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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Samuel M. Price, Jr., Special Referee

Appellate Case No.: 2017-001678

RECEIVED

APR 27 2020
SC Court of Appeals

Robert G. Shirey Respondent,

v.

Gwen G. Bishop,
Cassandra Robinson,
and T.D. Bank, N.A. Defendants,

of whom
Gwen G. Bishop
and Cassandra Robinson are Appellants.

PETITION FOR REHEARING AND/OR REHEARING *EN BANC*

Appellants, pursuant to Rules 219(b) & 221, SCACR, petition this Court for rehearing of this appeal, and/or rehearing of this appeal *en banc*.

~~ARGUMENT FOR REHEARING~~

Appellants would bring to this Court's attention the following points they believe were overlooked and/or misapprehended:

I. Appellants' statute of frauds defense was argued to and ruled upon by the Special Referee.

Specific performance requires the existence of a valid agreement. See Gibson v. Hrysikos, 293 S.C. 8, 13-14, 358 S.E.2d 173, 176 (Ct. App. 1987). The Respondent's claim for specific performance rests on a purported oral agreement to extend a contract to sell

land: on August 12, 2016 (the closing date of the original contract), a person¹ from Respondent's attorney's law firm contacted Appellant Bishop via telephone and requested closing take place the next day, and Bishop purportedly agreed. (R 172-173, 193-94, 204, 208). The Appellants maintain the August 12, 2016, purported oral agreement was void under the Statute of Frauds, which requires any contract for the purchase of land be in writing and signed by the party against whom enforcement is sought. E.g. Cash v. Maddox, 265 S.C. 480, 484, 220 S.E.2d 121, 122 (1975); Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983) (court held evidence of oral modification of the real estate contract as violative of the Statute of Frauds).

However, in its April 22, 2020 opinion (the "Opinion"), this Court held that the Appellants waived their Statute of Frauds defense because it was not pled in their answers and "neither appellant argued this issue while they were before the Special Referee." (Opinion § I.a). This holding overlooks the record's plain evidence the Appellants not only presented this argument (without objection to its consideration), but the Special Referee ruled on this argument. The Appellants asserted the Statute of Frauds, by name, at trial:

Mr. Parker:^[2] Okay. All right. Well let's talk about that. You agreed to come to the closing on the 13th.
Ms. Bishop: Because you cancelled -- your office cancelled it on the 12th
Mr. Parker: Okay.
Ms. Bishop: --- and I had an appointment on the 13th with the doctor already scheduled.
Mr. Parker: Yeah. You agreed to come to the closing on the 13th?
Mr. Pyatt: We'd like to make an objection based on the statute of fraud is [sic] that -- in term of this line of questioning 'cause our legal position is that no contract existed on the 13th, and that therefore she was not under obligation, legally, to appear on

¹ It is not clear from the record if this was Respondent's attorney or a staff member, but this Court found it was Respondent's attorney. (Opinion p. 3).

² Kyle Parker was Respondent's attorney at trial and on appeal. William Pyatt was Appellants' trial counsel.

the 13th, 'cause by the -- the contract expired on the 12th. And any extension of the contract has to be in writing, and since there is no writing it was up to her whether or not she wanted to perform the contract on the 13th. So anything that happened after the 13th is irrelevant.

The Court: Okay. So noted.

Mr. Parker: Yeah, I mean, do you want me to argue that now or ---

The Court: No, no ---

Mr. Parker: Good.

The Court: --- you don't have to argue that.

(R 204-205). The Appellants also repeatedly introduced testimony at trial, without objection, the purported land sale contract was not in writing:

Mr. Pyatt: All right. So on the 12th, when she wasn't there, did you ask for an extension in writing?

Mr. Shirey: I didn't need an extension. I did what I was supposed to do.

Mr. Pyatt: Well that's a yes or no response I'm asking for.

Mr. Shirey: No, I did not ask for an extension.

Mr. Pyatt: All right. And you didn't see the need to ask for an extension in writing?

Mr. Shirey: No. I was there. I was -- tendered the money.

