

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.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did Appellant waive appellate review of certain issues and arguments which were not raised to and ruled upon by the Master in Equity in the proceedings below?
- II. Did the Master in Equity correctly refuse to compel specific performance in light of clear and substantial evidence that the Purchase Agreement submitted by Appellant does not comply with the Consent Settlement Order and that its own principal's acts of non-compliance bar equitable relief?

STATEMENT OF THE CASE

Plaintiffs initiated these proceedings with the filing of a Lis Pendens, Summons and Complaint in the Charleston County Court of Common Pleas on June 15, 2015. The Complaint asserts a single cause of action for declaratory judgment. (R. pp. 27-31) Defendants' Answer, Cross-Claim, Counterclaim, and Third-Party Complaint (hereinafter the "Answer") was filed September 17, 2015. (R. pp. 62-71) Defendants' Answer denied the allegations asserted against them in Plaintiffs' Complaint, asserted substantive defenses to those allegations, and alleged claims against Plaintiffs and Third-Party Plaintiff PMC, LLC for foreclosure of a mortgage held by Defendant/Third-Party Plaintiff Dillon¹. Plaintiffs filed their Reply, and the matter was referred to the Master in Equity for Charleston County. (R. pp. 4-5; 72-78)

Defendants moved for appointment of a receiver, which was denied via Order filed July 7, 2016. (R. p. 7) Defendants next moved for summary judgment on July 28, 2016, and the subsequent mediation resulted in entry of a Consent Settlement Order (the "Consent Settlement Order") on September 12, 2016. (R. pp. 8-12) Plaintiffs thereafter filed their Notice of Motion and Motion to Enforce Settlement Order, which Defendants opposed via their response in opposition and supporting exhibits. (R. pp. 139-184) Following oral argument before the Master in Equity on June 14, 2017, the court entered its September 27, 2017 Order Denying Plaintiffs' Motion to Enforce Settlement Order. (R. pp. 15-23)

¹ Marilyn L. Dillon and her affiliated entity, JLJ Associates, LLC both are Respondents in this appeal. For ease of reference Respondents Marilyn L. Dillon, Third-Party Plaintiff below, and JLJ Associates, LLC, Defendant below and incorrectly identified by Plaintiffs as JLJ, LLC, will be referred to collectively as "Respondents". Respondent Marilyn L. Dillon will be referred to individually as "Dillon", and Respondent JLJ Associates, LLC will be referred to as "JLJ Associates, LLC".

Following denial of their Motion to Enforce Settlement Order, Plaintiffs filed their Motion to Alter or Amend Judgment pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure on October 9, 2017, followed by an amended motion on October 10, 2017. (R. pp. 191-199) Defendants again opposed Plaintiffs' requested relief via written memorandum and supporting exhibits. (R. pp. 209-213) The motion was denied via Form 4 Order entered December 20, 2017. (R. pp. 24-25) Plaintiffs thereafter filed their Notice and Amended Notice of Appeal² in this Court.

² Appellant's Amended Notice of Appeal clarifies that C-Miller Properties, LLC, Plaintiff below, is the sole Appellant. For purposes of this brief, C-Miller Properties will be referred to as "Appellant", and Cynthia Miller, the sole member of C-Miller Properties, LLC, will be referred to individually as "Miller".

FACTS

This appeal involves a family dispute regarding money and real estate. Prior to these proceedings, Respondent Dillon was the owner and holder of a modified promissory note dated March 22, 2012, in the amount of Four Hundred Thirty-Four Thousand Fifty-Nine and 00/100 (\$434,059.00) Dollars. (R. p. 92) The modified promissory note (the "Modified Note") is a renewal and modification of the prior note in the original principal sum of Three Hundred Sixty Thousand and 00/100 (\$360,000.00) Dollars dated June 1, 2006. (R. pp. 93-94) The loan at issue in the original and modified promissory notes was secured by a mortgage (the "Mortgage") dated February 5, 2008, and recorded February 1, 2008, in the office of the Register of Mesne Conveyances for Charleston County at Book 2 650 on page 250. (R. pp. 95-101) The Mortgage constituted a first priority lien on the real property at issue in these proceedings (the "Subject Property") described as follows:

