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 BRIEF OF APPELLANT

H. Fred Kuhn, Jr., Esquire
Moss, Kuhn & Fleming, P.A.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373 – Telephone
(843)524-1302 – Facsimile

Attorneys for the Appellant

INDEX

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

I. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT WOLFSON DEFAULTED ON THE AGREEMENT DATED MAY 21, 2017 BY FAILING TO MAKE THE FIRST INSTALLMENT PAYMENT OF $80,000 TO KIRKLAND ON OR BEFORE MARCH 1, 2018, OR BY THE EXPIRATION OF A THIRTY DAY GRACE PERIOD, WHICH THE COURT FOUND TO BE MARCH 31, 2018, WHERE THE DELAY IN TENDERING THE FIRST INSTALLMENT WAS NOT A MATERIAL BREACH JUSTIFYING RESCISSION OF THIS PORTION OF THE AGREEMENT AND THE PARTIES COULD NOT BE RETURNED TO THE STATUS QUO.

II. THE COURT ERRED IN FAILING TO FIND AS A MATTER OF FACT AND CONCLUDE AS A MATTER OF LAW THAT WOLFSON'S DELAY IN TENDERING THE FIRST INSTALLMENT PAYMENT OF $80,000 TO KIRKLAND WAS JUSTIFIED.

III. THE COURT ERRED IN FAILING TO FIND AS A MATTER OF FACT AND CONCLUDE AS A MATTER OF LAW THAT THE FAILURE OF KIRKLAND TO DELIVER TO WOLFSON A NOTICE OF DEFAULT DELAYED THE RUNNING OF THE THIRTY (30) DAY GRACE PERIOD UNTIL SAID NOTICE OF DEFAULT WAS DELIVERED.

IV. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT THE FORFIETURE PROVISION CONTAINED IN THE "NOTE AND SECURITY AGREEMENT" EXECUTED ON JULY 17, 2017 WAS ENFORCEABLE WHERE SAID PROVISION WAS NOT SUPPORTED BY ANY CONSIDERATION.

V. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT WOLFSON'S FAILURE TO TENDER $80,000 TO KIRKLAND BY MARCH 31, 2018 RESULTED NOT ONLY IN WOLFSON'S INABILITY TO ACQUIRE KIRKLAND'S ONE-HALF INTEREST IN OLD SOUTH PROPERTIES, INC., BUT ALSO COMPELLED WOLFSON'S FORFEITURE TO KIRKLAND OF WOLFSON'S ONE-HALF OWNERSHIP INTEREST IN OLD SOUTH PROPERITES, INC. FOR FREE, WHERE THIS CLAUSE IS AN UNENFORCEABLE FORFEITURE OR PENALTY.

I. STATEMENT OF THE CASE
A. PROCEDURAL BACKGROUND

This is a breach of contract action seeking primarily equitable relief. It was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on April 16, 2018 (ROA, pg. 58). In his Complaint, the Respondent, Stancel E. Kirkland ("Kirkland") alleges that he and the Appellant Robert Wolfson ("Wolfson") entered into a handwritten Settlement Agreement on May 21, 2017 (ROA, pg. 346), followed by a document entitled "Note and Security Agreement" which was executed by Wolfson only on July 5, 2017 (ROA, pg. 350). In his Complaint, Kirkland alleges that Wolfson is in default of these Agreements and that Kirkland is accordingly entitled to Order of the Court declaring him to be the sole owner of the Co-Defendant Old South Properties, Inc. ("Old South"), as well as the real property owned by Old South. Kirkland further alleges that a lien placed on Old South's property by the Co-Defendant Bull Point Plantation Property Owners Association, Inc. ("Bull Point Plantation POA"), as well as Mortgage placed on Old South's property by HCG Weight Loss Center, Inc. ("HCG"), are either void or fictitious. Finally, Kirkland alleges that Wolfson owes Kirkland $90,000.00 pursuant to the terms of the Agreement, and that Kirkland is entitled to have a Mortgage placed on a parcel of land located in Jasper County, South Carolina. By way of relief, Kirkland requests that the Court issue "a declaration of the rights of the parties one to another," for a declaration that the Bull Point Plantation POA lien, as well as the HCG Mortgage, are nullities, for judgment against Wolfson for both actual and punitive damages, and for an order appointing a receiver to foreclose on the property in Jasper County, as well as attorney's fees and costs.

The Appellant Wolfson filed his Answer to the Complaint on July 5, 2018 (ROA, pg. 78). In his Answer, Wolfson admits that he and Kirkland entered into the handwritten Settlement

Agreement dated May 21, 2017, and that he subsequently signed the document entitled "Note and Security Agreement" on July 5, 2017. Wolfson further admitted that Old South is a closely held South Carolina corporation owned equally by himself and Kirkland, subject to the May 21, 2017 handwritten Settlement Agreement pursuant to which Kirkland agreed to sell his interest in Old South to Wolfson. This handwritten agreement, which is attached to the Complaint as Exhibit A (ROA, pg. 65), provides in pertinent part as follows:

> "5. Wolfson shall pay Kirkland $80,000.00 cash on or before 3/1/18.
>
> 6. Wolfson shall also pay Kirkland $10,000 on or before 1/1/19.
>
> 7. Upon payment of the $90,000 mentioned in 5 and 6 above Kirkland transfers his interest in Old South Properties to Wolfson."

