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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2022-000290
Case No. 2020-CP-46-02006

Eastwood Construction Partners, LLC and
Eastwood Development Corporation,..... Appellants,

v.

GHD Brooks Creek, a North Carolina Limited Liability Company, and AF-Brooks Creek, LLC, a North Carolina Limited Liability Company, GHD River Falls, a North Carolina Limited Liability Company, and AF-River Falls, LLC, a North Carolina Limited Liability Company, Greenhawk Corporation, Inc. and
TRI Pointe Homes, Inc.,.....Respondents.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE

This is a dispute between Eastwood and Greenhawk over a contract and joint venture to purchase residential lots on two tracts of real property in York County, South Carolina (together, the "Properties"). Eastwood claims its contract with Greenhawk is evidenced by multiple writings and Eastwood's part performance.

Appellants Eastwood Construction Partners, LLC and Eastwood Development Corporation (together, "Eastwood") filed this action against Respondents GHD Brooks Creek, AF-Brooks Creek, LLC, GHD River Falls, LLC, AF-River Falls, LLC, and Greenhawk Corporation, Inc. (collectively, "Greenhawk") seeking specific performance of contracts for the sale of the Properties, as well as other remedies. (Compl.). Eastwood is a residential homebuilder, and Greenhawk is a land developer. (Third Am. Compl., ¶14). In 2014, Eastwood placed the Properties under contract and then assigned those contracts to Greenhawk. (Deposition of Craig Briner, at 58:2–4 ("Briner Dep.")). Eastwood assigned the sales contracts pursuant to an agreement with Greenhawk whereby Greenhawk would develop the Properties and then sell finished lots back to Eastwood so Eastwood could build homes and townhomes for sale to consumers. (Rule 30(b)(6) Deposition of Joseph Polite, at 71:12–22 ("Eastwood 30(b)(6)"); Deposition of Joseph Polite, at 51:1–13 ("Polite Dep."); Polite Dep., Ex. 23; Briner Dep., at 58:2–59:25). In accordance with their contract, Eastwood assisted Greenhawk in the development of the Properties, to include expending $360,000 in pre-development costs that have never been reimbursed and were to be treated as an earnest money deposit. (Eastwood 30(b)(6), at 146:9–12; Briner Dep., Ex. 95, October 12, 2016 Email re Deposit). Eastwood and Greenhawk also agreed to a pricing method for the lots—Greenhawk would sell the lots to Eastwood at a price that would generate a 20% return on its investment. (Briner Dep., at 56:7–20, 70:11–13, 75:7–16, 112:11–16; Eastwood 30(b)(6), at 16:19–21, 23:18–21, 39:6–18, 49:8–12, 101:12–102:10).

Greenhawk never finished developing the lots for resale to Eastwood. In 2020, one of Eastwood's officers happened to drive by one of the Properties, the Brooks Creek site, where he saw townhome construction underway. Only then did Eastwood learn that Greenhawk had contracted to sell finished lots to another residential homebuilder, Respondent TRI Pointe Homes, Inc. ("TRI Pointe").

Eastwood filed suit against Greenhawk on June 30, 2020, and simultaneously filed lis pendens against the Properties. (Compl.; Combined Lis Pendens). Greenhawk moved to dismiss the Complaint, and Eastwood filed a First Amended Complaint. The Circuit Court denied Greenhawk's motion to dismiss. On September 4, 2020, TRI Pointe moved to intervene in the suit and was allowed to do so.

Eastwood filed a Second Amended Complaint on October 30, 2020, and a Third Amended Complaint on January 7, 2021. In its Third Amended Complaint, Eastwood brings claims for: 1) specific performance of its contract with Greenhawk; 2) breach of contract against Greenhawk; 3) unjust enrichment against Greenhawk and TRI Pointe; 4) unfair trade practices against Greenhawk and TRI Pointe; 5) tortious interference with contracts against TRI Pointe; 6) misappropriation of trade secrets against TRI Pointe; 7) breach of joint venture agreement against Greenhawk; 8) breach of partnership agreement against Greenhawk; 9) another claim for tortious interference with contractual relationships against TRI Pointe; and 10) interference with prospective business advantage against TRI Pointe. (Third Am. Compl., at 7–14).

In late 2021, Greenhawk and TRI Pointe filed motions for partial summary judgment seeking dismissal of Eastwood's claims for specific performance and all other claims directly affecting title to the Properties. Eastwood filed a brief in opposition to both motions. (Eastwood Br. in Opposition to Summary Judgment). The Circuit Court held a hearing on the motions on December 10, 2021. Eastwood objected to the motions as premature, arguing that Respondents

were rushing the summary judgment process to consummate sale of the Properties Eastwood claims it is entitled to purchase before Eastwood—the party with the burden of proof—had completed discovery.

On January 14, 2022, the Circuit Court granted TRI Pointe's motion in a written Order. (TRI Pointe Partial Summary Judgment Order). Eastwood moved the Court to reconsider, and, on February 15, 2022, the Court denied Eastwood's motion to reconsider the TRI Pointe Order. (TRI Pointe Motion to Reconsider Order). On February 15, 2022, the Court granted Greenhawk's motion in a written Order. (Greenhawk Partial Summary Judgment Order). Eastwood moved the Court to reconsider, and, on March 8, 2022, the Court denied Eastwood's motion to reconsider the Greenhawk Order. (Greenhawk Motion to Reconsider Order).

The Circuit Court's summary judgment orders were only partial and addressed only Eastwood's claims for specific performance of the alleged contract. As a result, Eastwood's other claims for damages, as well as Respondents' counterclaims, are still pending.

Eastwood timely filed its notices of appeal on March 11, 2022. (Combined Notices of Appeal). Eastwood's appeals were subsequently consolidated. (Consolidation Notice). This Court has jurisdiction to hear this appeal pursuant to S.C. Code Ann. § 14-3-330. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011) ("An order 'involves the merits' when it finally determines a substantial matter forming the whole or a part of some cause of action or defense.").

After Eastwood filed the present appeal, Respondents moved the Circuit Court to lift the automatic stay and immediately cancel the lis pendens on the Properties. Eastwood opposed the motions in a written brief. (Eastwood Br. in Opposition to Mots. to Lift Stay). The Circuit Court granted the motions and lifted the stays in orders dated April 18, 2022. Eastwood filed a petition, pursuant to SCACR 241(d)(7), asking this Court to reverse those orders lifting the automatic stay.

Respondents filed a joint return. As of the date of this brief, this Court has not ruled on Appellants' Rule 241(d)(7) petition.

FACTUAL BACKGROUND

The facts in this case are still undeveloped because discovery is incomplete. What facts are known demonstrate that it was error for the Circuit Court to grant Respondents' partial summary judgment motions.

I. THE PROPERTIES AND PARTIES

Eastwood is a residential home builder, building homes in the major metropolitan areas of North and South Carolina. Eastwood is based in the Charlotte, North Carolina area. Greenhawk is a land development company based in Raleigh, North Carolina. Most of Greenhawk's land development activities are in the Raleigh and Greensboro areas of North Carolina, with a few properties in other areas including the properties at issue in this case. Greenhawk has no office or location in York County or the Charlotte area.

Prior to 2013, Greenhawk and Eastwood engaged in multiple business transactions where Greenhawk had either developed land into buildable lots, or taken over existing land developments and completed the development of lots. Once the development work was complete, Greenhawk sold those completed, ready to build lots to Eastwood so Eastwood could construct homes. The transaction at issue in this case was an extension of that ongoing business relationship between Greenhawk and Eastwood.