ALL that parcel, tract and piece of land in the County of Charleston, State of South Carolina beginning Eleven Hundred Fifty (1,150') feet north of Highway 162 on Highway 17; thence for Two Hundred Ninety-Seven and Fifty-Six-Hundredths (297.56') feet in a northerly direction to a point, thence for Thirty-Six and Forty-Hundredths (36.40') feet in a northerly direction to a point, thence easterly direction for Twelve and Six Hundredths feet (12.06') to point; thence in a northerly direction for Fifteen (15') feet to a point; thence for Twenty-Five (25') feet in an easterly direction to a point; thence in a northerly direction for One Hundred Twenty-Seven and Ninety-Nine-Hundredths (127.99') feet to a point; thence in an easterly direction for Sixty Seven and Twenty Hundredths (67.20') feet to a point; thence in a southerly direction for One Hundred Eleven and Sixty Hundredths (111.66') feet to a point; thence in a southerly direction for One Hundred Fourteen (114') feet to a point; thence in a southerly direction for Two Hundred Eighty-Eight and Fourteen-Hundredths (288.14') feet to a point; thence in a westerly direction for Eighty-Two (82') feet to the beginning point.

Further being the same property bounded on the North by Wallace Creek, on the East and South by the lands of Ernest C. Seel, et al, and on the West by U.S. Highway 17 (Savannah Highway).

BEING the same premises conveyed to the mortgagors herein by deed from Peter Miller as Trustee of the Peter Miller Living Trust dated December 31, 1999 dated August 30, 2002 and recorded in the RMC Office for Charleston County in Book U419, Page 263., and 1/2 interest in Book H610, page 775, dated December 28, 2006 and filed December 29, 2006.

TMS #: 244-00-00-122 (*Id.*)

Simultaneous with the execution and delivery of the Modified Note, Respondent Dillon and non-party Miller Group Properties, Plaintiff below, executed and caused to be recorded a Modification of Mortgage Agreement (the "Mortgage Modification") dated March 23, 2012, and recorded July 11, 2012, in the Office of the RMC for Charleston County in Book 263 at page 507. (R. pp. 102-105) Thus, the titleholders of record for the Subject Property became Appellant C-Miller Properties, LLC, Respondent JLJ Associates, LLC, and Third-Party Defendant below, PMC, LLC. (R. pp. 106-115) Further, each conveyance was made subject to the Mortgage, and, in fact, the deed to JLJ Associates, LLC and PMC, LLC expressly states:

WHEREAS, the grantor hereby informs the grantees the subject property interest conveyed and the property described in EXHIBIT A is subject to a Mortgage recorded in Book S650 at Page 250 in the RMC Office for Charleston County, South Carolina.

(R. p. 110)

It further appears undisputed that in light of numerous mortgages and conveyances, the sisters acquired from their parents varying degrees of ownership in the Subject Property: 50% to Appellant, 40% to Respondent JLJ Associates, LLC, and 10% to PMC, LLC. The nugget of the dispute between the parties had to do with whether transfer of other real property not at issue here, and the subsequent transfer of a 40% interest in the Subject Property to Respondent JLJ

Associates, LLC were sufficient to satisfy the note held by Dillon. However, that issue was resolved by way of the Consent Settlement Agreement which is the subject of this Appeal.

STANDARD OF REVIEW

Pursuant to South Carolina law, settlement agreements are viewed as contracts. *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621-622 (Ct. App. 2012) (quoting *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (citing *Pruitt v. S.C. Med. Malpractice Liab. Join Underwriting Ass'n.*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (finding enforcement of the terms of a settlement agreement is a matter of contract law); *Ecclesiastes Prod. Ministries v. Outparcels Assocs.*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (stating a release agreement is a contract and contract principles of law should be used to determine what the parties intended) (additional citations omitted)).

A case that presents both legal and equitable issues presents a divided scope of review. Accordingly, “a legal question in an equity case receives review as in law.” *South Carolina Dept. of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (2008) (quoting *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003)). Appellate courts may decide questions of law “with no particular deference to the trial court.” *Id.* (citing *Doe ex rel. Legal Guardian v. Barnwell School Dist. 45*, 369 S.C. 659, 662, 633 S.E.2d 518, 519 (Ct. App. 2006) (additional citation omitted)). In reviewing a final judgment entered by a master in equity, the Court is free to determine facts in accordance with its own view of the preponderance of the evidence. *Id.*, citing *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 391 S.E.2d 538 (1989). While the scope of its review is broad, the Court should not disregard the findings of the master in equity, who “saw and heard the witnesses and was in a better position to evaluate their credibility.” *Tiger, Inc.*, 301 S.C. at 237, 391 S.E.2d at 543.