In his Answer, Wolfson agreed with Kirkland that the lien purportedly filed on behalf of Bull Point Plantation POA was invalid and that Wolfson had already filed a suit against the Bull Point Plantation POA alleging that the lien was false, wrongful and fraudulent. Wolfson admitted that he had not yet paid the $80,000.00 payment due on March 1, 2018 (the January 1, 2019 was not yet due). Wolfson further alleged that Kirkland's ability to transfer his interest in Old South to Wolfson free and clear of liens and encumbrances has been prevented by the filing of the POA lien, and that until the lien was removed there was a cloud on the title of the assets to Old South and that he was justified in withholding payment to Kirkland until this cloud on the title of Old South's assets had been resolved.

Accordingly, Wolfson requested that the Complaint be dismissed.

On July 24, 2018 Kirkland, pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, entered a stipulation of dismissal without prejudice as to the Defendant, Bull Point Planation POA. (ROA, pg. 20).

On July 31, 2018 El Cid Holdings, LLC ("El Cid") moved to intervene in this case on the ground that, on June 29, 2018 Kirkland had transferred all of his interest in Old South to El Cid. (ROA, pg. 23).

In response, on August 10, 2018, Wolfson filed a motion to amend or supplement his Answer. (ROA, pg. 27).

El Cid's Motion to Intervene was granted, without objection on August 16, 2018 and Wolfson's Motion to Amend or Supplement his Answer was granted on October 5, 2018. (ROA, pg. 11)

In his Amended Answer and Counterclaim, filed October 5, 2018, Wolfson repeats the allegations of his original Answer, but adds a counterclaim, alleging that he stands "ready, willing and able to pay the full $90,000.00" referenced in the handwritten Settlement Agreement, but as a result of the assignment between Kirkland and El Cid, he is uncertain as to whom these funds are owed. He requests that the Court declare to whom he should pay the $90,000.00, and upon receipt, direct either Kirkland or El Cid, whoever may be appropriate, to transfer to Wolfson their stock in Old South, as called for by the handwritten Settlement Agreement.

On October 12 and October 22, 2018 El Cid and Kirkland, respectively, filed replies to Wolfson's counterclaims, denying the material allegations thereof. (ROA, pp. 89-94).

On October 1, 2018 this case was referred to the Honorable Marvin H. Dukes, III, the Master In Equity for Beaufort County. (ROA, pg.14).

On November 5, 2018 this case was tried before Judge Dukes in a non-jury trial.

In his Order, filed November 15, 2018, Judge Dukes found that when their agreement was executed, Kirkland and Wolfson were each 50% owners of Old South. (ROA, pg. 4). Judge Dukes further found that Wolfson was in default of the agreement by failing to make the initial

$80,000.00 payment to Kirkland before March 1, 2018, and failed to cure this default within the thirty (30) day grace period referenced in the Note and Security Agreement. As a result, Judge Dukes concluded that not only was Wolfson not entitled to purchase Kirkland's 50% interest in Old South for $90,000.00, but in accordance with the express terms of the "Note and Security Agreement" Wolfson forfeited his 50% interest in Old South to Kirkland. Since Kirkland had assigned his interest in Old South to El Cid, Judge Dukes concluded that El Cid thereby became the sole and exclusive owner of Old South.

On November 21, 2018 Wolfson filed a Motion for New Trial, to Reconsider, Alter or Amend Judgment pursuant to Rule 59, SCRCP. (ROA, pg. 36). This motion was denied by Judge Dukes pursuant to his Order filed January 16, 2019. (ROA, pg. 1)

On February 8, 2019 Wolfson filed his Notice of Appeal to the South Carolina Court of Appeals. (ROA, pg. 105).

B. FACTUAL BACKGROUND

Wolfson and Kirkland founded Old South, a South Carolina Corporation, in 1994 for the purpose of conducting real estate sales for two (2) developments they were planning, Vivian's Island and Bull Point Plantation. The next year they acquired Bull Point Plantation, which consisted of approximately 700 acres of raw land. They subdivided it into lots and installed the infrastructure, and turned it into a "very high end" residential development. ROA., pg. 161, lines 10 – 11; pg. 287, line 22 to pg. 289, line 14. Wolfson's background was real estate sales and development, and Kirkland's background was an attorney. *Id.*, pg. 289, lines 15 – 19.

Wolfson and Kirkland each owned 50% of Old South. Old South's sales office was located on the grounds of Bull Point Plantation, and in 2004 Old South purchased its sales office,

including the real estate upon which its office was located. This was a "very valuable" asset. *Id.*, pg. 161, lines 11 – 13; and pg. 290, line 19 – pg. 291, line 3.

Wolfson and Kirkland were not just business partners, but were friends and remained so until the economic recession of 2008 hit, at which time "everything just fell apart." *Id.*, pg. 289, line 21 to pg. 290, line 5.

The deterioration in the relationship between Wolfson and Kirkland led to two (2) lawsuits.

The first lawsuit, captioned *Bindon Plantation, LLC v. Robert Wolfson,* resulted in a judgment against Wolfson in the amount of $28,500.00. The Plaintiff, Bindon Plantation, LLC, was a limited liability company owned 25% by Wolfson, 25% by Kirkland, and 50% by a third party. The judgment resulted from Wolfson selling a piece of heavy equipment belonging to Bindon for $28,500.00, and then wrongfully loaning these proceeds to Old South for his personal benefit. ROA, pg. 355.