In 2013, Eastwood, through its then Vice President of Land, Joe Dority, identified the real property at issue in this case and placed all of the affected tracts under contract to purchase, including the payment of earnest money deposits. (Briner Dep., at 58:2–4). The purpose of that effort was to prevent others from gaining access to the property. The two properties were located off of Gold Hill Road in York County, South Carolina. One parcel was approximately 12 acres

and the other was 51 acres. (Compl., Ex. C). In anticipation of their purchase, Eastwood began preliminary development work on the Properties for the joint benefit of Greenhawk and Eastwood, including engineering, site design, and municipal related permitting. While the preliminary work was ongoing, Eastwood's Dority entered into an agreement with Greenhawk's Craig Briner regarding both properties. Pursuant to that agreement, Eastwood would assign its rights to purchase the properties to Greenhawk, Greenhawk would develop the properties in accordance with Eastwood's specifications, and Greenhawk would sell competed lots to Eastwood. (Eastwood 30(b)(6), at 71:12–22; Polite Dep., at 51:1–13; Polite Dep., Ex. 23; Briner Dep., at 58:2–59:25).

Craig Briner was a founding member and at the time was president of Greenhawk Corporation. (Briner Dep., at 15:24–16:6, 123:24). He was also one of Greenhawk Development, LLC's three managers with full authority to enter into agreements with Eastwood. (Deposition of Linwood Jackson, at 31–32 ("Jackson Dep.")).[1] Part of the reasoning for deciding to purchase the land and enter the agreement with Eastwood was that Eastwood would be buying the lots, providing a source of income and return on investment. (Briner Dep., at 37:7–38:1). In the 2013–2014 time frame, through the middle of 2018, Mr. Briner was the sole person responsible for Greenhawk's land development activities. Once he had authority to proceed from Mr. Agarwal and Mr. DesVergers, Greenhawk's other managers at the time, no one else at Greenhawk had knowledge of what arrangements were made with Eastwood or other developers. (Briner Dep., at 18:13–25).

The Properties are within a few thousand feet of one another, and Eastwood considered them two parts of a single development project. (Polite Dep., at 44:13–23, 45:5–12). The larger

[1] Since Mr. Jackson was deposed the week before the December 10, 2021 summary judgment hearing, a transcript of his testimony was not available for the hearing or Eastwood's briefing. However, Judge Hall allowed Eastwood to supplement its summary judgment record with cited portions of the transcripts once those were available.

tract was known as the River Falls site, and the smaller tract was known as the Brooks Creek site.[2] Greenhawk and Eastwood agreed that River Falls would be developed as a single-family subdivision with detached home lots, and Brooks Creek would be developed as a townhome subdivision with groups of attached lots.[3] (Polite Dep., at 194:19–21, 273:8–11; Eastwood 30(b)(6) Dep., at 71:12–22; Briner Dep., at 58:2–59:25).

Pursuant to the Eastwood-Greenhawk agreement, Eastwood assigned both land sale contracts to Greenhawk at roughly the same time. (Compl., Ex. D, Combined Assignments).[4] Greenhawk provided no consideration to Eastwood for the assignments other than the agreement to develop the properties to Eastwood's specifications and then to sell the lots to Eastwood. (*Id.*). When Greenhawk closed on the actual purchase, Eastwood received reimbursement of the earnest money it had paid for the Brooks Creek property but received no reimbursement related to the River Falls property. (Deposition of Jeff White, Exs. 149, 150, Settlement Statements ("White Dep.")).[5] Both before and after Greenhawk closed on the Properties, Eastwood arranged for and paid for development work all for Greenhawk's benefit. In total, Eastwood spent roughly $570,000 for development costs at River Falls and Brooks Creek. (White Dep., Ex. 151, Eastwood Costs). Of that amount, $360,000 was never reimbursed. (Eastwood 30(b)(6), at 146:9–12). Rather Greenhawk and Eastwood agreed that Greenhawk would treat Eastwood's early payments as an earnest money deposit for the purchase of lots in River Falls and Brooks Creek. (Briner Dep., Ex.

[2] The Brooks Creek site was later known as Brooks Springs. TRI Pointe refers to the site as "Ashburn."

[3] Eastwood picked the names for both developments. (Briner Dep., at 66:24–67:11).

[4] Though the River Falls assignments are unsigned, Greenhawk does not contest that they were signed. (Briner Dep., at 63:14–16).

[5] Since Mr. White was deposed the week before the December 10, 2021 summary judgment hearing, a transcript of his testimony was not available for the hearing or Eastwood's briefing. However, Judge Hall allowed Eastwood to supplement its summary judgment record with cited portions of the transcripts once those were available.

95, October 12, 2016 Email re Deposit; Deposition of Jeremy Medlin, Ex. 121 ("Medlin Dep.")).[6] To date, Greenhawk has not sold lots to Eastwood, nor has it refunded Eastwood this earnest money deposit. (Eastwood 30(b)(6), at 146:9–12).

After Greenhawk closed on the Properties, Eastwood and Greenhawk worked together to develop the River Falls and Brooks Creek projects. Eastwood contracted with an engineering firm, Land Design, to provide consolidated services for both projects. (*See, e.g.*, First Am. Compl., Ex. L, Land Design Invoice). Land Design developed a plan for River Falls that called for the development of 138 individual lots. (Dority Dep., Exs. 67, 68). Land Design also created a site plan for Brooks Creek to have 58 townhome lots. (Polite Dep., Ex. 29). Eastwood paid all of these engineering and design expenses for the properties. (White Dep., Ex. 151, Eastwood Costs). Both sets of plans identify Eastwood as the home builder.

Eastwood also contracted for wetland services with Leonard S. Rindner and for environmental services with Summit ECS, Inc. on both properties. (*Id.*). Callahan Grading Company provided general contractor services for development work on both Properties. (Polite Dep., Ex. 12, October 2016 Email Exchange between Joe Polite and Clark Stewart).

Briner testified unequivocally that he was the person at Greenhawk with the authority to enter the contract with Eastwood. He confirmed that the terms of the agreement with Eastwood were reached in conjunction with the approval by Greenhawk to enter into the transaction, accept the assignment of the land purchase contracts, and close the purchase. (Briner Dep., at 18:15–25, 64:2–65:5). Throughout development, Eastwood and Greenhawk agreed that, after all costs were

[6] Since Mr. Medlin was deposed the week before the December 10, 2021 summary judgment hearing, a transcript of his testimony was not available for the hearing or Eastwood's briefing. However, Judge Hall allowed Eastwood to supplement its summary judgment record with cited portions of the transcripts once those were available.

factored in, the lot prices would be calculated such that Greenhawk would receive a 20% return. (Briner Dep., at 56:7–20, 70:11–13, 75:7–16, 112:11–16; Eastwood 30(b)(6), at 16:19–21, 23:18–21, 39:6–18, 49:8–12, 101:12–102:10). As Mr. Briner testified:

> Q. What was GreenHawk's I would say standard estimated markup over costs for a lot?
>
> THE WITNESS: Typically, we were trying to get sort of a 20 percent IRR number. Some were more, if we both cured it ourself. Some were less, if the risk was assumed to be less or the time frame was shorter than sort of normal takedown. But 20 IRR.
>
> Q. And how would you go about calculating that for any given project?
>
> A. Obviously, you start with the cost, the length of time that it would take to go ahead and sell those, typically in a takedown schedule, over a period of a couple three years, something like that typically.
>
> And use that time frame, and then the sales price, which frequently had escalators in them, given the time that it took to consume them.
>
> Q. And was that part of the analysis that would have been done at the initiation of a project to get Mr. Agarwal's approval and permission to make the acquisition and have it funded?
>
> A. Typically, yes.
>
> Q. To your recollection, was Mr. Dority or anybody else at Eastwood aware of GreenHawk's standard expected 20 percent IRR on its development projects?
>
> A. I think -- I think Joe Dority was aware of what we were trying to target, I'm pretty sure.
>
> Q. And was he aware that costs, you know, that the takedown schedule and price escalators would roughly be pegged so that GreenHawk would get a 20 percent rate of return on its money over the life of the takedown as far as you know?
>
> A. Yes.