ARGUMENTS

Appellant's quixotic effort to compel specific performance of the September 12, 2016 Consent Settlement Order notwithstanding its principal's well-documented non-performance with the terms of that Order is misguided. To begin, Appellant relies on arguments and issues that were never raised to and ruled upon by the Master in Equity and are, therefore, not subject to appellate review in this Court. Further, where, as here, substantial record evidence exists to support the Master in Equity's determination that Appellant's principal willfully failed to perform her obligations under the Consent Settlement Order, equity and the law of contracts do not permit the relief Appellant seeks. Thus, and for the reasons explained in greater detail herein, the Orders below should be affirmed in their entirety.

I. APPELLANT HAS WAIVED APPELLATE REVIEW OF CERTAIN ISSUES AND ARGUMENTS WHICH WERE NOT RAISED TO AND RULED UPON BY THE MASTER IN EQUITY IN THE PROCEEDINGS BELOW.

On appeal, Appellant seeks to expand its grounds for relief well beyond those included in the Motion to Enforce Settlement Order and subsequent Motion and Amended Motion to Alter or Amend Judgment. These thinly disguised attempts to expand the scope of appellate review are inappropriate and should be rejected out of hand. As the South Carolina Supreme Court has observed, "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues. . . . [Thus, i]t is axiomatic that an issue cannot be raised for the first time on appeal." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dec. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). These stringent preservation requirements serve to "enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Id.* (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724

(2000)). Inasmuch as Appellant failed to make these arguments and obtain a ruling on them from the Master in Equity, they should be deemed waived and not considered on appeal.

Appellant moved to enforce the Consent Settlement Order via motion filed April 28, 2017. (R. pp. 139-141) In that motion, Appellant argued she was entitled to enforcement of the Consent Settlement Order *vis a vis* an order compelling Respondents to execute its proposed Real Estate Purchase Agreement. (hereinafter “the Purchase Agreement”) (R. pp. 149-155) At oral argument, Appellant’s arguments were simple and straightforward – Appellant had until March 11, 2017, to present a purchase contract; it failed to obtain all the necessary signatures for the Purchase Agreement; Respondents “summarily” rejected the un-ratified Purchase Agreement; and, nevertheless, Appellant should have been given additional time to negotiate the terms of the Purchase Agreement with Respondents³. (R. pp. 220, line 6 – p. 223, line 17)

The gravamen of Appellant’s argument in support of enforcing the Consent Settlement Order was simple: Respondents summarily rejected the Purchase Agreement (an offer Miller asserted effectively complied with the terms of the Consent Settlement Order irrespective of her non-performance, her failure to cooperate or to obtain all the required signatures, her failure to obtain a financing commitment letter, and her failure to pay any earnest money as consideration for the purchase agreement). (R. pp. 17-22; p. 220, line 20 – p. 223, line 17)

³ Indeed, at oral argument of the Motion to Enforce Settlement Order, Appellant’s counsel referred to the remaining issues she now presses on appeal as “collateral matters”. (R. p. 221, lines 8-9)

The Master in Equity rejected Appellant's contentions, concluding instead that the Purchase Agreement did not comply with the express terms of the Consent Settlement Order, that Appellant could not seek specific performance in light of Miller's own non-performance of the obligations imposed upon her by the Consent Settlement Order, and that an order compelling Respondents' compliance with the Consent Settlement Order (and by extension Appellant's dubious Purchase Agreement) would result in prejudice to Respondents. (R. pp. 15-23)

Similarly, in its initial Motion to Alter or Amend Judgment pursuant to SCRCp 52(b) and 59(e) filed October 9, 2017, Appellant asserted the Master In Equity erred in three specific particulars: (1) in finding the Purchase Agreement was invalid because it was not ratified as required by the Consent Settlement Order; (2) in concluding Miller's own non-performance in failing to cooperate with the listing agent and not paying property taxes prevented her from seeking specific performance; and (3) in ruling that enforcement of the Consent Settlement Order would unfairly prejudice Respondents and would further require setting aside the deed in lieu of foreclosure. (R. pp. 193-194) In its "amended" motion filed the next day, October 10, 2017, Appellant effectively re-stated the grounds for relief asserted in the original motion. (R. pp. 197-199). It appears that the only reason for the amendment of the motion was to remove the remaining Plaintiffs from the action who, notably, have not joined in this appeal.