The second lawsuit, captioned *Vivian's Island, Inc. v. Robert Wolfson,* involved a real estate development, known as Vivian's Island, involving Wolfson, Kirkland, and a third party, (Henry Taylor). This case was tried non-jury before the Honorable Marvin H. Dukes, III, Beaufort County's Master In Equity. The Plaintiff was represented by attorney S. Jahue Moore of West Columbia, South Carolina and Mr. Wolfson was pro se. When the trial broke for lunch, the parties, at the suggestion of Judge Dukes, went to lunch together and reached a settlement agreement, which was hastily written out by Attorney Moore and signed by the parties. ROA, pg. 167, lines 4 – 8; pg. 210, lines 14 – 22; pg. 293, lines 3 – 24; pg. 332, pg. 13 – 25; and pg. 149, lines 1 – 18.

The current appeal arises out of this handwritten Settlement Agreement, which is dated May 21, 2017. The Agreement contains ten (10) enumerated terms, as follows:

1. The Vivian's Island Agreement of today's date placed on record is affirmed.

2. Except for the obligations herein Bob Wolfson and Stan Kirkland fully release each other from any liability.

3. The Bindon judgment against Wolfson shall be satisfied immediately.

4. Satisfaction of the Bindon judgment is the responsibility of Kirkland.

5. Wolfson shall pay Kirkland $80,000 cash on or before 3/1/18.

6. Wolfson shall also pay Kirkland $10,000 on or before 1/1/19.

7. Upon payment of the $90,000 mentioned in 5 and 6 above Kirkland transfers his interest in Old South Properties to Wolfson.

8. Wolfson shall have the $90,000 obligation to Kirkland secured by a Mortgage on a lot owned by Bob Wolfson valued at least $80,000.

9. 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.

10. Kirkland will withdraw his request for a receiver and shall not pursue it so long as Wolfson is current under this Agreement.

ROA, pg. 346 and pg. 148, lines 16 – 21. After signing the aforesaid Agreement, the parties returned to the courtroom, announced on the record that they had reached a settlement, and the case was dismissed. ROA,, pg. 148, lines 15 – 18.

In accordance with the aforesaid Agreement, the Bindon judgment was satisfied. This judgment was held 25% by Wolfson, 25% by Kirkland, and 50% by Henry Taylor. ROA, pg.

299, lines 3 – 16. Accordingly, but for this Agreement, Wolfson would have been responsible for paying 75% of this judgment. *Id.*

The foregoing Agreement also required Kirkland and Wolfson to release all claims they held against each other. Kirkland stipulated at trial that each party held significant potential claims against the other which were released pursuant to this Agreement. ROA, pg. 298, lines 17 – 22.

With respect to the Vivian's Island dispute Mr. Wolfson surrendered to Kirkland his 38-40% interest in Vivian's Island, which still owned approximately $320,000.00 in unsold lots. *Id.*, pg. 294, lines 2 – 25.

Attorney Moore subsequently drafted and delivered to Wolfson for his signature a document entitled "Note and Security Agreement," representing this to be the Security Agreement referenced in paragraph 9 of the handwritten Settlement Agreement. Wolfson signed this document on July 17, 2017. ROA, pg. 350; pg. 164, lines 4 – 18; pg. 165, lines 12 – 24. Attorney Moore intended for the handwritten Settlement Agreement and the "Note and Security Agreement" to be part of the same transaction and the "Note and Security Agreement" was not intended to re-write, contradict or replace the handwritten Settlement Agreement. ROA, pg. 211, lines 9 – 25. The "Note and Security Agreement" was simply intended to be the Security Agreement required by paragraph 9 of the handwritten Settlement Agreement. *Id.* No additional consideration was given for the "Note and Security Agreement," it was simply presented to Wolfson by Attorney Moore. ROA, pg. 301, lines 16 – 23.

The "Note and Security Agreement" recites that it is made pursuant to the Agreement signed on May 21, 2017. It repeats the terms of the Agreement regarding Wolfson's obligation to

pay Kirkland the sum of $90,000, with $80,000 due on or before March 1, 2018, and $10,000 due on or before January 1, 2019. It then provides as follows:

> This Note is hereby declared secured by Robert Wolfson's interest in Old South Properties, Inc. Should Robert Woldson forfeit on his obligations hereunder, Wolfson shall transfer his interest at the election of Stancel E. Kirkland to Stancel E. Kirkland. Should there be a default, Robert Wolfson shall have thirty (30) days from the day of default to cure said default. Following any default, Robert Wolfson's interest in Old South Properties, Inc. shall be the exclusive property of Stancel E. Kirkland."

Id., pg. 350.