(Briner Dep., at 55:6–56:20).

After Mr. Dority left Eastwood in late 2016, Joe Polite, became Eastwood's Vice President of Land. (Polite Dep., at 34:1–5). Polite concurred with Briner's testimony on the pricing of the lots:

> Q. So Eastwood's position right now at this deposition is it will pay whatever the confirmed net costs are that is GreenHawk's costs minus Eastwood's costs and will guarantee a 20 percent rate of return to GreenHawk on that number and it's compelled to accept that price and cannot back out. Is that Eastwood's testimony?
>
> A. I would say yes.
>
> Q. Okay. All right.
>
> A. If –

Q. If what?

A. No, if we all confirm the pricing and the costs, both parties together, we, being GreenHawk, if we confirm those prices, yes, we would be willing to purchase based on those costs.

Q. You said pricing and costs. You said pricing and costs. As I understand your testimony costs determine the price, correct?

A. Plus profit less our investment.

(Eastwood 30(b)(6), at 129:12–130:5).

This price agreement within the Eastwood-Greenhawk unwritten contract was borne out by the numerous "pro formas" sent from Greenhawk to Eastwood that show a projected IRR near 20% for both Properties. (Briner Dep., Exs. 91–93, 96). Greenhawk included Eastwood in meetings and discussions where the pro forma analysis was discussed. (Briner Dep., at 72:2–8). In other words, after all costs were accounted for, Eastwood would pay a lot price and on a schedule that allowed Greenhawk to reach the 20% IRR mark. (Eastwood 30(b)(6), at 129:12–130:5; Briner Dep., at 56:7–20, 70:11–13, 75:7–16, 112:11–16).

Greenhawk's internal documents from 2016 confirmed that Eastwood was the intended buyer of the lots and that the costs, and cost increases were the prohibiting factor in having a final lot sales price. (Jackson Dep., Ex. 139). Even after this lawsuit began, Briner confirmed to Greenhawk that lot pricing had been delayed because of increased costs. (Medlin Dep. Ex. 121). However, Briner was also clear that the agreement to price lots at 20% over costs had never changed:

Q. And was there ever any change in the discussion with Eastwood about the 20 percent internal rate of return expectation on the project?

A. Not to my knowledge.

Q. And was there ever a point in time that you recall anyone at Eastwood saying that they would not be willing to accommodate a purchase price for River Falls that would provide GreenHawk with that 20 percent rate of return?

A. I don't think we ever got -- no, no.

(Briner Dep., at 75:7-16).

II. EASTWOOD AND GREENHAWK WORK JOINTLY ON DEVELOPMENT BUT EXPERIENCE DELAYS.

Development at River Falls by Callahan Grading, the general contractor, began in 2014. (Briner Dep., Ex. 94, Tega Cay Memo). Due to wetlands incursions and other code violations by Callahan, work was immediately stopped in early 2015 until remediation efforts were approved. (*Id.*). There were other delays at both Properties due to general contractor errors, licensing problems, sewer connections, and other issues. (Briner Dep., Ex. 98, May 12, 2017 Email from Mike Conley).

During this time period, Joe Dority personally monitored the initial development at the River Falls site and worked with Briner. (Briner Dep., at 59:11–14, 60:1–6, 99:2–6). Dority served as the primary point of contact for various contractors, and he was listed as the primary contact for the City of Tega Cay's storm water and sediment control plan. (Polite Dep., Ex. 7, May 8, 2014 Email re Invoice; Dority Dep., Ex. 70, Tega Cay Contact Sheet). Greenhawk and Eastwood worked closely together on the development timelines for both Properties. (First Am. Compl., Ex. J, Timeline Correspondence from Greenhawk). After Dority left Eastwood, Eastwood's engineer, Pat Quinn, would occasionally visit the Properties and report back to Mr. Briner. Because this was part of the contract, Eastwood (or Dority or Quinn) was never compensated by Greenhawk for those efforts. (Briner Dep., at 78:3–19).

In 2014, Greenhawk and Eastwood were informed by the South Carolina Department of Transportation ("SCDOT") that the planned entrance to River Falls would have to be moved a few feet down Gold Hill Road. However, the land acquired by Greenhawk did not encompass the area where SCDOT dictated the entrance had to be. To satisfy SCDOT and facilitate development of River Falls, Eastwood paid $55,741 for the 2316 square feet of land, or .055 acres, needed to move River Falls' entrance on Gold Hill Road. (*See* Helms Settlement Statement, BATES

ECP_ECP_0012091; Deed from Caroline Helms to Eastwood Development Corp). The cost of that sliver of land equated to a cost per acre of over $900,000. The land owner was apparently aware of the predicament Eastwood and Greenhawk were in and used that to her advantage. (*See* June 10, 2014 Email from Joe Dority to Craig Briner, BATES ECP_0013183). In addition to an exorbitant purchase price, Eastwood also agreed to build the Seller an improved driveway, with a security gate, and granted her an easement to the River Falls entrance road. (*See* Helms Purchase and Sales Agreement, BATES GHD_0016151, ¶3). In 2018, Eastwood transferred the sliver of land to Greenhawk for no cash consideration. (Briner Dep., at 61:17–62:8; Eastwood 30(b)(6), at 122:1–4, 141:21–24; Quitclaim Deed from Eastwood to Greenhawk, BATES ECP_0005870). Eastwood gave Greenhawk that vital piece of land for no consideration other than Greenhawk's agreement to develop and sell lots to Eastwood.

Throughout the time from 2013 through 2018, Greenhawk experienced numerous development delays. With delays, Greenhawk's costs could not be finalized so a written lot purchase agreement could be arrived at. However, both Greenhawk and Eastwood consistently understood that Greenhawk was preparing lots to Eastwood's specifications and that Eastwood would buy those lots.

At multiple times, Eastwood pressed Greenhawk for costs so that the terms could be computed, but Greenhawk's development delays prevented that from happening. Eastwood inquired in April 2016, (Polite Dep., Exs. 9, 10); October 2016, (Polite Dep., Ex. 12); December 2016, (Polite Dep., Exs. 14–16); February 2017, (Briner Dep., Ex. 97 ("Mike Conley (of Eastwood) is eager to this these projects started")); March 2017, (Polite Dep., Ex. 17 (Eastwood is "anxiously awaiting those lots")); and May 2017, (Briner Dep., Ex. 98 ("Good news they [River Falls and Brooks Creek] will be ours!")). Again, Greenhawk understood that the parties were waiting on costs, pursuant to the terms of their unwritten contract. (Jackson Dep., Ex. 139).

Compounding the delays and problems with the Properties, in July 2018, the towns of Fort Mill and Tega Cay both passed new builder "impact fees" that affected pricing. (Briner Dep., 132:10–133:12; Polite Dep., Ex. 25, Fort Mill Massacre Email). In July 2018, Eastwood asked Greenhawk to join in the lawsuit that was challenging the impact fees because Eastwood lacked standing to be a plaintiff; it was not a landowner in the affected jurisdiction. (Polite Dep., Ex. 27). Greenhawk declined, but both parties knew the impact fee litigation was central to the calculation of final costs. As it turned out, the lawsuit persisted through 2019 and was not resolved initially until January 2020.

A. Brooks Creek: Eastwood is still waiting on lots at the agreed-upon price.

In the wake of the impact fees, on October 31, 2018, Greenhawk sent a draft lot purchase agreement ("LPA") to Eastwood to memorialize their unwritten contract for the Brooks Creek lots, which it believed were nearing completion. (Eastwood 30(b)(6), at 53:7–12). Eastwood did not respond to the October 2018 LPA because there were key cost items that were not yet accounted for. Chief among those were the new impact fees. (Polite Dep., at 194:13–195:12; Polite Dep., Ex. 26, August 2018 Impact Fee Email Exchange).