* * *

Mr. Pyatt: Well, you admitted that you didn't put anything in writing asking for an extension.

Mr. Shirey: I didn't need to ask for an extension. Your client needed to ask for an extension. I was on time. What is it you're confused about? Is it the paper or the writing on the paper?

(R 152, 156). The deposition transcript of Appellant Bishop, which the Special Referee considered, without objection, in its entirety (R 160-162, 277) also presented testimony the purported extension of the land sale contract was not in writing:

Mr. Pyatt: Ms. Bishop, did you -- did you sign an extension to this land purchase agreement extending the closing beyond August 12th?

Ms. Bishop: No.

Mr. Pyatt: Were you presented a written extension to sign on the 12th?

Ms. Bishop: Not to my knowledge.

(R 76).

After considering all of this evidence, the Special Referee issued an order on May 18, 2017, that specifically addressed Appellants' Statute of Frauds defense in its "Findings of Law" (number three, last paragraph). (R 10). The Special Referee again addressed Appellants' Statute of Frauds defense throughout his July 28, 2017, order denying both parties' motions to reconsider. (R 16-19). Neither of these orders memorialize, or even imply, an objection to the consideration of this defense,³ and the transcript of trial (R 114-277) contains no objection to the consideration of the Statute of Frauds.

South Carolina law provides: "When issues not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP; see also Cheap-Os Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 608, 567 S.E.2d 514, 520 (Ct.App. 2002) (describing this concept as a "cardinal rule of law in South Carolina"). Consent to trial is implied when the opposing party fails to object to testimony or evidence supporting the issue at trial. Ellie, Inc. v. Miccichi, 358 S.C. 78, 98, 594 S.E.2d 485, __ (Ct. App. 2004); see also Woods v. Rabon, 295 S.C. 343, 347, 368 S.E.2d 471, 474 (Ct.App. 1988) ("If neither party timely objects to evidence raising issues not pleaded, each is deemed impliedly to consent to the trial of such issues."). The Statute of Frauds was asserted, by name, at trial, and Appellants introduced substantial evidence supporting it without objection; this defense was tried by consent.

With the Statute of Frauds squarely before the Special Referee, this Court is compelled find the parties' purported August 12, 2016, oral agreement void. Without a valid contract, specific performance is not appropriate. This Court must grant rehearing

³ Appellants represent that Respondent's June 1, 2017 motion for reconsideration does not object to the Special Referee's consideration of the Statute of Frauds. Though not part of the record on appeal, the Appellants can provide a copy of this motion for this Court's consideration. See Rule 212(a), SCACR (Appellate court's authority to *sua sponte* request copies of record below).

and/or issue an amended opinion reversing, at a minimum, the Special Referee's award of specific performance and attorneys' fees.

II. The Respondent's failure to prove the equity of specific performance was properly before this Court.

The Respondent asserted an action for specific performance; a court will not grant specific performance without finding enforcement of the contract was equitable. King v. Oxford, 282 S.C. 307, 314, 318 S.E.2d 125, __ (Ct.App. 1984). However, in the Opinion this Court held: "Appellants never argued that the equities of the transaction did not favor specific performance while they were before the referee." (Opinion § I.b). As part of his case for specific performance, it was the Respondent's burden to prove the equity of enforcement by a preponderance of the evidence, and the Appellants challenged Respondent's entitlement to specific performance at all times.⁴ "[I]t is the duty of this [appellate] court in equity cases to review challenged findings of fact as well as matters of law." Twitty v. Harrison, 230 S.C. 174, 177, 95 S.E.2d 879, __ (1956); see also Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, __ (2011) (Appellate courts reviewing the decisions of a court of equity have the jurisdiction to find facts in accordance with its view of the preponderance of the evidence.); S.C. Const. Art. V § 5 (same). Accordingly, Respondent's failure to prove the equities fall in his favor was before this Court,⁵ and this Court must review the record and find facts based on its view of the evidence. When it does

⁴ While failure to meet the burden of proof is not an affirmative defense that must be pled under Rule 8, SCRPC, the Appellants did generally deny the Respondent's entitlement to relief in their answers. (R 34-38, 50-57).