On November 20, 2017 the Bull Point Plantation POA, acting through its president Billy Gavigan, filed a lien against Old South's real estate from which it operated its sales office, claiming $39,160.66 in past due assessments. Complaint, Exhibit C. Since this alleged lien was purportedly for past due POA fees owed by Old South, Wolfson believed this lien impacted Kirkland just as much as it did himself. ROA, pg. 338, lines 12 – 16. Additionally, Wolfson felt the lien was invalid, and accordingly filed suit to have the lien declared invalid. *Id.*, pg. 338, lines 17 – 25. Since Kirkland also believed that the lien was invalid (Complaint, ¶15) Wolfson met with Attorney Moore and Kirkland on December 14, 2017 to discuss joining forces in Wolfson's fight against the POA to have the lien removed. ROA, pg. 185, lines 7 – 23; pg. 186, lines 6 – 18; pg. 172, lines 15 – 25; pg. 173, lines 3 – 17; pg. 174, lines 10 – 17; pg. 338, lines 3 – 16; and pg. 340, lines 7 – 8. Attorney Moore and Kirkland responded to Wolfson that they had no interest in joining the lawsuit against the POA, and simply expected him to live up to his agreement and purchase Kirkland's one-half interest in Old South. *Id.*

From Wolfson's point of view, however, the filing of the lien on Old South's property "changed the course and direction of everything." ROA, pg. 2340, lines 7 – 8. First, Wolfson had planned to obtain the money to pay Kirkland by placing a mortgage on Old South's property, which was otherwise unencumbered. *Id.,* pg. 338, lines 3 – 9. Second, with this lien in place, Kirkland would be unable to transfer his one-half interest in Old South to Wolfson free and clear of any liens.

Nevertheless, with the March 1 deadline for the first payment approaching, Wolfson arranged to borrow the full $90,000 from his son's company, HCG Weight Loss Center, Inc. ("HCG"). To secure the loan, Wolfson executed a Mortgage to HCG for $97,000 on February 16, 2017. This Mortgage was subsequently filed on March 6, 2017. ROA, pg. 225.

HCG wired to Old South's bank account the sum of $95,000 on March 2. Old South turned this money over to Wolfson personally on March 8 and on March 16 Wolfson sent $96,700.00 back to HCG. ROA, pg. 273, lines 10 – pg. 280, line 19; pg. 317, lines 5 – 14.

Wolfson explained that "after thinking about it a couple of days" he did not feel comfortable giving his son a mortgage on property that had been encumbered by the lien, and wanted to "think of another way to get Mr. Kirkland his money without encumbering Old South Properties. ROA, pg. 317, line 7 to pg. 318, line 5.

Accordingly, Wolfson did not make the March 1 payment and instead, on that date, sent Attorney Moore an email, stating in pertinent part as follows:

> I'm writing to let you know that I will not be able to meet my buyout deadline with Stan (Kirkland) as I am now involved in a full blown lawsuit against Gavigan, et al. They have filed liens against Old South . . .. **Please let Stan know I want to honor this Agreement** . . .."

ROA, pg. 378.(emphasis added).

Wolfson and his son then decided that rather than place a mortgage on the Old South Property, HCG would lend the needed money to Wolfson by placing a mortgage on a condominium owned by Wolfson at the beach. ROA, pg. 318, lines 6 – 21. Wolfson met with Attorney Moore on May 10, 2018 to discuss this option. Before this mortgage could be put in place, however, Wolfson was involved in a severe accident on May 13, 2018. Wolfson suffered severe spinal injuries as a result of this accident, was in a coma for approximately 10 days, and was not released from the hospital until August 1, 2018. ROA, pg. 318, lines 2 – 10; pg. 322, line 18 – pg. 323, line 9.

On August 10, 2018, soon after his release from the hospital, Wolfson informed Attorney Moore and Kirkland that he was "ready, willing and able" to pay to Kirkland not only the $80,000 that had been due on May 1, 2018, but also the $10,000 that was not due until January 1 of the following year. ROA, pg. 95, ¶6. Wolfson further indicated that he had become aware of the "Assignment" that had been executed by Kirkland on June 29, 2018, while Wolfson was hospitalized, pursuant to which Kirkland conveyed his interest in Old South to El Cid. Wolfson indicated that he was now satisfied that the POA lien was not valid and he was "ready, willing and able to immediately pay $90,000" for Kirkland's interest in Old South, but was uncertain if he should make the payment to Kirkland or El Cid. *Id.*, ¶¶ 8, 9 and 10 and ROA, pg. 350. Although Wolfson did not tender the money to either Kirkland or El Cid, these parties stipulated that they would not have accepted the tender. ROA, pg. 324, lines 3 – 19.

Prior to the filing of this lawsuit, Wolfson never received any notice of default. ROA, pg. 333, lines 8 – 10 and pg. 320, lines 9 – 12. Wolfson was never told that if he did not pay the

money by March 1 he would lose the right to buy Mr. Kirkland's interest in Old South. ROA, pg. 320, lines 19 to pg. 321, line 3.

C. STANDARD OF REVIEW

This action was tried non-jury before the Beaufort County Master In Equity. Kirkland's main purpose in bringing this action was to seek a declaration from the Court rescinding that portion of the handwritten Settlement Agreement dated May 21, 2017 requiring Kirkland to sell to Wolfson Kirkland's one-half interest in Old South Properties for $90,000, and additionally, seeking a declaration that Wolfson had forfeited his one-half interest in Old South Properties to Kirkland for free, thereby vesting Kirkland with 100% ownership of Old South Properties. This is the relief that was granted to Kirkland by the Beaufort County Master In Equity.

"Whether an action for declaratory relief is legal or equitable in nature depends on the Plaintiff's main purpose in bringing the action." *Willliams v. Wilson,* 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002).

An action in which the main purpose is to rescind an agreement is equitable in nature. *Anderson County v. Preston*, 420 S.C. 546, 560, 804 S.E.2d 282, 289 (Ct.App. 2017).

