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

CASE NO.: 2018-CP-07-00796

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

vs.

Robert Wolfson, Appellant.

FINAL REPLY BRIEF OF APPELLANT

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PREFATORY STATEMENT

In its Brief, the Respondent enumerates six (6) Arguments that do not align precisely with the five (5) issues raised by Appellant in his Statement of Issues on Appeal. For the sake of simplicity, Appellant in this Reply Brief will adopt Respondent's numbering and headings and reply to each of the Arguments raised by Respondent as set forth in Respondent's Brief.

I. JUDGE DUKES CORRECTLY APPLIED SOUTH CAROILNA 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.

The Respondents' Brief fails to address the issue raised in this argument – Was the Appellant's delay in tendering the first installment payment, after the due date for the first installment payment but prior to the due date for payment in full, a "material" breach?

"For one party's obligation to perform to be discharged, the other party's breach must be material. A breach of a contract is a "material breach" when it involves an essential and inducing feature of the contract, or makes it impossible for the other party to substantially perform under the contract. A material breach is more than incidental and touches the fundamental purpose of the contract, defeating the object of the parties entering into the contract." 17(a) Am.Jur.2nd Contracts §670 (May 2019 Update) (footnoted citations omitted).

The Courts have formulated various "tests" to assist in determining whether a breach of contract is "material."

For example, whether a breach of contract is material is measured by examining the "extent to which the injured party will obtain the substantial benefit . . . reasonably anticipated." *Harris v. Brownlee,* 477 F.3d 1043, 1047 (8th Cir. 2007). In the instant case, the Respondent, but for his refusal to accept Appellant's attempt to make the first installment payment, will obtain the "substantial benefit" which he "reasonably anticipated" when the contract was written. "A material breach of contract is a non-performance of a duty that is material and important as to justify the injured party in regarding the whole transaction as at an end." *Celler Dwellers, Inc. v. D'Alessio*, 993 A.2nd 1, 5 (Supreme Judicial Court of Maine, 2010).

The Restatement (Second) of Contracts §241 lists five (5) "circumstances significant in determining whether a failure is material." These circumstances (in bold) and their applicability to the facts of this case, are as follows:

(a) **The extent to which the injured party will be deprived of the benefit which he reasonably expected**. The Respondent El Cid will receive payment in full and every penny which it "reasonably expected."

(b) **The extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived**. The Respondent El Cid will be deprived of no benefit but, as noted, will be paid in full, and but for its refusal to accept the payments, would have been paid in full prior to the time in which full payment was required.

(c) **The extent to which the party failing to perform or to offer to perform will suffer forfeiture**. The Appellant Wolfson, under the terms of the Master's Order, loses his one-half ownership of Old South Properties, without the Respondent El Cid being required to pay one penny.

(d) **The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances**. The likelihood of Appellant Wolfson curing his failure was 100%, as he stood ready, willing, and able to make payment in full, albeit late, and was prevented from doing so only by the Respondent El Cid's refusal to accept his money.

(e) **The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing**. The Appellant Wolfson's delay in tendering the first payment was the result of two (2) factors - - initially the lien filed on Old South Properties, which was not anticipated by any party at the time the contract was drawn,

and subsequently the delay was extended by his physical incapacity. The Respondent El Cid's attempt to draw a distinction between a lien on the stock of Old South and a lien on Old South's property is disingenuous. A corporate stock certificate is significant only because it signifies ownership of the underlying corporate asset. Respondents' argument that a lien on the underlying asset is immaterial is like arguing that a mortgage on a house would be immaterial in a real estate contract to transfer a deed.

There is a total absence of any evidence indicating that the Appellant's delay in tendering the first installment payment caused any harm to the Respondent El Cid or caused the Respondent El Cid to suffer any prejudice. In fact, if the Respondent had not refused the Appellant's money, the Respondent would have received payment prior to the time that the final installment payment was even due.