In fact, it is now clear that the lot price offered by Greenhawk in October 2018 was not in accordance with Greenhawk's and Eastwood unwritten contract that Greenhawk would sell lots at cost plus a 20% markup. (Jackson Dep., Ex. 138). Rather the lot price was identical to the price Greenhawk was given in an unsolicited offer from another homebuilder, NVR, an offer Greenhawk declined because of its unwritten contract with Eastwood. (Briner Dep., at 125:12–126:23). The draft contract called for lot prices of $76,000 without regard to the impact fees. However, Greenhawk's internal pro forma for Brooks Creek used an assumed $77,000 per lot price to yield a 27% profit based on its known and estimated costs. (Jackson Dep., Ex. 146). Using those same costs, a $76,000 lot price would yield a 25.5% return. A 20% return would have the lot price less

than $71,000. (Jackson Dep., at 156–61). Greenhawk never offered Eastwood a lot price of $71,000. (*Id.* at 160–61).

These facts show it is dubious whether Greenhawk ever had an intention of complying with its unwritten contract with Eastwood. As Mr. Jackson stated in July 2018, a few days after the unsolicited NVR offer, "at Brooks Creek . . . we have buyers at ***substantially higher*** prices than what we have in the latest pro forma." (Jackson Dep., Ex. 138 (emphasis added)).

At no point did Eastwood tell Greenhawk that it no longer wished to buy lots at Brooks Creek. (Polite Dep., at 234:6–9).[7] Eastwood did not reject the October 2018 draft written contract and expected a final memorialization of the unwritten contract once all costs were accounted for—this is why Joe Polite was shocked when another Eastwood employee erroneously implied that the Brooks Creek contract had been terminated. (Polite Nov. 6, 2018 Email re Brooks Creek).

Shortly after the impact fee case concluded, Joe Polite called Craig Briner about Brooks Creek and River Falls. During the call, both Briner and Polite agreed that Eastwood and Greenhawk had a contract. (Polite Dep., at 167:8–24). Polite confirmed the conversation by email, and Briner did not respond or disagree. (Polite Dep, Ex. 23; Briner Dep., at 170:4–8).[8]

Unbeknownst to Eastwood, and in breach of the unwritten contract with Eastwood, Greenhawk offered Brooks Creek to other builders and eventually entered into a letter of intent and written contract with TRI Pointe in August 2019. (Briner Dep., Ex. 105). Despite an obligation to close in 2019, Greenhawk was not able to deliver lots to TRI Pointe because of continued development issues and costs. (Medlin Dep., at 114:18–116:9). In other words, Greenhawk elected to enter into a written contract with TRI Pointe before its costs were known, the claimed predicate

[7] In fact, the only written record at Greenhawk of the alleged rejection was made in June 2020, after this lawsuit was commenced, and was prepared "for the file."
[8] Briner now says he disagrees. (Briner Dep., at 170).

requirement to arriving at lot prices with Eastwood. Further, according to current Greenhawk COO Jeff White, Greenhawk is losing money on the lots it sold to TRI Pointe because it priced them too early. (White Dep., at 57:16–59:6). Eastwood learned of Greenhawk's sale of the Brooks Spring lots to TRI Pointe only when Mr. Polite and another Eastwood officer drove by the site in and saw ongoing home construction. (Eastwood 30(b)(6), at 140:7–13).

In order for a developer to actually deliver lots a final plat must be approved by the governing authorities and it must be recorded. The final Brooks Creek plat was not recorded until May 2020. The final Brooks Creek plat conforms with the Eastwood site plan, which is actually attached as an exhibit to the TRI Pointe-Greenhawk LPA for Brooks Creek. (Briner Dep., at 172:14–173:12; Briner Dep., Ex. 105, TRI Pointe and Greenhawk LPA, Ex. A).

B. River Falls: Greenhawk offers lots to Eastwood in violation of the unwritten contract.

Unlike with the Brooks Creek project, as of 2018, the job site "was basically abandoned." (Jackson Dep., Ex. 138). River Falls was not close to being completed and, in fact, most of the entitlements that had been obtained with Eastwood's assistance at that point had been allowed to expire. (Medlin Dep., Ex. 131). Consequently, Greenhawk had no idea of its costs to develop lots. (Briner Dep., at 117:1–118:5).

Nevertheless, in June 2020, Greenhawk invited Eastwood to make an offer for the raw River Falls land—they never offered finished lots as previously agreed. (Medlin Dep., Ex. 120).

After this lawsuit was initiated, Greenhawk entered into a written contract with Taylor Morrison of the Carolinas, Inc. to sell the River Falls property "as is." (Medlin Dep., Exs. 134,

135).[9] Greenhawk has completely abandoned its unwritten contract to develop lots and to sell those to Eastwood.

Greenhawk has also refused to reimburse Eastwood for the $350,000 earnest money deposit it made for Greenhawk's behalf from 2013 and 2014 on River Falls and Brooks Creek. Instead, Greenhawk has taken the position that it is entitled to both keep Eastwood's funds and also not sell Eastwood lots on the Properties sourced, named, and designed by Eastwood. The combination of those palpable failures required Eastwood to file this lawsuit.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo* under the same standard as the trial court under Rule 56(c), SCRCP. *Wright v. PRG Real Est.* Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019); *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). Under that standard, summary judgment is proper only "if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* "[T]he nonmoving party . . . is ***only required to submit a mere scintilla of evidence*** in order to withstand a motion for summary judgment." *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 271, 826 S.E.2d 609, 614 (2019) (emphasis added) (quoting *Hancock v. Mid-S. Mgmt.*, 381 S.C. 326, 329–31, 673 S.E.2d 801, 802–03 (2009) ("[W]e hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.")).

[9] As of the summary judgment hearing, Greenhawk had still not produced a copy of the written Taylor Morrison contract. In fact, Greenhawk has still not produced a copy of the written contract with Taylor Morrison.

ARGUMENT

The Circuit Court's orders granting partial summary judgment were erroneous on two grounds. First, summary judgment was premature and, under Rule 56(f), SCRCP, the Court should have deferred judgment until discovery on key issues had concluded. Second, the incomplete, undisputed facts demonstrated that judgment as a matter of law was improper both as a matter of law and because there were genuine issues of material fact. The Circuit Court erroneously drew all inferences in favor of Respondents and failed to acknowledge that Appellants have come forward with far more than a "mere scintilla" of evidence in support of their specific performance claims.

I. DISCOVERY WAS INCOMPLETE AT THE TIME THE CIRCUIT COURT GRANTED SUMMARY JUDGMENT, TO INCLUDE SIGNIFICANT, UNFULFILLED DISCOVERY OBLIGATIONS.

Despite being presented with information about essential, specific discovery, the Circuit Court proceeded to grant summary judgment rather than delay ruling in order to allow Eastwood to complete the discovery to which it was entitled.

Rule 56(f), SCRCP, allows a trial court to defer summary judgment until essential discovery is complete:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Rule 56(f), SCRCP. Rule 56(f) exists because "[s]ummary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). A party arguing that summary further discovery is needed before summary judgment can be granted "must advance

a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 53–54, 677 S.E.2d 32, 36 (Ct. App. 2009). Where the party opposing summary judgment meets that burden, the court may deny the moving party's motion or order a continuance to allow "depositions to be taken or discovery to be had or may make such order as is just." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

The Circuit Court erred when it failed to delay summary judgment until Eastwood could complete essential discovery. Discovery was not complete by the December 10, 2021 hearing, nor is it complete now. The incomplete discovery includes essential testimony and documents from Greenhawk decision makers, not trivial matters. Specifically, at the time of the hearing, Greenhawk: 1) had not produced Greenhawk's founder and president, Sajjan Agarwal, for a deposition; 2) identified another key decision maker just days before the December hearing; 3) failed to produce emails and notes from Sajjan Agarwal, Greenhawk's founder, president, and financial backer; and 4) overly redacted important documents despite Eastwood's request to produce attorneys' eyes only versions.