In an equitable action, the Appellate Court reviews factual findings and legal conclusions *de novo*. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct.App. 2011). Therefore, the Court of Appeals may find facts according to its own view of the preponderance of the evidence. *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). Moreover, the Court of Appeals is free to decide questions of law with no particular deference to the Circuit Court. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

I. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT WOLFSON DEFAULTED ON THE AGREEMENT DATED MAY 21, 2017 BY FAILING TO MAKE THE FIRST INSTALLMENT PAYMENT OF $80,000 TO KIRKLAND ON OR BEFORE MARCH 1, 2018, OR BY THE EXPIRATION OF A THIRTY DAY GRACE PERIOD, WHICH THE COURT FOUND TO BE MARCH 31, 2018, WHERE THE DELAY IN TENDERING THE FIRST INSTALLMENT WAS NOT A MATERIAL BREACH JUSTIFYING RESCISSION OF THIS PORTION OF THE AGREEMENT AND THE PARTIES COULD NOT BE RETURNED TO THE STATUS QUO.

The handwritten Settlement Agreement called for Wolfson to pay Kirkland $80,000 on or before March 1, 2018. The "Note and Security Agreement" states:

> Should there be a default, Robert Wolfson shall have 30 days from the day of default to cure said default. Following any default, Robert Wolfson's interest in Old South Properties, Inc. shall be the exclusive property of Stancel E. Kirkland."

ROA, pp. 346 and 350.

The Trial Court found that Wolfson failed to make the $80,000 payment to Kirkland on or before March 1, 2018, that the 30 day "grace period" began to run on that date, and Wolfson was accordingly in default of the Agreement as of March 31, 2018, and that "this default activated the self-executing clause transferring Wolfson's interest in Old South Properties, Inc. to Kirkland." The Master accordingly found that as April 1, 2018 Kirkland was the exclusive owner of Old South Properties, Inc. ROA, pp. 5 and 6.

In so holding, the Trial Court, in essence, rescinded that portion of the handwritten Settlement Agreement between Wolfson and Kirkland whereby Kirkland agreed to sell his one-half interest in Old South to Wolfson for $90,000.00.

"A breach of contract claim warranting rescission of the contract must be so substantial and fundamental as to defeat the purpose of the contract. Thus, a rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of

the contracting parties." *Brazell v. Windsor,* 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009) (citations omitted).

In the instant case, Wolfson's approximate five month delay in tendering the first installment payment is not a breach that is "so substantial and fundamental so to defeat the purpose of the contract." The "object of the contracting parties" was to settle a number of outstanding issues between them. In order to accomplish this objective, they agreed, among other things, that Wolfson would acquire Kirkland's one-half interest in Old South's properties for the total sum of $90,000.00. Wolfson tendered payment of the entire $90,000 approximately 4 ½ months prior to the time the final installment payment was due. In other words, Wolfson offered to pay the entire amount that was due **prior** to the time that full payment was due.

Additionally, "in the absence of fraud, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *Brazell v. Windson*, 384 S.C. 512, 682 S.E.2d 824, 826-27 (2009) (citation omitted). In the instant case, it is impossible to return both parties to the status quo simply by rescinding one portion of the handwritten Settlement Agreement. The portion of the Settlement Agreement that is most advantageous to Wolfson is Kirkland's agreement to sell Wolfson his one-half interest in Old South Properties for $90,000. By throwing that provision of the handwritten Settlement Agreement out, the Court has left the balance of the Agreement standing. Since this Agreement contains, among other things, mutual releases of any and all claims each party may have against the other, the parties cannot be returned to the status quo **prior** to the time of the settlement agreement.

It is worth noting that the handwritten Settlement Agreement does not provide that time is of the essence. The "Note and Security Agreement," likewise does not contain any language indicating that time is of the essence. Since both of these documents were drafted by Attorney Moore on

behalf of his client, Attorney Kirkland, it would have been very easy to include language indicating that time was as of the essence, if this was to be the intent of the parties. They had two (2) occasions to do so and failed to include such language in either document. In *Dargan v. Page*, 222 S.C. 520, 73 S.E.2d 705 (1952) the South Carolina Supreme Court noted "in equity, strict compliance with the time limits contained in a contract will not ordinarily be enforced." *Id,* 222 S.C. at 527, 73 S.E.2d at 708. "It is well settled in this State that time is not of the essence of a contract to convey land unless made so by its terms expressly or by implication." *Faulkner v. Millar,* 319 S.C. 216, 219, 460 S.E.2d 378, 380 (1995).

It is accordingly respectfully submitted that the Court erred in finding and concluding that Wolfson's delay in tendering the first installment payment to Kirkland constituted a breach of contract so substantial and fundamental as to defeat the purpose of the contract and warranting rescission, particularly where rescinding that portion of the contract pursuant to which Wolfson is entitled to purchase Kirkland's one-half interest in Old South Properties leaves the balance of the contract in place, rendering it impossible to return the parties to the status quo that they enjoyed prior to entering into the handwritten Settlement Agreement.

II. THE COURT ERRED IN FAILING TO FIND AS A MATTER OF FACT AND CONCLUDE AS A MATTER OF LAW THAT WOLFSON'S DELAY IN TENDERING THE FIRST INSTALLMENT PAYMENT OF $80,000 TO KIRKLAND WAS JUSTIFIED.