As a final note, given the length of time that has now passed in the event the Master-In-Equity's Order should be reversed, Appellant agrees that it would be fair given the liquidated nature of the amount of money at issue for the Appellate Court to add interest at the legal rate to the principal amount.

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

Again, the Respondents fail to address the issue raised by this argument – Was the Appellant's delay in tendering the first installment payment "justified," initially by the unforeseen lien placed upon the assets of Old South (which was just as significant as if the lien had been placed upon the stock certificate indicating ownership of Old South), which delay was subsequently extended by Wolfson's physical incapacity.

Instead, Respondents' attempt to avoid the issue completely by arguing that there was no "rescission" of the contract.

The "bottom line" of the Court's ruling is that Kirkland was relieved of his obligation to transfer his one-half ownership interest in Old South to Wolfson for the total sum of $90,000.00. The Trial Court "rescinded" this portion of the contract, and to add insult to injury, enforced the penalty or forfeiture provision in the subsequent so called "Note and Security Agreement" pursuant to which Wolfson forfeited his one-half interest in Old South to Kirkland.

As Respondents correctly notes, Respondents' Brief, pg. 13, fn. 5, the rescission of a contract means "to abrogate, annul, void, or cancel a contract." In this case the Court did not rescind the entire contract, but rather, rescinded a portion of it, relieving the Respondent of its obligation to sell its interest in Old South to Appellant, but leaving in place the remainder.

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.

In its response to this argument, the Respondents argue that the cases cited by the Appellant in Appellant's Brief regarding "time is of the essence" are distinguishable because they relate to the sale of land, as opposed to the sale of stock. As previously noted, however, the stock certificates in the corporation are significant only because they evidence ownership of the assets of the corporation. There is no evidence in this case that the stock certificates of Old South have any value separate and apart from the assets of Old South.

The Contract, drafted by Kirkland's attorney, and executed by the Appellant without the benefit of advice of counsel, contains nothing, other than the due dates, indicating that time is of the essence. There is absolutely no evidence that time was of the essence. In other words, there is no evidence that the Respondent El Cid was prejudiced in the least by the Appellant's delay in tendering payment of the first installment payment.

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

In its Brief, the Respondent does not dispute the fact that the Appellant was never given notice by the Respondent that the Respondent was holding the Appellant in default for failure to timely make the first installment payment. Instead, the Respondent argues that notice that Respondent was holding the Appellant in default would have been meaningless because the Appellant should have known he was in default. This argument misses the point.

All the Appellant knew was that he had not made the first installment payment on the due date recited in the Contract. Payment of the full purchase price was not yet due. A lien had unexpectedly been placed upon the assets of Old South, and the Appellant had filed suit to have the lien declared invalid and removed. He had discussed this lawsuit with Kirkland and Kirkland's attorney, who had both refused to join him in prosecuting this litigation. While the Appellant was hospitalized, the lien issue was resolved, and the Appellant attempted to make his installment payment, which was refused.

In short, at no time prior to the time his tender was refused, was the Appellant informed that the Respondent was holding him in default or in breach of the contract. Although the Appellant knew that the Respondent desired payment, the Appellant was never told that by failing to make the first payment prior to the due date the Respondent would consider that to be a material breach of the terms of the agreement, justifying refusal of any subsequent payment and the forfeiture of the Appellant's interest in Old South Properties.

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

In its Brief, the Respondent seeks to merge the Agreement dated May 21, 2017, which is supported by consideration, with the "Note and Security Agreement" dated July 5, 2017, which the Respondent admits is not supported by consideration. Respondent's Brief, pp. 17-18.

The foregoing documents are not two parts of the same contract. In other words, the so called "Note and Security Agreement" is not part of the handwritten Agreement dated May 21, 2017 (ROA, pg. 346), but rather, is a document whose execution is one of the **requirements** of the Agreement dated May 21, 2017.