A. Eastwood did not have a chance to depose two of the three key decision makers with knowledge of the Eastwood-Greenhawk agreement.

Eastwood did not have a chance to depose Greenhawk's founder and president, Sajjan Agarwal, prior to the December hearing. (Affidavit of Ward Bradley, ¶23 ("Bradley Aff.")). This left a critical gap in Eastwood's discovery prior to summary judgment.

There is no dispute that Mr. Agarwal is the final decision maker, financial backer, and leader of Greenhawk. (*See, e.g.*, Briner Dep., at 15, 17–20, 16:16–19, 18:20–25). Indeed, even though Mr. Briner was President of Greenhawk in 2013/14, he still had to get approval from Sajjan

Agarwal to buy land, including River Falls and Brooks Creek. (*Id.* at 19:14–17). A deposition of the most important decision maker at the conception of the Eastwood-Greenhawk is no "fishing expedition," but is instead the type of specific, essential discovery that should have delayed summary judgment.

Further, Eastwood also did not have a chance to depose another key decision maker, Matt DesVergers. In fact, Mr. DesVergers's existence was only disclosed to Eastwood the week before the December hearing. During the December 2, 2021 deposition of Woody Jackson, Greenhawk's current CFO, it was revealed that Matt DesVergers was one of the three decision makers in 2013/2014 when the Properties were assigned to Greenhawk and the contract with Eastwood was reached. (Bradley Aff., ¶21). Mr. DesVergers was not named in Greenhawk's responses to Eastwood's interrogatories, and his significance was not clear from the documents produced.[10] (*Id.*). Though Eastwood was partly to blame for the late date of Mr. Jackson's deposition during which Mr. DesVergers's identity was revealed, the failure to identify two of the three decision makers was Greenhawk's failure. It is a failure the Circuit Court should have allowed Eastwood to remedy before considering, let alone rendering, judgment.

These depositions alone satisfy Rule 56(f)'s requirements that the party opposing summary judgment come forward with specific, essential evidence needed to rebut a summary judgment motion. It was error for the Circuit Court to deny Eastwood's request to delay summary judgment until essential discovery was complete.

[10] Sajjan Agarwal was also not listed in Greenhawk's responses, but Eastwood was able to surmise his importance from other sources.

B. Agarwal Documents: Eastwood could not follow the money.

Prior to the December hearing,[11] Greenhawk also failed to comply with the terms of its informal agreement with Eastwood to search the email account of Sajjan Agarwal, Greenhawk's founder and current president,[12] for responsive documents.

On June 3, 2021, Eastwood issued a subpoena to the Agarwal Family III, LLC. (Bradley Aff., Ex. C, Eastwood Subpoena to Agarwal Family III, LLC). Greenhawk[13] moved for a protective order and to quash the subpoena, and Judge Hall heard the motion on August 24th, 2021. At Judge Hall's suggestion, Eastwood and Greenhawk entered into an informal agreement. (Bradley Aff., ¶16.)

It was Eastwood's understanding that Greenhawk would, at a minimum, search Mr. Agarwal's email account for responsive documents. (Bradley Aff., Ex. D, Email from Will Walker to John Mabe). Though Greenhawk produced some documents in response to the Agarwal subpoena, it was clear from the limited emails where Mr. Agarwal was included that his emails were not searched for responsive documents. (Bradley Aff., Ex. F, Oct. 13, 2021 Letter to John Mabe). In response, Greenhawk did not expressly contest that they failed to search Mr. Agarwal's emails for responsive documents. (Bradley Aff., Ex. G, Oct. 20, 2021 Letter from John Mabe). Despite Eastwood's repeated requests and efforts to resolve the dispute with Greenhawk, the parties were at an impasse prior to the December hearing. (Bradley Aff., Ex. H, October Email Chain between James Adams and John Mabe).

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[11] Following the December 10, 2021 hearing, Greenhawk did produce some handwritten notes taken by Mr. Agarwal.

[12] (Briner Dep., at 15:17–23, 26:6–8).

[13] Though the subpoena was issued to Agarwal Family III, LLC, Greenhawk is the only entity who has responded in any way, further evidence that Agarwal and Greenhawk are so interwoven that no practical distinction can be made.

As noted above, there is no dispute that Mr. Agarwal was the final decision maker, financial backer, and leader of Greenhawk. Inexplicably, however, Greenhawk minimized Mr. Agarwal's importance in the unwritten contract between Eastwood and Greenhawk, even though Mr. Agarwal was the final approval authority at the time the parties entered into the unwritten contract.

Greenhawk's recalcitrance on the production of Agarwal documents left a critical gap in Eastwood's discovery just prior to the December hearing. That gap affected both Properties, as the unwritten contract Mr. Agarwal approved involved both River Falls and Brooks Creek. Respondents were not entitled to judgment as a matter of law until Eastwood had a full and fair opportunity to review the documents connected to Greenhawk's leader and the decisions he did or did not make. *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439.

C. Greenhawk overly redacted documents before the December hearing.

Finally, prior to the December hearing,[14] Greenhawk overly redacted several important documents and refused to abide by the terms of the parties' consent confidentiality order ("Confidentiality Order"). In its most recent productions, Greenhawk overly redacted numerous documents. (Bradley Aff., Ex. F, Oct. 13, 2021 Letter to John Mabe). Greenhawk counsel erroneously asserted that the Confidentially Order was not in effect. (Bradley Aff., Ex. G, Oct. 20, 2021 Letter from John Mabe). The Confidentiality Order was signed and ordered by Judge McKinnon on January 22, 2021. (Confidentiality Order, at 14).

Eastwood provided the Circuit Court with two examples establishing the potential importance of the redacted portions. The first was a January 28, 2014 email exchange between Craig Briner and Sajjan Agarwal. (Bradley Aff., Ex. I, BATES GHD_18744). The unredacted[15]

[14] Following the December 10, 2021 hearing, Greenhawk finally produced unredacted copies of several documents that did indeed include emails from Mr. Agarwal.

[15] There are no black redaction blocks in this document, but the formatting and context indicate that portions have been removed.

email exchange with Greenhawk's leader notes that Joe Dority was doing initial work on the Brooks Creek site and that Greenhawk did not yet have money invested in Brooks Creek. (*Id.*). It was entirely possible, and likely, that River Falls was also discussed, but it was impossible to know with the redactions applied.

A second example was an October 2016 email from Craig Briner to Sajjan Agarwal. (Bradley Aff., Ex. J, BATES GHD_18773). Mr. Briner's update was limited to a portion that was ostensibly helpful to Greenhawk's defense. All other portions of the update were withheld. Furthermore, Mr. Agarwal, or another party who was carbon copied, responded to Mr. Briner's email, but the entirety of that response had been redacted, including the responding party and date. No privilege claim was made supporting the redaction.[16] Greenhawk maintained that Mr. Agarwal's emails prior to 2017 have all been lost. (Bradley Aff., Ex. G, Oct. 20, 2021 Letter from John Mabe). Because it was likely that the redacted response was a 2016 email from Greenhawk's leader, Mr. Agarwal, it was unacceptable to withhold such responses prior to summary judgment.

These were two examples of many where Eastwood was improperly denied the chance to view attorneys' eyes only versions of potentially key documents prior to the Circuit Court rendering judgment.

D. Pursuant to Rule 56(f), it was error for the Circuit Court to grant Respondents' motions until Eastwood was able to remedy the discovery deficiencies identified above.

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Evening Post Pub. Co. v. Berkeley Cty. Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). Summary judgment was not appropriate here.[17] Prior

[16] In fact, Greenhawk has not claimed privilege on any of the documents as no privilege log has been provided.