Wolfson's delay in tendering the $80,000 payment to Kirkland was the result of the lien that had been placed on Old South's property by the Bull Island Plantation POA in December 2017, well after the signing of the May 21, 2017 Settlement Agreement but before the initial installment due date of March 1, 2018. The handwritten Settlement Agreement simply provides that Wolfson is paying $90,000 for Kirkland's one-half interest in Old South. This Agreement was drafted by Attorney Moore on behalf of Kirkland, who is also an attorney. It is clear that the Agreement contemplates that Wolfson is purchasing Kirkland's one-half interest in Old South as Old South exists at the time of the agreement. The substantial lien being unexpectedly placed on Old South's property by the Bull Island Plantation POA prevented Kirkland from transferring his one-half ownership interest in Old South to Wolfson as was contemplated by the parties at the time the agreement was drafted. Both Wolfson and Kirkland believed that the lien was invalid. Although the burden should have been on Kirkland to have the lien removed, Wolfson took the initiative and filed a lawsuit for this purpose himself.

Kirkland's ability to comply with his end of the bargain was substantially impeded by the lien against Old South. Wolfson's delay in tendering payment was accordingly justified. Additionally, the delay in tendering payment is further justified by the reality that Wolfson was physically incapacitated from May 13 to August 1 as a result of his accident. Almost immediately upon being discharged from the hospital, he offered to tender payment in full even though full payment was not yet due.

"It is well established in this State that time is not of the essence of a contract to convey land unless made so by its terms expressly or by implication." *Faulkner v. Miller*, 319 S.C. 216,

229, 460 S.E.2d 378, 380 (1995). "When the contract does not include a provision that "time is of the essence," the law implies that it is to be done within a reasonable time." *Id.*, citations omitted. "In equity, strict compliance with time limits contained in the contract will not ordinarily be enforced, except with regard to option contracts." *Id.*, 319 S.C. at 221, 460 S.E.2d at 380 (citation omitted). Although the hastily drawn handwritten agreement does not so specify, the primary asset of Old South which Wolfson was purchasing from Kirkland was the real estate sales office and the land upon which the office is located.

It is, accordingly, respectfully submitted that the Court erred in failing to find that Wolfson's delay in tendering the first installment payment to Kirkland was not justified considering the intervening lien placed on Old South and Wolfson's unforeseen physical incapacity.

III. THE COURT ERRED IN FAILING TO FIND AS A MATTER OF FACT AND CONCLUDE AS A MATTER OF LAW THAT THE FAILURE OF KIRKLAND TO DELIVER TO WOLFSON A NOTICE OF DEFAULT DELAYED THE RUNNING OF THE THIRTY (30) DAY GRACE PERIOD UNTIL SAID NOTICE OF DEFAULT WAS DELIVERED.

Prior to filing the lawsuit, Kirkland never notified Wolfson that Wolfson was in default for failing to tender the first installment payment. The Note and Security Agreement expressly provided that "should there be a default, Wolfson shall have 30 days from the day of default to cure said default." Exhibit 2. The Trial Court found that this 30 day period in which to cure any default began to run automatically on March 1, 2018, despite the fact that no notice of default was ever delivered to Wolfson. Final Judgment, pg. 3.

The instance case is analogous to cases involving the maker of a note payable in installments. Wolfson promised to pay Kirkland $90,000 in two (2) installments with said payments to be secured by a mortgage. ROA, pg. 346. Kirkland never sent Wolfson a notice of default. Kirkland never gave Wolfson the opportunity to cure the alleged "default," but instead, filed this suit asking the Court, among other things, to rescind that portion of their agreement requiring Kirkland to sell his one-half interest in Old South to Wolfson.

The issue as to whether Wolfson was entitled to receive notice of default from Kirkland is answered by comparing the results reached by the South Carolina Supreme Court and the South Carolina Court of Appeals in two (2) cases.

First, in *Allendale Furniture Company v. Carolina Commercial Bank,* 284 S.C. 76, 325 S.E.2d 530 (1985) the maker of a note defaulted on an installment note it gave to the bank. The bank brought suit, seeking acceleration of the note and foreclosure of the mortgaged property. The maker argued the bank did not provide notice before bringing its action for acceleration and foreclosure. The note stated: "If default be made in the performance of . . . this note . . ., said

principal sum with all accrued interest thereon shall become at once due and payable at the option of the holder **without further notice**." *Id.* at 77, 325 S.E.2d at 530-31 (emphasis in original). The Trial Court held the maker's default entitled the bank to pursue acceleration and foreclosure without further notice to the maker. The South Carolina Supreme Court upheld the Trial Court's determination, ruling the phrase "without further notice" permitted the bank's election to accelerate all payments without any notice to maker. *Id.*, at 80, 325 S.E.2d at 532.

Conversely, in *Hendrix v. Franklin,* 292 S.C. 138, 355 S.E.2d 273 (Ct. App. 1986) immediately upon the maker's default, the lender brought a foreclosure action. The maker of the note averred that it was entitled to "notice of acceleration." Unlike the note in Allendale Furniture Company, supra, there was no language in the Hendrix note stating what may occur regarding notice upon the maker's default. Upon other grounds, the Trial Court ruled the lender forfeited her right to foreclosure. The South Carolina Court of Appeals reversed and held that the lender was permitted to bring suit. The Court of Appeals recited the rule that where acceleration clauses do not provide for acceleration "without notice" (i.e., there is silence regarding the right to notice of default), then initiation of a civil action constitutes adequate "notice of acceleration." *Id.* at 140, 355 S.E.2d at 274.