The Agreement dated May 21, 2017 calls for the Appellant to pay a total sum of $90,000.00 for the Respondent El Cid's one-half interest in Old South Properties. The Agreement further provides that this "$90,000.00 obligation" will be "secured by a mortgage." ROA, pg. 347, ¶8. In addition to the mortgage, the Agreement states:

> "Old South Properties shall also guarantee the obligation of Wolfson and **Wolfson shall provide a security agreement as to his interest in Old South Properties**."

Id., Agreement, ¶9 (emphasis added).

The Respondents admit that the document entitled "Note and Security Agreement" is the "security agreement" referenced in paragraph 9 of the Agreement.

The "Note and Security Agreement" dated July 17, 2017 (ROA, pg. 350), also prepared by Kirkland's attorney, goes way beyond what is contemplated by the Agreement. The Agreement simply recites that Wolfson "shall provide a security agreement as to his interest in Old South Properties." ROA, pg. 347 ¶9. Giving these words their plain meaning, the Agreement requires that Wolfson will provide a document giving the Respondent El Cid a

secured interest in his one-half ownership interest in Old South Properties so that in the event Wolfson should fail to pay all or any portion of the $90,000.00 called for in the Agreement, the Respondent El Cid could foreclose on and sell Wolfson's interest in order to secure payment of the unpaid portion of the purchase price and complete the transaction.

The so called "Note and Security Agreement," however, goes way beyond any "Security Agreement" contemplated by the plain language of the Agreement. Rather than simply giving the Respondent the right to foreclose on Appellant's interest in Old South Properties, thereby obtaining the payment contemplated under the terms of the Agreement, after which Wolfson in turn obtains ownership of Old South Properties, the "Note and Security Agreement" recites that the $90,000.00 is an absolute obligation owed pursuant to "this Note," and further, "should Robert Wolfson forfeit on his obligations hereunder, Wolfson shall transfer his interest (in Old South Properties) at the election of Stancel E. Kirkland to Stancel E. Kirkland."

In other words, the "Security Agreement" contemplated by the original Agreement, was replaced with an entirely new "Agreement" containing the forfeiture provision. The "Note and Security Agreement" is an entirely new Agreement which, as Respondent candidly admits, is not supported by any consideration. Accordingly, it is unenforceable.

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

Respondents argue that the Appellant Wolfson's forfeiture of his one-half ownership of Old South Properties, despite the fact that the so called "Note and Security Agreement" expressly calls this a "forfeit," (ROA, pg. 351) is not forfeiture or a penalty. This argument simply ignores common sense. Normally, if two parties enter into a contract pursuant to which the buyer agrees to buy the seller's property for a certain price, and the buyer fails to pay that price, the buyer simply does not get to acquire the seller's property. In this case, however, not only did the buyer lose the right to acquire the seller's property for the purchase price, but the bottom line consequence is that the seller, for free, acquired the buyer's property. Common sense dictates that this consequence is nothing more, nor less, than a penalty.

The second argument advanced by Respondent is that this is an action at law, and the cases cited by Appellant in his brief concern actions in equity. First, as noted in the Standard of Review, Appellant's Brief, pp.10-11, this is an action in equity in which the Respondent sought declaratory relief. Second, enforcement of the forfeiture clause is not simply a "hardship" but an unenforceable "penalty," in which the buyer, simply by failing to purchase the seller's property as agreed, forfeits buyer's valuable property to seller for free.

CONCLUSION

It is, accordingly, respectfully requested that the South Carolina Court of Appeals reverse the Order of the Beaufort County Master-In-Equity and compel the Respondent to accept Appellant's tender of the purchase price agreed upon for Old South Properties and thereby acquire ownership of Old South Properties, or alternatively, declare the penalty or forfeiture provision invalid allowing Appellant to retain his one-half ownership interest in Old South Properties, or such other relief as this Court may deem to be proper.

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CERTICIATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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