In a stark departure from the arguments to the lower court, Appellant's Brief to this Court significantly alters and expands its arguments well beyond those presented to the trial court. For example, Appellant argues for the first time on appeal that the Master in Equity committed

“plain” error by improperly weighing testimonial affidavits⁴ and other evidence of Miller’s non-performance, failing to find Respondents acted in bad faith, and in rejecting Appellant’s arguments with regard to an extended closing date and “undoing” the deed in lieu of foreclosure. These transmutations violate the long-standing rule that appellate courts of this State “do not recognize the plain error rule. The appellants have the responsibility to identify errors on appeal, not the Court. South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal.” *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) and citing *Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.E.2d 838 (1997)).

Appellant never made or received a ruling on many of the broadly sweeping arguments regarding the weight to be given affidavits or Respondents’ alleged (but unsubstantiated) acts of bad faith to the Master in Equity. Instead, its arguments were limited to whether it presented a valid Purchase Agreement and whether Miller’s actions barred equitable relief in the form of an order compelling specific performance. As such, any arguments other than or in addition to those raised to and ruled upon by the Master in Equity should be deemed waived and not subject to further appellate review.

⁴ Specifically, at oral argument, Appellant never directly challenged the admissibility or weight of any testimonial affidavits submitted for the court’s consideration at oral argument of the Motion to Enforce Settlement Order or her subsequent Motions to Alter or Amend Judgment. Similarly, neither the motion nor the amended motion makes any reference to improper or erroneous consideration of testimonial affidavits. (Cf. Appellant’s Br. at pp. 14-15) In like fashion, there was no evidence or finding below, and Appellant has not argued prior to submission of the brief to this Court, that Respondents acted in bad faith or in any manner inconsistent their rights and obligations pursuant to the Consent Settlement Order beyond moving to enforce their rights upon Appellant’s breach of the terms thereof. (Cf. Appellant’s Br. at pp. 16-18)

II. THE MASTER IN EQUITY DID NOT ERR IN REFUSING TO COMPEL SPECIFIC PERFORMANCE IN LIGHT OF CLEAR AND SUBSTANTIAL EVIDENCE THAT THE PURCHASE AGREEMENT SUBMITTED BY APPELLANT DOES NOT COMPLY WITH THE CONSENT SETTLEMENT ORDER AND THAT ITS OWN PRINCIPAL'S ACTS OF NON-COMPLIANCE BAR EQUITABLE RELIEF.

At its core, Plaintiffs' Motion to Enforce Settlement Order is one for specific performance. That is, they sought an order from the Master in Equity compelling Respondents to divest their interest in the subject property on less than fair terms. The Master in Equity correctly recognized that the proposed Purchase Agreement failed to meet the requirements of the Consent Settlement Order and that Miller's acts of non-performance served as a further impediment to the grant of equitable relief. Thus, the Master in Equity did not err in denying Plaintiffs' Motion to Enforce Settlement Order and subsequent Motion and Amended Motion to Alter or Amend Judgment. For these reasons, explored in greater detail below, the Orders below should be affirmed in their entirety.

Specific performance should be compelled only where no adequate legal remedy is available and specific performance of the contract is equitable to the parties. *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 628 (Ct. App. 2004) (quoting *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000)). In order to compel specific performance, the 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." *Id.* (quoting *Ingram*, 340 S.C. at 106, 531 S.E.2d at 291).

The first element that must be satisfied in Appellant's quest to compel specific performance is clear evidence of a valid agreement. Neither party, however, disagrees that the

September 12, 2016 Consent Settlement Order is valid or enforceable. Indeed, the Consent Settlement Order satisfies both elements necessary to be enforceable – it has been entered into the court’s record and has been acknowledged and placed on the record in open court. *See Motley v. Williams*, 374 S.C. 107, 111, 647 S.E.2d 244, 236 (Ct. App. 2007) (noting requirements of Rule 43(k) of the South Carolina Rules of Civil Procedure and collecting cases). Obviously, Appellant, as the party seeking to enforce the terms of the Consent Settlement Order, does not challenge its existence or validity.