In the instant case, unlike the Allendale Furniture Company case, the handwritten Settlement Agreement does not provide for acceleration of the installment payments "without further notice." The agreement, which was drafted by Kirkland's attorney, and must therefore be construed against Kirkland, is silent regarding the right to notice of default. Accordingly, the first notice Wolfson received of default was when this suit was filed. At that point in time, any tender of payment by Wolfson would have been pointless, as it would have been refused. ROA, pg. 324. "The rules of equity concerning the necessity of actual tender are not as stringent as

those of the law. It is sufficient if the party seeking specific performance states in his pleadings that he is ready, willing and able to perform his obligations under the contract. Moreover, where the contract has been repudiated by the other party or it is clear tender will be refused, the party seeking specific performance is relieved of the obligation to make tender." *Maccaro v. Andrick Development Corp.*, 280 S.C. 96, 101-02, 311 S.E.2d 91, 94 (Ct. App. 1984).

Unlike the agreement in Allendale Furniture Company, supra, the agreement between Wolfson and Kirkland does not expressly provide that Kirkland may proceed "without further notice." The handwritten Settlement Agreement is similar to the agreement in Henrdix, surpa, in that there is no language in either the handwritten Settlement Agreement or the document labeled "Note and Security Agreement" stating that Kirkland may proceed "without further notice." Accordingly, under the holding in Hendrix, the first "notice of default" given to Wolfson was when this suit was filed. Indeed, Kirkland's Complaint expressly confirms that it is Wolfson's notice of default. ROA, pg. 60, ¶10. At that point in time, any tender of payment by Wolfson would have been pointless, since it would have been refused. ROA,, pg. 324.

IV. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT THE FORFIETURE PROVISION CONTAINED IN THE "NOTE AND SECURITY AGREEMENT" EXECUTED ON JULY 17, 2017 WAS ENFORCEABLE WHERE SAID PROVISION WAS NOT SUPPORTED BY ANY CONSIDERATION.

Under the terms of the handwritten Settlement Agreement Wolfson agreed to buy, and Kirkland agreed to sell, Kirkland's one-half interest in Old South to Wolfson for $90,000. This Agreement further provides that "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."

Accordingly, Wolfson agreed simply to provide a "Security Agreement as to his interest in Old South Properties." The "Note and Security Agreement" prepared by Attorney Moore on behalf of Kirkland, however, goes way beyond a "Security Agreement." Without any additional consideration, the "Note and Security Agreement' contains a forfeiture clause, pursuant to which "Robert Wolfson's interest in Old South Properties, Inc. shall be the exclusive property of Stancel E. Kirkland." ROA, pg. 350. In other words, if Wolfson does not purchase Kirkland's one-half interest in Old South Properties for $90,000, not only does Wolfson not get Kirkland's one-half interest in Old South Properties, but Kirkland automatically gets Wolfson's one-half interest in Old South Properties for free. This forfeiture provision goes way beyond a Security Agreement as called for in the original handwritten Settlement Agreement.

It is a totally new agreement, addressing not only Wolfson's right to purchase Kirkland's one-half interest, but now addressing, for the first time, Kirkland's entitlement to receive Wolfson's one-half interest in Old South Properties for free.

One of the required elements of an enforceable contract is valuable consideration. *Armstrong v. Collins,* 366 S.C. 204, 222, 621 S.E.2d 368, 377 (Ct.App. 2005). "Valuable

consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. A benefit to the promissor or a detriment to the promisee may provide sufficient consideration for a contract." *Id.,* 366 S.C. at 222-23, 621 S.E.2d at 377.

That portion of the "Note and Security Agreement" pursuant to which Wolfson agrees to forfeit his one-half interest in Old South Properties to Kirkland for free is an entirely new agreement that is not reasonably encompassed or anticipated under the four corners of the original handwritten Settlement Agreement. This forfeiture provision, in essence, is an entirely new contract. It is unenforceable, however, since it is not supported by any valuable consideration given by Kirkland. Kirkland, in fact, is not even a party to the "Note and Security Agreement." Kirkland is neither a signatory or a party to the "Note and Security Agreement."

The agreement of Wolfson to forfeit his one-half ownership interest of Old South to Kirkland for free is not supported by any consideration and is accordingly unenforceable.

V. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT WOLFSON'S FAILURE TO TENDER $80,000 TO KIRKLAND BY MARCH 31, 2018 RESULTED NOT ONLY IN WOLFSON'S INABILITY TO ACQUIRE KIRKLAND'S ONE-HALF INTEREST IN OLD SOUTH PROPERTIES, INC., BUT ALSO COMPELLED WOLFSON'S FORFEITURE TO KIRKLAND OF WOLFSON'S ONE-HALF OWNERSHIP INTEREST IN OLD SOUTH PROPERITES, INC. FOR FREE, WHERE THIS CLAUSE IS AN UNENFORCEABLE FORFEITURE OR PENALTY.

In his Final Order, the Beaufort County Master In Equity ruled that Wolfson, by missing the first installment payment, not only lost the right to purchase Kirkland's one-half interest in Old South Properties, but forfeited Wolfson's own one-half ownership interest in Old South Properties to Kirkland for free as a penalty.

