT "RESCIND" ANY PART OF THE CONTRACT, NOR WAS RESCISSION SOUGHT BY THE PLAINTIFF.

Perhaps Wolfson's most curious argument is that Judge Dukes' decision had the effect of "throwing out" the provision of the contract that Wolfson could purchase Kirkland's one-half interest in Old South Properties, Inc. In arriving at his decision, Judge Dukes did not "throw out" anything, nor did the Respondents request that he do so. As the well-established principles of construing the contractual language cite above dictated, Judge Dukes actually gave effect to all provisions of the contract by reading them as a whole and giving effect to all of them.

In making this argument, Wolfson simply asks this Court to ignore entirely whole sections of the contract in order to excuse the inexcusable, and to ignore entirely Wolfson's own anticipatory repudiation of his duty to make timely payment as the contract explicitly provided.

For these reasons alone, the authority that Wolfson cites applicable to an equitable "rescission" action is simply inapplicable to the present action. Respondents did not, and have never, sought "rescission"[5] of the contract at issue in this litigation.

III. WOLFSON'S ARGUMENT THAT THE COURT'S FINDING SHOULD BE SET ASIDE BECAUSE THE CONTRACT DID NOT SPECIFICALLY STATE THAT "TIME IS OF THE ESSENCE" IS WHOLLY WITHOUT BASIS.

As an initial matter, the cases cited by Wolfson concerning "time is of the essence" clauses relate to the sale of land, not to the sale of shares of stock in a company such as Old South Properties, Inc. Even Wolfson's own counterclaim asks the Court to identify "to whom this Defendant should deliver his payment and declaring that, in return, the shares of stock in Old South Properties, Inc. referenced in the Agreement attached as Exhibit A to the Complaint shall be

[5] "Rescission of a contract" means "to abrogate, annul, avoid, or cancel a contract." *Black's Law Dictionary* (6th ed. 1993). This case has absolutely nothing to do with "rescission" of any contract.

conveyed to this Defendant Wolfson free and clear." (Amended Answer and Counterclaims, ¶ 42) (emphasis added). For this reason alone, Wolfson's argument fails.[6]

Further, it need hardly be pointed out that the contract in question sets forth specific deadlines for action, and sets forth in equally clear terms the consequences for inaction. In terms of the basic interpretation of a contractual deadline, Wolfson's "buyer's remorse" or other misgivings about meeting his contractual obligations – or his fruitless efforts to leverage his threats of breach to force Moore and Kirkland to support his other litigation efforts – do not excuse his failure to make the required payment on time or the consequences of his failure. *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 593, 658 S.E.2d 539, 543 (S.C. Ct. App. 2008) (A party "is not permitted to reinterpret written contract terms midstream because he is unhappy with the contract he executed."); *Xu Dong Sun v. Wang*, 2014 WL 2957105, at *1 (S.C. App. 2014) (contract enforced where "Appellants had no right to cure and no right to notice under the contract.").

Indeed, to the extent that Wolfson regarded the contract as an "option" to purchase Kirkland's share in Old South Properties, Inc., in addition to the other benefits he received and the consequences of "any" default that he assumed, it is well-settled in South Carolina that "if the option requires performance in a certain manner, time is of the essence and exact compliance with the terms of the option are required." *Cotter v. James L. Tapp Co.*, 267 S.C. 647, 653, 230 S.E.2d 715, 717–18 (1976).

For these reasons, Wolfson's arguments on this point are meritless and must be dismissed.

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[6] Even in cases where time is not originally of the essence, it may be made so by one party giving notice to the other that he will insist on performance by a certain date, provided the time allowed by the notice is reasonable, which is a question of fact for the jury depending on the circumstances of the particular case. *Hobgood v. Pennington*, 300 S.C. 309, 314, 387 S.E.2d 690, 693 (S.C. App. 1989). It is clear that, from the evidence before the fact-finder (especially testimony provided by Mr. Moore concerning Kirkland's demands for payment), Judge Dukes' conclusion that Wolfson breached the contract by failing to make payment by April 1, 2018 was amply supported in the record.

IV. WOLFSON'S ARGUMENT THAT HIS BREACH SHOULD BE EXCUSED BECAUSE HE DID NOT RECEIVE PROPER "NOTICE" OF HIS OWN BREACH IS COMPLETELY MERITLESS.

Wolfson argues that he should have received "notice of default" following his default on his payment obligation and his failure to cure.

As a factual matter, it is undisputed that the contract did not contain a notice provision. Had Wolfson wanted one, he could have bargained for it, but did not. As the Court noted, both Kirkland and Wolfson were experienced businessmen. In fact, they had been negotiating business contracts for decades.

It is not the function of the court to rewrite contracts for parties. *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983). Wolfson's demand that the Court conjure a "notice provision" out of whole cloth where none existed has no basis in law.