Going further, neither party materially disputes the key terms of the Consent Settlement Order. That Order requires, in part, the following:

1. Within one hundred and eighty (180) days of the date of the filing of [the] Consent Order. . . Plaintiffs [Appellant] must provide Defendants [Respondents] with one of the following:
 - a. A ratified contract to sell the property identified as TMS # 244-00-00-122 (the Subject Property”) [described, *infra*] for Eight Hundred Fifty Thousand and 00/100s (\$850,000.00) or higher; or
 - b. An unqualified loan commitment letter from a reputable lender licensed by the state or federal government for a loan on commercially reasonable terms in an amount sufficient to pay the debt owned [sic] Defendants/Third Party Plaintiff as more fully described in the Answer, Counterclaim, Cross-Claim and Third-Party Complaint filed in this matter, with the caveat that the attorneys’ fees due to Defendant/Third-Party Plaintiff Marilyn L. Dillon will be attorney’s fees and costs actually incurred by her related to this matter and not the attorneys’ fees provided for under the Modified Note, Mortgage and other related loan documents.
2. If Plaintiffs obtain a ratified contract or loan commitment as described in paragraph 1 hereof, any such sale or refinance must be closed within Two Hundred Seventy (270) days of the date of the entry of this consent order.

(R. p. 9)

In addition to the terms outlined in the preceding paragraph, failure to obtain a ratified purchase contract or loan commitment, as well as to close or re-finance within 270 days from the

date of entry of the Consent Settlement Order, constituted default. (R. p. 10, ¶¶ 3-4) The Consent Settlement Order also contained provisions governing appointment of a real estate broker to handle the listing, as well as for the payment of regular expenses, including upkeep and maintenance, taxes, and insurance. (*Id.*, ¶¶ 5-6) Furthermore, the Consent Settlement Order required the parties to execute and deliver to counsel for Respondents a deed in lieu of foreclosure to be held in trust pending Miller's compliance with her obligations thereunder. (R. p. 11, ¶¶ 13-14)

These provisions are not complicated or difficult to understand. Indeed, Appellant's counsel succinctly characterized the Consent Settlement Order as follows:

Per that settlement agreement, the Plaintiffs, Ms. Miller -- the Millers -- were given a period of time to either produce a contract to purchase the property that the Dillons had the mortgage on, or to produce a commitment letter from a lender that would allow the property to be refinanced and pay the Dillons their mortgage and everybody would go on about their business. . . . I think it's really a simple matter.

(R. p. 220, line 25 – p. 221, line 13) At no point, however, did Appellant seek to contradict, alter, or expand the rights and obligations set forth in the Consent Settlement Order until faced with the consequences of failing to comply with them. *See* Section II.C., addressing Miller's non-performance, *infra*. Rather, the real dispute between the parties is simple and hinges on whether Appellant's proffered Purchase Agreement was unratified and untimely and whether Miller failed to perform her obligations pursuant to the Consent Settlement Order.

A. The Purchase Agreement Does Not Comply With the Consent Settlement Order or South Carolina Contract Law.

Appellant had two options to effect compliance with the Consent Settlement Order: (1) present “a ratified contract to sell the property for Eight Hundred Fifty Thousand and 00/100s (\$850,000.00) dollars or higher. . .” within 180 days of the date of filing of the Order, or

March 11, 2017; **OR** (2) deliver an unqualified commitment letter from a reputable lender in an amount sufficient to pay the debt owed by Plaintiffs below. The Master in Equity determined Miller failed to produce a valid loan commitment letter⁵ or a valid ratified contract and, therefore, Appellant was not entitled to specific performance. The Master's holding is supported by substantial record evidence and should be affirmed.

Appellant conveniently overlooks the fact that Miller consented to entry of the Consent Settlement Order and now challenges the ratification provision to which she did not initially object at the June 14, 2017 hearing on her Motion to Enforce Settlement Order. At that hearing, at which all family members were present, Miller agreed with the basic terms of the Consent Settlement Order: that on or before March 11, 2017, she would produce a ratified purchase contract or (2) a refinance commitment letter from a lender. (R. p. 219, line 24 – p. 220, line 5; p. 221, lines 1-18) Going further, Appellant conceded the Purchase Agreement Miller submitted in fact was *not* ratified and that “[i]t was totally within [Respondents’] power of whether to ratify it or not.” (R. p. 222, lines 7-15) Appellant also conceded that ratification was impossible because one of the required signatures was obtained two days beyond the deadline for compliance pursuant to the terms of the Consent Settlement Order. (R. p. 223, lines 7-13)