"A court of equity abhors forfeitures, and will not lend its aid to enforcement." *Jones v. New York Guarantee and Indemnity Company,* 101 U.S. 622, 628 (1879). "Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." *Lane v. New York Life Insurance Company,* 147 S.C. 333, 374, 145 S.E. 196, 209 (1928). "The Court has the power in equity to deny or delay forfeiture when fairness demands." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011) citing *Lewis v. Premium Investment Corporation*, 351 S.C. 167, 172, 568 S.E.2d 361, 364 (2002).

In *Lewis v. Premium Investment Corporation*, supra, the Court found it would be inequitable to enforce the forfeiture provision without first allowing the purchaser an opportunity to redeem the contract by paying the entire purchase price. The Court looked at case-specific factors in making this determination, specifically the amount of equity the purchaser had accumulated, the length and number of defaults, the amount of forfeiture, the speed in which equity was sought, and the amount of money the purchaser would forfeit in relation to the purchase price of the property. *Id.*

Applying the Lewis factors to this case, Wolfson's "default" consist of a relatively short delay in making the first installment payment. The delay was justifiable due to the fact that Kirkland could not transfer clear title due to the lien placed upon Old South's assets by the POA. Wolfson's delay was also partially excused by his incapacity for a substantial period of time. Wolfson offered to pay not only the missed installment payment, but the full purchase price prior to the time the full purchase price was due. No notice of default was ever sent to Wolfson, and by the time he was declared to be in default by the filing of this suit, any tender would have been refused.

It is reasonable to believe that if Kirkland's one-half interest in Old South was worth at least $90,000, then Wolfson's one-half interest in Old South is worth at least that same amount of money and to forfeit it for zero dollars is clearly inequitable and unfair. The foregoing factors, coupled with the fact that this forfeiture provision was in no way a part of the original Settlement Agreement entered into between the parties, but was added by Kirkland's attorney without the provision of any additional consideration, leads to the inescapable conclusion that it is simply an unenforceable penalty.

CONCLUSION

It is respectfully submitted that the Trial Court erred in concluding that Wolfson defaulted on the agreement dated May 21, 2017 by failing to make the first installment payment of $80,000.00 to Kirkland before March 1, 2018 or by the expiration of a thirty (30) day grace period which the Court found to expire on March 31, 2018. Wolfson's delay in tendering the first installment payment was not a material breach of the agreement. Wolfson's delay in tendering payment was not a breach that was so substantial and fundamental as to defeat the purpose of the agreement. The non-materiality of the delay is emphasized by the fact that Wolfson offered to pay the entire amount that was due prior to the time that full payment was due. Additionally, the purpose of the May 21, 2017 agreement between Wolfson and Kirkland went far beyond Wolfson's purchase of Kirkland's interest in Old South. The Trial Court, by simply rescinding this one portion of the May 21, 2017 agreement, did not return the parties to the status quo, but simply deprived Wolfson of one of the benefits for which he had bargained.

Wolfson's delay in tendering the first installment payment was justified due to the intervening imposition of a lien upon the assets of Old South, thereby preventing Kirkland from transferring his interest as was contemplated by the parties at the time they entered into the May 21, 2017 Settlement Agreement. This was further exacerbated by Wolfson's subsequent physical and mental incapacity as a result of his accident.

Both the May 21, 2017 Settlement Agreement, and the subsequent "Note and Security Agreement" are silent regarding Wolfson's entitlement to notice of default. As a result, Wolfson was not declared to be in default until this lawsuit was filed. By that time, although he was ready, willing and able to tender the first installment payment, the contract had already been repudiated by Kirkland and Kirkland stipulated that any tender would have been refused.

Finally, even if Wolfson were in default of the May 21, 2017 agreement and not entitled to purchase Kirkland's interest in Old South for $90,000.00, it is respectfully submitted that the Court erred in going further and holding that not only could Wolfson not purchase Kirkland's one-half interest in Old South, but Wolfson automatically forfeited his one-half interest in Old South to Kirkland for free. In so holding, the Court relied upon the "Note and Security Agreement." This was error, inasmuch as the "Note and Security Agreement" was executed unilaterally by Wolfson without any further consideration and the forfeiture provision is clearly an unenforceable penalty.

It is, accordingly, respectfully requested that the Order of the Beaufort County Master In Equity be reversed, that the South Carolina Court of Appeals declare that Wolfson did not forfeit his one-half interest in Old South to Kirkland, and that the South Carolina Court of Appeals declare that Wolfson be allowed to purchase Kirkland's one-half interest in Old South (now assigned to El Cid) for the sum of $90,000.00, together with such other and further relief as this Court may deem to be just and proper.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: _____

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373 - Telephone
(843)524-1302 - Facsimile
Email: fred@mossandkuhn.com

Attorneys for the Appellant

Beaufort, South Carolina
June 19, 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

CASE NO.: 2018-CP-07-00796
APPELLATE CASE NO.: 2019-000203

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

vs.

Robert Wolfson, Appellant.

CERTICIATE OF COUNSEL

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

MOSS, KUHN & FLEMING, P.A.

By: _____

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373 - Telephone
(843)524-1302 - Facsimile
Email: fred@mossandkuhn.com

Attorneys for the Appellant

Beaufort, South Carolina
August 20, 2019