[17] As a final example of the prematurity of summary judgment, counsel for Greenhawk notified Eastwood several days before the December hearing that it had an additional document it failed to

to the December hearing, Eastwood had not had the chance to review key Greenhawk documents and depose essential Greenhawk officers. Those issues were not a result of Eastwood's own lack of diligence. For these reasons, Eastwood respectfully contends that the Circuit Court erred in failing to deny or delay summary judgment until essential discovery was complete.

II. THE INCOMPLETE FACTS ESTABLISHED THAT RESPONDENTS WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Circuit Court incorrectly concluded, based on the facts that were known, that Respondents were entitled to judgment as a matter of law. No party disputes that Greenhawk originally agreed to sell finished lots at the Properties to Eastwood after Greenhawk developed them. (Briner Dep., at 59:9–14; Polite Dep., Ex. 23). Respondents instead argue that since the contract was not reduced to a formal, written contract, it is not enforceable. However, the terms of the Eastwood-Greenhawk unwritten contract were included in several writings, including the Properties' plats and pro formas. These documents constitute writings that satisfy the statute of frauds.

Furthermore and alternatively, Eastwood's uncompensated improvements to the Properties, its uncompensated efforts to advance the Properties' development, and its uncompensated transfers of property and property rights to Greenhawk constituted partial performance that took the unwritten contract outside of the statute of frauds.

Finally, there was a genuine dispute of material fact as to whether Greenhawk and Eastwood were joint venturers for the purpose of developing the River Falls and Brooks Creek properties.

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produce until then. (Bradley Aff., ¶13). The document was purportedly a text message from Joe Polite to Craig Briner, both individuals who had already been deposed. (*Id.*). The short text ostensibly supported Greenhawk's legal position in this case.

Eastwood, as the nonmoving party, needed to come forward with a mere scintilla of evidence that, when construed in Eastwood's favor, supported these arguments—it came forward with far more than a scintilla. The Circuit Court, however, chose to draw inferences in favor of the movants, contrary to the rule.

A. The Eastwood-Greenhawk unwritten contract satisfied 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). The purpose of the Statute of Frauds is to prevent fraud by requiring a writing, but, as the U.S. Supreme Court noted, the rule should not be blindly enforced:

There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. ***But where there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud.***

Beckwith v. Talbot, 95 U.S. 289, 292, 24 L. Ed. 496 (1877) (emphasis added), *cited in Cash v. Maddox*, 265 S.C. 480, 489, 220 S.E.2d 121, 125 (1975) (Lewis, C.J., dissenting), *and Speed v. Speed*, 213 S.C. 401, 411, 49 S.E.2d 588, 593 (1948). In enforcing the statute it should be remembered that "[t]he note or memorandum is not the contract, but only the written evidence of it required by statute." *Cash*, 265 S.C. at 488, 220 S.E.2d at 124 (Lewis, C.J., dissenting) (quoting 37 C.J.S., Frauds, Statute of, s 174).

The rule is not and should not be a rigid one, and for that reason.

[t]he statute of frauds merely requires some memorandum or note of the agreement relating to real estate to be in writing and signed by the party charged therewith or his agent, and does not require a formally executed contract. There must be written ***evidence of the contract***, if there is no written contract . . . .

Blocker v. Hundertmark, 204 S.C. 269, 28 S.E.2d 855, 856 (1944) (emphasis added); *accord Young v. Indep. Pub. Co.*, 273 S.C. 107, 110, 254 S.E.2d 681, 683 (1979); *Cash*, 265 S.C. at 484, 220 S.E.2d at 122 (noting, in a dispute involving the sale of land, that the statute "may be satisfied entirely by a written correspondence"). When taken as a whole, the writings must provide all the essential terms of the agreement. *Young*, 273 S.C. at 111, 254 S.E.2d at 683. Contracts for the sale of land must include essential terms regarding price and an adequate description of the land with reasonable certainty. *See Fici*, 372 S.C. at 346, 642 S.E.2d at 604; *Honorage Nursing Home of Florence, S.C., Inc. v. Florence Convalescent Ctr., Inc.*, 367 S.C. 108, 115, 623 S.E.2d 853, 856 (Ct. App. 2005).

"Where a contract does not fix a definite price, there must be a definite method for ascertaining it." *Trident Const. Co. v. Austin Co.*, 272 F. Supp. 2d 566, 576 (D.S.C. 2003), *aff'd sub nom. Trident Constr. Co. v. Austin Co.*, 93 F. App'x 509 (4th Cir. 2004) (quoting *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 350 S.E.2d 208, 211 (1986)); *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). "If the contract is silent on price, for instance, the agreement is not indefinite if a formula or method for ascertaining the price is understood and agreed upon." *Trident*, 272 F. Supp. 2d at 576 (quoting *S. Fire & Cas. Co. v. Teal*, 287 F. Supp. 617, 621–22 (D.S.C. 1968)).

A percentage of profits is a definite method of determining price. *See Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 271, 705 S.E.2d 73, 76 (Ct. App. 2010) ("Here, the parties agreed on a price term: $20,000 and 50% of the 'net profits' generated by each supply contract."). Courts in other states, analyzing contracts for the sale of land, have approved of pricing mechanisms such as agreements to allow appraisers, arbitrators, or auctioneers to set the price. *Barry v. Liddle, O'Connor, Finkelstein & Robinson*, 98 F.3d 36, 40 (2d Cir. 1996) (analyzing New York law); *Ross v. Ross*, 170 N.H. 331, 339, 172 A.3d 1069, 1076–77 (2017) ("For example, a

writing that does not explicitly state the agreed-upon price may satisfy the statute of frauds if the contract prescribes a method, such as a future appraisal, which will necessarily result in the determination of the price."); *Headstart Bldg., LLC v. Nat'l Centers for Learning Excellence, Inc.*, 2017 WI App 81, ¶ 20, 379 Wis. 2d 346, 360, 905 N.W.2d 147, 154; *Wakelam v. Hagood*, 151 Idaho 688, 693, 263 P.3d 742, 747 (2011) ("[A] seller can agree that, rather than stating a definite purchase price, the land sale contract provide a definite method to determine the purchase price, such as being established by an appraiser, by arbitrators, or by the successful bidder at an absolute auction.").

As for the description of the land, "a description of the property must be in a signed writing; parol evidence cannot supply this essential element." *Fici*, 372 S.C. at 346, 642 S.E.2d at 604. "A decree for specific performance operates as a deed. Hence, the land must be described so as to indicate with reasonable certainty what it to be conveyed." *Cash*, 265 S.C. at 484, 220 S.E.2d at 122.

1. Here, multiple writings satisfied the Statute of Frauds.

Beginning with price, though the unwritten contract between Eastwood and Greenhawk did not contain an exact price for each lot, it does include a method for determining the price: 20% IRR for Greenhawk. (Briner Dep., at 56:7–20, 70:11–13, 75:7–16, 112:11–16; Eastwood 30(b)(6), at 16:19–21, 23:18–21, 39:6–18, 49:8–12, 101:12–102:10). The numerous pro formas sent from Greenhawk to Eastwood show a projected IRR near 20% for both Properties. (Briner Dep., Exs. 91–93, 96 (pro formas and emails discussing pro formas)). As Mr. Polite, Eastwood's 30(b)(6) designee, summarized when asked:

> Q. So Eastwood's position right now at this deposition is it will pay whatever the confirmed net costs are that is GreenHawk's costs minus Eastwood's costs and will guarantee a 20 percent rate of return to GreenHawk on that number and it's compelled to accept that price and cannot back out. Is that Eastwood's testimony?

A. I would say yes.

(Eastwood 30(b)(6), at 129:12–19). Greenhawk understood this pricing method as well. As Craig Briner testified, Greenhawk and Eastwood had a meeting of the minds on this essential term:

Q. To your recollection, was Mr. Dority or anybody else at Eastwood aware of GreenHawk's standard expected 20 percent IRR on its development projects?