⁵ Even if preservation of this issue was questionable (Appellants do not concede it is), it is nonetheless appropriate to consider it. Though our appellate courts "should follow...longstanding precedent and resolve [an] issue on preservation grounds when it *clearly* is unpreserved," it is "good practice for us to reach the merits of an issue when error preservation is *doubtful*". Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (emphasis added).

so, it will be compelled to find that the equities favor Bishop and Robinson, not Shirey. (App. Brief pp. 11-12; App. Reply Brief pp. 1-5). This Court must grant rehearing and/or issue an amended opinion reversing, at a minimum, the Special Referee's award of specific performance and attorneys' fees.

This Court's holding in Part I.b. requiring some form of "preservation" when disputing an equity court's factual findings renders the Opinion internally inconsistent. In Section II of the Opinion, this Court engages in substantial appellate factfinding to find the existence of a "confidential relationship" between Appellants Robinson and Bishop. (Opinion pp. 8-10). This finding of a "confidential relationship" is the basis of this Court's decision to affirm setting aside the 2015 deed from Bishop to Robinson. (Opinion p. 10). The Respondent does not allege the existence of a "confidential relationship" in his complaints (R 20-33, 39-43), and this issue is not argued by name during trial: the word "confidential" never appears in the transcript, and the only time "relationship" appears it is referring to the relationship between Appellant Robinson and Respondent Shirey (R 258). Similarly, this Court found in Section III of the Opinion the Respondent was a bona fide purchaser, despite the fact that this doctrine was not mentioned in trial and the Respondent never asserted this doctrine in his pleadings. See Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006) (bona fide purchaser must be specifically pled). In order to present an internally consistent opinion, this Court must review the equity of enforcement of the purported contract at issue. This Court must grant rehearing and/or issue an amended opinion reversing, at a minimum, the Special Referee's award of specific performance and attorneys' fees.

SUGGESTION FOR REHEARING *EN BANC*

The Court of Appeals will order rehearing *en banc* when “consideration by the full court is necessary to secure or maintain uniformity of its decisions.” Rule 219(a), SCACR. This Court’s holding in Section I.b. requiring some form of “preservation” when disputing an equity court’s factual findings takes a position (in a published opinion) inconsistent with long-standing precedent and well-settled law mandating *de novo* review of equitable actions. See e.g. Twitty & Lewis, *supra*; see also Regions Bank v. Wingard Prop., 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011) (*de novo* review of equitable actions); S.C. Const. Art. V § 5 (same). In order to conform the Opinion to existing precedent (both Court of Appeals and Supreme Court), and prevent reversal by the Supreme Court, the Opinion must be reviewed *en banc*.

CONCLUSION

The petition for rehearing, either by the panel or *en banc*, should be granted.

Dated: 04/24/2020



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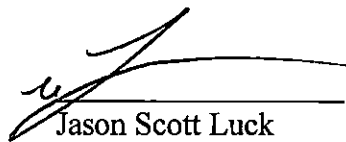
of whom
Gwen G. Bishop
and Cassandra Robinson are Appellants.

CERTIFICATE OF SERVICE

I certify that I served the Petition for Rehearing and/or Rehearing *en banc* on the persons set forth below by depositing a copy of it in the United States Mail, postage prepaid, on the date set forth below:

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24 April 2020

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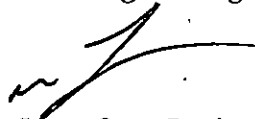
Re: *Shirey v. Bishop*, 2017-001678

Madame Clerk:

Pursuant to Order 2020-03-20-01, please find enclosed one unbound copy of the Petition for Rehearing in this matter. Please also find enclosed a Certificate of Service for the same and a check for \$50.00.

Please do not hesitate to contact me with any questions.

With Highest Regards,



Jason Scott Luck

/JSL

Enclosures

cc: Kyle B. Parker, Esq. (w/enc)

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