Appellant now posits for the first time on appeal that the Consent Settlement Order did not require all interested parties to “ratify” the contract and that, in any event, Appellant

⁵ Appellant does not appear to challenge on appeal the Master's conclusion that Miller failed to produce a valid loan commitment letter and has not included any version of the same in the Record on Appeal. Further, Respondents do not recall ever receiving the “revised” Purchase Agreement from Appellant. (R. p. 224, lines 18-22)

delivered a “revised” Purchase Agreement⁶ to Respondents on March 13, 2017 – two days beyond the March 11, 2017 deadline. Appellant argues that the revised document, purportedly signed by Miller’s parents and her sister, Patrease Clarkson, cures any deficiencies with regard to the ratification requirement. This argument fails for a number of reasons.

First, despite Appellant’s best effort to argue otherwise, the unratified Purchase Agreement submitted for the Master’s consideration was signed *only* by C-Miller Properties, LLC and the proposed buyer, CRM Agency, LLC.⁷ (R. p. 155) Neither Respondent JJJ Associates, LLC nor PMC, LLC, the other two owners of the property, signed the Purchase Agreement. (*Id.*) While Appellant contends the only missing signature is that of the Respondents, it conveniently overlooks the omission of the signature of any individual authorized to sign on behalf of PMC, LLC.

Second, by its express terms the Consent Settlement Order mandated that a ratified purchase contract must be delivered to Respondents within 180 days of entry of the Consent Settlement Order, or March 11, 2017. (R. p. 144, ¶ 1(a)) Appellant has conceded Miller failed to comply with this temporal requirement. Specifically, at the hearing on the Motion to Enforce Settlement Order, Appellant’s counsel acknowledged the deadline to submit a ratified contract to purchase the subject property was Saturday, March 11, 2017, that Appellant did not obtain an additional required signature of Patrease Clarkson until Monday, March 13, 2017, and that the

⁶ The “revised” Purchase Agreement was not presented to the Master in Equity and has not been designated by Appellant for inclusion in the Record on Appeal.

⁷ The parties do not dispute that CRM Agency, Inc., the putative purchaser of the subject property, is an entity wholly owned by Cynthia Miller. (R. p. 224, lines 9-10; Br. of Appellant, p. 4)

Purchase Agreement had not been signed by Respondent Dillon prior to the deadline. (R. p. 223, lines 7-12)

Finally, the term “ratified” is not so inconsequential as Appellant would have this Court believe. Ratification “creates or establishes the relation of agency in respect to a matter as to which none before existed, . . . and such ratification operates not merely as presumptive evidence of previous authority, but per se as a confirmation of the act of the agent.” *Williams v. Jacobs*, 237 S.C. 183, 195, 116 S.E.2d 157, 162 (1960); *see also Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989) (“Ratification . . . means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent.”). Further, “[r]atification exists upon the concurrence of three elements: (1) acceptance by the principal of the benefits of the agent’s acts, (2) full knowledge of the facts, and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements.” *Lincoln, supra*.

Here, as only one of the required signatures appeared on the Purchase Agreement prior to the March 11, 2017 deadline, Appellant failed to satisfy the ratification requirement prior to the deadline mandated by the Consent Settlement Order, and it has no valid basis to argue otherwise. In light of Appellant’s failure to produce a ratified contract as required by the Consent Settlement Order, the Master in Equity correctly held that the Purchase Agreement lacked evidence of mutual assent and could not be enforced⁸. (R. p. 17) (citing *Prestwick Golf Club*,

⁸ Although not specifically addressed by the Master in Equity, the Purchase Agreement also fails inasmuch as it does not comply with the Statute of Frauds. “To satisfy the Statute of Frauds, every essential element of the contract must be expressed in a writing signed by the party to be compelled.” *Fici v. Koon*, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007) (citing *Cash v. Maddox*, 265 S.C. 480, 220 S.E.2d 121 (1975) (emphasis added) (additional citation omitted)). In addition, “[t]he burden of proof is on the party seeking to enforce the contract.” *Id.*

Inc. v. Prestwick Limited Partnership, 331 S.C. 385, 503 S.E.2d 184 (Ct. App. 1998) (“In order for a contract to be binding, there must be mutual manifestation of assent between the parties.”); *Rose Electric, Inc. v. Cooler Erectors of Atlanta, Inc.*, 418 S.C. 424, 794 S.E.2d 382 (Ct. App. 2016) (“A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct.”).