A. I think –

THE WITNESS: I think Joe Dority was aware of what we were trying to target, I'm pretty sure.

Q. And was he aware that costs, you know, that the takedown schedule and price escalators would roughly be pegged so that GreenHawk would get a 20 percent rate of return on its money over the life of the takedown as far as you know?

A. Yes.

(Briner Dep., at 56:7–20; *see also id.* at 75:7–15).

The method for pricing was understood by Greenhawk and Eastwood. It was reflected in the pro formas sent by Greenhawk to Eastwood. This method is similar to pricing based on projected profits, *Consignment Sales*, 391 S.C. at 271, 705 S.E.2d at 76, and arguably more definite than other accepted methods, such as appraisal, auction, or arbitration. The price was definite.

The description of the land is also certain. Both the River Falls and Brooks Creek properties have definite boundaries. (Polite Dep., Ex. 29, Brooks Creek Plat; Dority Dep., Ex. 68, River Falls Plat). The LPA between TRI Pointe and Greenhawk for Brooks Creek actually included the plat bearing Eastwood's name. (Briner Dep., Ex. 105, TRI Pointe and Greenhawk LPA, Ex. A). There would be no guesswork for the Court in a specific performance order. *See Cousar v. Shepherd-Will, Inc.*, 300 S.C. 366, 369, 387 S.E.2d 723, 724 (Ct. App. 1990) (finding description of 15 acres of a 100 acre tract too imprecise to enforce since the precise 15 acres were not defined).

Finally, the fact that the takedown schedule for either Property may be ill-defined was not sufficient reason to grant Respondents' motions. First, the timing of a property sale is not, as a matter of law, an essential term. The essential terms are price and description. *Fici*, 372 S.C. at 346; 642 S.E.2d at 604; *Honorage Nursing Home*, 367 S.C. at 115, 623 S.E.2d at 856. Second, as Greenhawk and Eastwood's agreements in other developments show, the takedown schedules are

often changed during the course of development. (Eastwood 30(b)(6), at 153:1–17; Dority Dep., Exs. 60–61, Amendments to Lindley LPA). Indeed, the only true determining factor for the timing of lot sales is the recording of a plat, something that may be delayed due to governmental issues unrelated to the parties own plans.[18] "[A] contract [will not] fail for indefiniteness when the gaps that the parties have left 'may be implied from custom and usual forms and former course of dealing.'" *S. Fire & Cas. Co. v. Teal*, 287 F. Supp. 617, 622 (D.S.C. 1968), *aff'd*, 406 F.2d 1330 (4th Cir. 1969) (quoting *Carolina Aviation v. Glens Falls Ins. Co.*, 214 S.C. 222, 230, 51 S.E.2d 757, 761 (1949)). Take down schedules between Greenhawk and Eastwood changed in the past, and that customary gap should not have served as a basis for the Circuit Court's orders.

2. Eastwood has not repudiated its unwritten contracts for either Property.

Eastwood and Greenhawk had an unwritten contract. Greenhawk repudiated it, not Eastwood. Any argument to the contrary ignores the genuine issues of material fact that exist in this case and fails to draw all reasonable inferences in Eastwood's favor.

First, according to Eastwood's 30(b)(6) designee, Eastwood never told Greenhawk it no longer wished to buy the lots in Brooks Creek:

> ·Q. Why is it that Eastwood didn't talk to GreenHawk about Brooks Creek and GreenHawk didn't talk to Eastwood about Brooks Creek?
> ·A. It was the unknown on this whole impact thing. We talk about the Halloween contract.
> Q. Right.
> A. We still had a huge uncertainty of the Fort Mill massacre which was the title of the impact fees. That was just unresolved at that time.
>
> Q. And did anyone from GreenHawk ever say to Eastwood we are terminating our relationship with you and we are now going to sell this property – the Brooks Creek property to another home builder?

[18] Greenhawk was not able to deliver lots to TRI Pointe on the agreed schedule for that very reason. Further, the original agreement called for a single takedown, not multiple takedowns. (Briner Dep., Ex. 105).

A. No.

Q. Did they ever tell you that they had entered into discussions with another home builder?

A. No. Not about selling them.

(Eastwood 30(b)(6), at 144:11–21).

When Greenhawk sent Eastwood the October 2018 draft written contract for Brooks Creek, there was no way for the parties to calculate the lot price since the Fort Mill impact fees were still uncertain. A law suit challenging the impact fees had just been filed in September 2018. The constitutionally of the impact fees was not even resolved until March of 2021. Eastwood is still waiting on the lots. Indeed, Joe Polite's shock at reading the erroneous assertion from a fellow Eastwood employee that the Brooks Creek contract had been cancelled is proof of Eastwood's mindset following receipt of the October 2018 written contract. (Polite Nov. 6, 2018 Email re Brooks Creek). Eastwood was still waiting on an accurate memorialization of its unwritten contract.

Likewise, as to River Falls, Eastwood was never given the chance to buy finished lots, and now, inexplicably, Greenhawk claims that Eastwood failed to make an offer on raw land. Greenhawk has no intent in honoring its unwritten contract with Eastwood.

Taking the incomplete facts as they stand and drawing all reasonable inferences in Eastwood's favor, there was, at a minimum, a genuine dispute of material fact about whether the unwritten Eastwood-Greenhawk contract was sufficiently evidenced in multiple writings so as to take it outside the Statute of Frauds. The essential terms of the contract were clear: The pricing method was definite, the description of the Properties was definite, the Parties were definite, and any lack of a takedown schedule was not essential or dispositive. This is far more than a "mere scintilla of evidence." For those reasons, the Court should have denied Respondents' Motions for Partial Summary Judgment.

B. Eastwood's relinquishment of its contract rights and its investments in and improvement to the Properties constituted partial performance, removing the unwritten contract from the Statute of Frauds.

Though sufficient writings exist to satisfy the Statute of Frauds, Eastwood's relinquishment of its contract rights, the conveyance of land for no consideration, and multiple and valuable initial investments in the Properties, to include the uncompensated work of Joe Dority, removed the unwritten contract from scope of the Statute of Frauds. On this alternative basis, it was error for the Circuit Court to grant Respondents' motions.

"An oral contract within the Statute of Frauds may be taken out by performance where one party does some act essential to performance of the agreement resulting in loss to himself and benefit to the other." *Graham v. Prince*, 293 S.C. 77, 81, 358 S.E.2d 714, 717 (Ct. App. 1987); *accord Parr v. Parr*, 268 S.C. 58, 65, 231 S.E.2d 695, 698 (1977) ("Sufficient part performance of a parol contract to convey or devise real estate will, in equity, remove the agreement from the [Statute of Frauds].") In short, conduct by one party to the unwritten contract which enriches the other party excuses any Statute of Fraud failings. *Id.*

The courts will require specific performance of an oral contract for the conveyance of land, where the terms of the contract are clear, definite and certain and are established by competent and satisfactory proof, and where the party seeking to rescue it from the statute shows such acts of performance or part performance on his part, ***clearly and unequivocally referable to such agreement,*** as would render application of the statute unconscionable.

Fesmire v. Digh, 385 S.C. 296, 311, 683 S.E.2d 803, 811 (Ct. App. 2009) (emphasis in original) (quoting *Scurry v. Edwards*, 232 S.C. 53, 61, 100 S.E.2d 812, 816 (1957)); *see also Parr*, 268 S.C. at 66, 231 S.E.2d at 698 (noting that the doctrine of part performance rests on the related doctrine of equitable estoppel); *Scurry*, 232 S.C. at 62, 100 S.E.2d at 817 (discussing the equitable origins of the doctrine of partial performance and noting its purpose in protecting plaintiffs who

"had so altered [their] position in reliance on the agreement that a refusal to enforce it would amount to a fraud upon [them]"); *Honorage Nursing Home*, 367 S.C. at 115, 623 S.E.2d at 857 (noting that defendant's relinquishment of its property rights, in the form of tenancy, was evidence of partial performance).