In any event, the record is replete with evidence that Wolfson consciously and knowingly defaulted on his obligation to pay $80,000 on March 1, 2018, and failed to cure within 30 days, and thus had "actual notice" of his default. For instance, Moore gave the following testimony concerning his meeting with Wolfson in December 2017:

> THE WITNESS: It would appear that I met with Bob Wolfson and Stan Kirkland on December the 14th. I know it was sometime about then. Stan and myself and Bob met.
>
> BY MR. MATTHEWS:
> Q. Where did you meet?
>
> A. My office.
>
> Q. And what was the purpose of the meeting?
>
> A. Bob had contacted me and indicated that he wasn't going to make the payment due. And I told him that that was unacceptable. And he said we needed to talk, that he had an opportunity that we could make things work to where Stan could make a lot of money.

And I told him Stan and I were not interested in having any further dealings with him other than receiving the money. I remember him very specifically stating to me, Jake, don't be that way. I've got to talk to you. I want to make a proposal.

I said, Bob, the only proposal we're interested in is $90,000 when it's due. **His response was something to the effect of, I'm not going to pay the money**, but I want to come talk to you. I said we'll talk, but we're not changing anything. So he showed up in my office, and myself and Mr. Kirkland and Mr. Wolfson had a conversation.

Q. And?

A. Well, in that conversation, first of all, I brought up the fact that the property had been mortgaged and that we thought that that was contrary to our agreement. The property was now encumbered and that was, in itself, an event of default. It was then he explained to me that the mortgage was fictitious, that there was no mortgage on the property. There was no note and that the mortgage had been on there simply to protect the property.

At which time, I asked the question, how in the name of goodness is a fictitious mortgage on a piece of property designed to protect the property? At which time, he explained to me that he had gotten into a controversy with a man named Gavigan. And that he didn't like Mr. Gavigan. And that he wanted for me and Stan to join forces with him to fight Mr. Gavigan.

(Trial Transcript, pp. 52-54) (emphasis added). Wolfson renewed his abject refusal again in March 2018:

Q. What did Mr. Wolfson indicate to you in December through March about his willingness to pay his debt?

A. It is my belief that in December he told us that he was not going to pay. I know that he didn't pay and **I know that in or about March of 2018 he clearly and unequivocally repudiated the obligation to pay**.

(Trial Transcript, p. 60) (emphasis added).

Wolfson's repudiations of his obligation to make the $80,000 payment within the time to cure, and the fact that he made good on his refusal to pay even through the "cure" period, make his argument regarding "lack of notice" particularly ridiculous. In this case, Wolfson clearly knew

that he was in default, that Kirkland was demanding payment of the $80,000 by March 1, 2018, and that the contract provided for specific consequences in the event of "any default."

Furthermore, even in cases where the contract actually requires that notice be given in a prescribed manner – unlike the instant case – it is "not required where a party has actual notice and has not suffered prejudice by the other's failure strictly to follow the contract." *Hammond v. Tilghman Lakes, Inc.*, 295 S.C. 152, 153, 367 S.E.2d 446, 447 (S.C. App. 1988). Indeed, the very purpose of a notice of default is to give the party allegedly in default an opportunity to cure the default and meet his obligation. *Id.* In this case, as set forth above, the evidence amply supports a finding that Wolfson (1) had actual notice of his default, (2) notice of the applicable "cure" period, (3) notice of the consequences of his default and failure to cure. These findings are consonant with the well-established law that "no one needs notice of what he already knows." *Cleland*, 295 S.C. at 128, 367 S.E.2d at 433. In fact, these findings have not been, and cannot be, disputed.

Even the cases cited by Wolfson are inapplicable, as this case does not involve an installment land contract or mortgage, but instead involves the transfer of interest in a corporation. Further, the cases cited by Wolfson sound in equity, and the case before Judge Dukes was an action at law.

For these reasons, Wolfson's arguments regarding "notice" are baseless and must be dismissed.

V. WOLFSON'S ARGUMENT BASED ON "LACK OF CONSIDERATION" IS BELIED BY HIS OWN TESTIMONY AND ACTUAL LANGUAGE OF THE CONTRACT.

In his Final Judgment, Judge Dukes observes that "[t]here were several provisions in the contract that provided valuable consideration to each party." (Final Judgment, p. 2). Indeed, as

set forth above, both parties admitted that the contract at issue was made in two parts: (1) an Agreement dated May 21, 2017, and (2) a Note of Security Agreement dated July 5, 2017. In fact, Wolfson himself specifically confirmed under oath that the Security Agreement dated July 5, 2017 was a part of the Agreement dated May 21, 2017. (Wolfson Deposition, p. 20, lines 20-25; p. 21, lines 1-7). By their own terms, the two parts of the contract refer to each other and are meant to act and be construed in conjunction with one another and as a single agreement. Thus, there is ample evidence in the record to support Judge Dukes' finding on this point.