In summary, the Master in Equity’s Orders correctly applied the law to facts to conclude the Purchase Agreement did not comport with the ratification requirement of the Consent Settlement Order or the basic contract law of South Carolina. On this score, the observation of the Master in Equity is instructive:

... the [Appellant] wanted to submit its own contract, the ratified contract under an alterego [sic] LLC, which they had a right to do. I just don’t understand why they would do it at the last minute and with zero consideration. I don’t find that to be a valid offer. I don’t find that to be an offer in good faith. That’s ultimately what I’m saying there.

(R. p. 261, lines 11-18)

Appellant has not presented any evidence to the contrary. The Orders below should be affirmed on this basis.

B. Evidence of Miller’s Non-Performance Bars Any Order Compelling Respondents’ Specific Performance of the Consent Settlement Order or the Purchase Agreement.

In addition to Appellant’s failure to produce a ratified purchase contract, the Master in Equity also concluded Miller’s non-performance was fatal to her motion to compel enforcement of the Consent Settlement Order. This finding is consistent with the record evidence and should be affirmed.

As noted, *supra*, settlement agreements are viewed as contracts. *Byrd*, 398 S.C. at 241, 727 S.E.2d at 621-622. The party who is guilty of the first breach generally is the party upon whom liability for non-performance rests. *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008) (internal citation omitted). In addition, the party who seeks to compel specific performance is required, in part, to demonstrate she has performed or is willing and able to perform her part of the contract, and the doctrine of unclean hands prevents a party from obtaining equitable relief when that party has acted unfairly to the prejudice of the other party. *Ingram*, 340 S.C. 98, 531 S.E.2d 287 (2000). The Master in Equity was persuaded that Respondents “put forth sufficient evidence illustrating that they have fulfilled their obligations . . . while [Miller has] consistently failed to honor [hers].” (R. p. 20) This finding finds ample support in the record.

First, as required by the express terms of the Consent Settlement Order, “Reid Davis and the firm of Lee & Associates [were] appointed as the broker to list the Property for sale as indicated by the consent of the parties.” (R. p. 10, ¶ 5) Disregarding her consent to this provision, Miller steadfastly refused to cooperate with the listing agent and agency, and the property was not listed for sale prior to expiration of the March 11, 2017 deadline. Going further, Reid Davis, the agent designated in the Consent Settlement Order as the listing agent, testified by way of affidavit that he “made numerous efforts to acquire sufficient information so that I could come up with a value as well as list the subject property for sale.” (R. p. 181, ¶ 4) According to Mr. Davis, Miller was “uncooperative,” did not sign the listing agreement, and, therefore, he was “unable to move forward listing the property.” (*Id.*, ¶¶ 5-8) Indeed, the only

party who cooperated in efforts to have the property evaluated and listed for sale was Joseph H. Dillon, the spouse of Respondent Dillon. (*Id.*, ¶ 4)

Joseph H. Dillon also provided affidavit testimony. Mr. Dillon cooperated with Mr. Davis by providing Mr. Davis with information in his possession relating to the subject property. (R. p. 183, ¶ 5) At the same time, Mr. Dillon noted the bulk of information needed to appropriately list the subject property was in the possession of Miller and that while Miller consented to the listing agent, she steadfastly refused to provide the listing agent with the information necessary to evaluate and list the property. (*Id.*, ¶¶ 6-8)

The evidence presented to the Master in Equity makes clear Respondent complied with the listing requirement of the Consent Settlement Order. In contrast, Miller actively subverted efforts to derive a fair market price and to list for sale the subject property in contravention of her obligations pursuant to the Order to which she consented. In light of these facts, she has not performed her part under the contract and was not entitled to specific performance thereof. *Ingram*, 340 S.C. at 186, 531 S.E.2d at 292 (one seeking to compel specific performance must have fulfilled her obligations under the contract) (citations omitted).