The Supreme Court's decision in *Parr v. Parr* is instructive and on point. In *Parr*, a father conveyed several hundred acres of land to his son, relinquishing possession of the whole other than a small portion where the family home was located. *Parr*, 268 S.C. at 63, 231 S.E.2d at 696. The purpose of the conveyance was to allow the son to obtain a loan secured by the property. After the loan was obtained, the son was to convey back to the father that small portion of the total where his father lived. *Id.* The conveyance back to the father was to be in fee simple, but the son instead signed a deed conveying back only a life estate, and the father sued for specific performance. *Id.* Addressing the son's assertion of the statute of frauds as a defense, the Court found that the father's relinquishment of the more than 400 acres to his son, in conjunction with the father's continued occupation of the portion that was to be conveyed back by the son, was sufficient performance to bring the verbal agreement outside the statute of frauds. *Id.* at 66, 231 S.E.2d at 698. The Court relied on two simple facts—(1) that the father deeded the land, and (2) that he relinquished possession of the entire tract except the portion with the home on it—"as evidence of the agreement."

Eastwood's actions in this case were "clearly and unequivocally" tied to its unwritten contract with Greenhawk to assign the right to purchase the Properties and then buy back finished lots for construction. As in *Parr*, Eastwood relinquished its right to purchase both River Falls and Brooks Creek tracts and develop them on their own. In the case of River Falls, it relinquished the right for no compensation. In the case of Brooks Creek, it did so for only a return of its earnest money deposit without any additional consideration. (Compl., Ex. D, Combined Assignments).

Eastwood's relinquishment of these contractual rights, without compensation, are sufficient performance to remove the contract from the statute of frauds. Like in *Parr*, they are actions that make enforcement of the statute of frauds unconscionable when Eastwood has already performed to its detriment. The assignment of the contract rights and are also actions Eastwood would not have taken without its unwritten contract with Greenhawk. The assignments were therefore clearly and unequivocally connected to that contract.

And Eastwood did not just assign contractual rights to purchase land: it gave additional land to Greenhawk to advance the unwritten contract. For no consideration from Greenhawk, Eastwood transferred a sliver of land for which it paid $55,741, which was essential, according to SCDOT, for proper ingress and egress to the River Falls project. (*See* Helms Settlement Statement, BATES ECP_ECP_0012091; Deed from Caroline Helms to Eastwood Development Corp; Quitclaim Deed from Eastwood to Greenhawk, BATES ECP_0005870). Not only did Eastwood pay dearly for the sliver of land, Eastwood also agreed to build the Seller an improved driveway, with a security gate, and granted her an easement to the River Falls entrance road. (*See* Helms Purchase and Sales Agreement, BATES GHD_0016151, ¶3). Eastwood is not in the habit of giving away land—it made this transfer because it expected Greenhawk to comply with the unwritten contract and sell Eastwood developed lots.

Beyond the transfer of property interests, Eastwood made other significant investments in the Properties. Over the initial course of the contract, Eastwood expended over $570,000 and was not compensated for almost $360,000 in predevelopment and entitlement costs. (Eastwood 30(b)(6), at 146:9–12). Those costs were to be treated as an earnest money deposit—i.e., a down payment—on the finished lots that were to be sold to Eastwood. (Briner Dep., Ex. 95, October 12, 2016 Email re Deposit; Eastwood 30(b)(6), at 146:9–12). Eastwood's former Vice President for Land Acquisition, Joe Dority, spent significant time monitoring and driving the River Falls project.

Mr. Dority was never compensated for that work by Greenhawk, because Greenhawk and Eastwood understood the benefit his work brought to both of them in the form of finished lots.

Finally, another decision of this Court, *Honorage Nursing Home of Florence, South Carolina, Inc. v. Florence Convalescent Center, Inc.*, demonstrates that the two ways in which this suit is distinguishable from *Parr* are immaterial. First, it is not necessary that Eastwood have occupied the Properties in order to establish its unwritten contract by partial performance. In *Honorage Nursing Home*, this Court affirmed summary judgment in favor of a former tenant who vacated a premises in reliance on an agreement with a plaintiff. *See Honorage Nursing Home*, 367 S.C. at 115, 623 S.E.2d at 857. What mattered is that the tenant acted to its detriment and in reliance on an agreement with the plaintiff. *Id.* Second, though *Parr* did not involve sophisticated commercial entities, *Honorage Nursing Home* did. The fact that Eastwood and Greenhawk are commercial entities does not preclude Eastwood's partial performance argument.

Eastwood acted, to its detriment, in reliance on an agreement with Greenhawk. *See id.* at 115, 623 S.E.2d at 857. Eastwood's actions are evidence of its unwritten contract with Greenhawk to buy finished lots at River Falls and Brooks Creek. Its actions also make it unconscionable to allow Greenhawk to assert a Statute of Frauds defense after it repudiated that contract. For these reasons, it was error for the Circuit Court to grant Respondents' motions. *Graham*, 293 S.C. at 81, 358 S.E.2d at 717.

C. There was a genuine dispute of material fact as to whether Eastwood and Greenhawk were joint venturers.

Finally, the facts, as they are presently known, also created a genuine dispute of material fact as to Eastwood's joint venture claim.

"A joint enterprise exists where there are two or more persons united in the joint prosecution of a common purpose under such circumstances that each has authority, express or

implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 147, 425 S.E.2d 764, 774 (Ct. App. 1992) (citing *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939)). "Further, in order to constitute a joint enterprise, there must be a common purpose and community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto." *Id.* (citing *Spradley v. Houser*, 247 S.C. 208, 146 S.E.2d 621 (1966)). Joint venturers also share in profits and losses. *See Mid-S. Mgmt. Co. Inc. v. Sherwood Dev. Corp.*, No. 2004-UP-611, 2004 WL 6337256, at *1 (S.C. Ct. App. Dec. 7, 2004) (noting that agreement provided for allocation of profits and losses).

Here, the incomplete record established that Eastwood and Greenhawk were working for a common purpose. Eastwood made what was essentially gratuitous assignment of the contracts to buy both Properties to Greenhawk. Eastwood later transferred land it paid a high price for without asking for anything in return from Greenhawk. Joe Dority was Greenhawk's uncompensated man on the ground in Tega Cay. He worked to coordinate engineering services, wetland services, and meeting with Tega Cay officials. Pro formas were regularly exchanged between Greenhawk and Eastwood and sensitive financial information shared as they worked to finalize pricing and costs.

There was also an agreement to share profits and losses. Greenhawk and Eastwood agreed that Greenhawk would receive a 20% return for the lots after factoring in their costs. This equation would ensure that both parties shared in the financial burden or windfall in a way that was predetermined.

For these reasons, there was, at a minimum, a genuine dispute of material fact as to whether Greenhawk and Eastwood were joint venturers as to the River Falls and Brooks Creek properties. It was error for the Circuit Court to grant summary judgment on this claim.

CONCLUSION

Eastwood came forward with far more than a "mere scintilla of evidence" in support of its claims. Nonetheless, the District Court drew all inferences in favor of Respondents' and granted summary judgment. It did so before Eastwood could complete other key discovery. Even without that discovery, the known facts establish that the Eastwood-Greenhawk contract was evidenced in multiple writings. The evidence also established that Eastwood's partial performance, to its own detriment, removed the contract from the Statute of Frauds. That same performance also established a genuine dispute of material fact as to Eastwood's joint venture claim.

For these reasons, Eastwood respectfully asks this Court to reverse the Circuit Court's orders dated January 14, 2022, and February 15, 2022, granting TRI Pointe and Greenhawk's motions for partial summary judgment.

Respectfully submitted,

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