In this regard, Wolfson's arguments that any part of the contract was unsupported by consideration, or not properly a part of the Contract, simply have no basis. It should also be noted that Wolfson has retained, and continues to benefit from, the consideration granted to him under the contract, including a satisfaction of judgment and releases of various claims.

For these reasons, Wolfson's arguments regarding "lack of consideration" are baseless and must be dismissed.

VI. WOLFSON'S ARGUMENT THAT THE CONTRACT CONTAINED AN UNLAWFUL "FORFEITURE" CLAUSE IS WITHOUT BASIS AND SHOULD BE DISMISSED.

Finally, Wolfson's argument that the Agreement's provisions were an unenforceable "forfeiture" or "penalty" has no basis in law or fact.

First, the provision providing for transfer of ownership of Old South Properties, Inc. to Kirkland in the event Wolfson failed to pay is not even a "liquidated damage" clause. As was thoroughly discussed at the trial, Wolfson gained significant benefits from this contract as well as an opportunity to gain control of Old South Properties, Inc. If Wolfson failed to take advantage of his option to make the purchase, he could retain the other benefits of the contract and keep his $90,000, but Kirkland would have full ownership over Old South Properties, Inc. In return for the

other benefits in the contract extended to Wolfson, Kirkland would either receive (1) $90,000 by the dates noted in the Contract, or (2) full ownership of Old South Properties, Inc. Wolfson has failed in every possible way to meet the demanding requirements to show that provisions of his own contract are unenforceable "penalties" or even qualify as "liquidated damages." *ERIE Ins. Co. v. Winter Const. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (S.C. App. 2011).[7]

Second, the cases cited by Wolfson entirely concerned actions in equity. This is an action at law, and concerns a contract made by "sophisticated and experienced businessmen. The evidence also confirmed that, at all times relevant, Wolfson had superior knowledge of the books, operations, assets and liabilities of Old South Properties, Inc. than did Kirkland." (Final Judgment, p. 1). It is well-established in South Carolina that, even in cases where enforcement of clear and unambiguous contracts may hold a party to "hardship, nonetheless it is the court's duty to enforce the contract made by the parties. Hardship alone provides no basis for relieving one from a contract." *Gamble, Givens & Moody by Gamble v. Moise*, 288 S.C. 210, 218, 341 S.E.2d 147, 151 (S.C. App. 1986); *Oxman v. Profitt,* 241 S.C. 28, 126 S.E.2d 852 (1962) ("Sound public policy generally requires the enforcement of contracts freely entered into by the parties."). Although Wolfson has not – and cannot – establish that the provision at issue is a "penalty" or "forfeiture," even where a provision is considered a "forfeiture," courts will enforce them where the clause is clear and it is violated. *Wolf v. Colonial Life & Acc. Ins. Co.*, 309 S.C. 100, 108, 420 S.E.2d 217, 221 (S.C. App. 1992).

[7] For the reasons set forth above, Wolfson's various excuses for default have no bearing on the matter, and are belied by his attempts to leverage his default to force Moore and Kirkland to join his litigation efforts against William Gavigan.

CONCLUSION

In short, Wolfson's appeal fails in every possible way, and the final Judgment of Judge Dukes should be AFFIRMED.

Respectfully submitted,

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COUNSEL FOR PLAINTIFF EL CID HOLDINGS, LLC

Columbia, South Carolina
July __, 2019

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY AND
SPECIAL CIRCUIT COURT JUDGE

Appellate Case No.: 2019-000203

Stancel E. Kirkland and
El Cid Holdings, LLC, Respondents,

vs

Robert Wolfson, Appellant

PROOF OF SERVICE

I, the undersigned employee for Richardson Plowden & Robinson, P.A., counsel for the Respondents, do hereby certify that I have served a filed copy of the Initial Brief and Designation of Matter by causing a copy of the same to be deposited in the United States mail, first class postage prepaid, addressed as indicated below on this 19th day of July, 2019:

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July 19, 2019

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RE: *Stancel E. Kirkland and EL CID Holdings, LLC v. Robert Wolfson*
C/A No.: 2019-000203
Our File No.: 9354-001

Dear Ms. Kitchings:

Enclosed herewith for filing is the original Initial Brief of Respondent concerning the above referenced matter, together with the original Designation of Matter and Proof of Service.

With kind regards, I am

Sincerely,

RICHARDSON PLOWDEN & ROBINSON, P.A.

Mary Jane Wilson
Legal Assistant

/mjw
Enclosures as Stated

cc: Maryann E. Blake, Esquire
H. Fred Kuhn, Jr., Esquire
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