In addition to the listing provisions discussed in the preceding paragraphs, the Master in Equity likewise found Miller failed to honor her obligations under the Consent Settlement Order in neglecting to pay the 2016 property taxes for the subject property. (R. pp. 20-21) Specifically, the Consent Settlement Order required Miller and Plaintiffs below to “pay the regular expenses, taxes, insurance and maintenance on the buildings during [sic] until such time as the sale or refinance contemplated herein has been consummated.” (R. p. 10, ¶ 6) Going

further, Miller also failed to provide deed in lieu of foreclosure documents until after the deadlines set out in the Consent Settlement Order had expired, once again in contravention of the specific settlement terms to which she agreed. (R. pp. 20-21) Most egregiously, when Miller finally did provide the late deed in lieu documents, she had altered them so as to make it impossible for Respondents to obtain title insurance. (R. p. 21)

In light of Miller's recalcitrance, the Master in Equity appropriately and correctly determined she had not complied with the Consent Settlement Order and was not entitled to seek specific performance thereunder. That finding is more than supported by the record evidence and should be affirmed.

C. The Master in Equity Correctly Determined That Enforcement of the Consent Settlement Order Would Result in Prejudice to Respondents.

Ample record evidence in this case also supports the Master in Equity's finding that enforcement of the Consent Settlement Order would result in prejudice to Respondents and would be inconsistent with the court's equitable powers. (R. pp. 21-23) (quoting *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-117, 687 S.E.2d 29, 33 (2009) ("Under South Carolina law, the equitable power of a court is not bound by cast-iron rules, but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all circumstances, to deny it would permit one party to suffer a gross wrong at the hand of another.") (additional citations omitted)). In light of Miller's delinquency, lack of good faith, and defiance of a court order, as well as the on-going and likely future prejudice and harm to Respondents, the Orders below should be affirmed.

As noted by the Master in Equity, the equities in this case favor Respondents. (R. p. 22) Specifically, the Master in Equity noted that Respondent Dillon's initial loan (secured by the subject property) matured May 1, 2013, more than four years prior to the date of the order giving rise to this appeal, all evidencing Respondents' "substantial amount of forbearance in this case. . . ." (R. p. 257, lines 19-23). As a result, Respondent Dillon has been without repayment of those funds since at least May 1, 2013, and possibly longer. (*Id.*) In an effort to be made whole, Respondent Dillon negotiated for a foreclosure of the property and/or a deed in lieu of foreclosure after giving Miller adequate time to sell or re-finance the property consistent with the provisions of the Consent Settlement Order. Despite Respondent Dillon's best efforts, which were actively thwarted by Miller, the property was not sold or re-financed. Respondents were, therefore, within their rights to record the deed in lieu of foreclosure⁹ along with the title to the subject property. (*Id.*) The court below was correct in recognizing the prejudice to Respondents and Respondents' "substantial amount of forbearance" in upholding these valid conveyances. (R. p. 257, line 19 – p. 258, line 2) The orders below should be affirmed.

⁹ The deed in lieu of foreclosure and related corrective deeds intended to clear certain title issues were recorded prior to the filing of Plaintiffs' Motion to Enforce Settlement Order, and the property subsequently was conveyed into the name of an LLC. As the Master in Equity observed, "[a]ny order compelling enforcement of the Settlement Agreement would require this Court to either set aside those transfers or re-write the parties Settlement Agreement. . . .," a task the court was both unwilling and unable to undertake. (R. p. 22) (quoting *Abel v. S.C. Dept. of Health and Environmental Control*, 419 S.C. 434, 441, 798 S.E.2d 445, 448 (Ct. App. 2017) ("Courts are without authority to alter a contract by construction or to make new contracts for the parties.") (additional citation omitted))

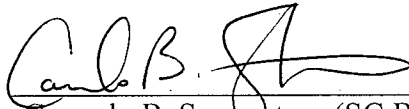
CONCLUSION

Based upon the foregoing, Respondents submit that the Master in Equity's findings of fact and conclusions of law were correct and that the court's Orders denying the Motion to Enforcement Settlement Order and subsequent Motion and Amended Motion to Alter or Amend Judgment should be affirmed in their entirety.

Respectfully submitted,

October 4, 2018

By:



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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.

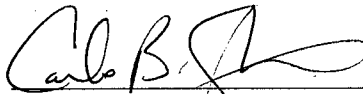
PMC, LLC, ... Third-Party Defendant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF RESPONDENTS complies with Rule
211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

(Signature page to follow.)

October 4, 2018

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