Rel: June 10, 2022

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1210011

Terri Anderson

v.

Robin Coleman; Michael Coleman; France M. Frederick; Thomas C. Sparks; Robert S. Bowling III; and Wells Fargo Bank, N.A.

Appeal from Baldwin Circuit Court (CV-21-900565)

BRYAN, Justice.

Terri Anderson, the plaintiff below, appeals from a summary judgment entered by the Baldwin Circuit Court in favor of the defendants

below. For the reasons explained below, we reverse the circuit court's judgment and remand this case for further proceedings.

Background

This case concerns an agreement to purchase certain residential property located on Ono Island in Baldwin County ("the property") for $1.4 million. In 2012, Robert S. Bowling III acquired the property and executed a promissory note in favor of Merchants Bank, which was secured by a purchase-money mortgage interest in the property granted to Merchants Bank. Merchants Bank subsequently assigned the promissory note and its mortgage interest in the property to Wells Fargo Bank ("Wells Fargo").

In 2018, Bowling conveyed his interest in the property to Robin Coleman and Michael Coleman via a vendor's lien deed. The Colemans executed a promissory note evidencing a debt to Bowling in the amount of $580,000, plus interest. In part, the vendor's lien deed provided

> "[t]hat the [Colemans]' right to convey [their] interest [in the property] is subject to the procurement of [Bowling]'s prior written consent thereto for so long as the latter retains his vendor's lien therein. Upon the [Colemans]' entering into a contract for the sale of all or a portion of the [property] without such prior written consent, all payments aforementioned shall immediately become due and payable."

In 2020, the Colemans conveyed a partial interest in the property to their friends, France M. Frederick and Thomas C. Sparks.

In March 2021, the Colemans, Frederick, and Sparks entered into a purchase agreement regarding the property with Anderson ("the purchase agreement"). The Colemans, Frederick, and Sparks are hereinafter collectively referred to as "the sellers." The purchase agreement was completed using a "Baldwin Realtors" form agreement. In pertinent part, the purchase agreement provided that Anderson would pay a $5,000 earnest-money deposit and further stated:

> "If this offer is accepted and the Title is not marketable, or if the terms of the Agreement are contingent upon ability to obtain a New Mortgage or Seller Financing or other contingencies as specified which cannot be met, and which are not otherwise satisfied or removed, this deposit to be refunded upon written instructions signed by Buyer and Seller, thereby causing a mutual release and automatic termination of Agreement."

In April 2021, the sellers decided they had made a mistake by agreeing to sell the property. Robin Coleman eventually sent a communication to Anderson's realtor explaining, in relevant part: "We have voided the contract you sent us and have decided to keep our property." Anderson then initiated this action in the circuit court, seeking an injunction prohibiting the sellers from violating the terms of

the purchase agreement and a judgment requiring specific performance under the terms of the purchase agreement or, as an alternative to specific performance if the court were to determine that such relief was unavailable, damages for breach of contract. Anderson attached to her complaint a copy of the purchase agreement and a copy of e-mail correspondence sent to her realtor.

The sellers thereafter filed a motion to dismiss Anderson's complaint. In summary, they argued that title to the property was unmarketable due to Bowling's unsatisfied interest in the property and Wells Fargo's unsatisfied interest in the property. Accordingly, they contended, the language of the purchase agreement required a refund to Anderson of her earnest-money deposit and an automatic termination of the purchase agreement. In addition to a copy of the purchase agreement, the sellers attached to their motion to dismiss a copy of the deed conveying the property to Bowling, a copy of the mortgage instrument executed by Bowling in favor of Merchants Bank, an affidavit executed by Bowling, a monthly loan statement from Wells Fargo to Bowling, a copy of the promissory note evidencing the Colemans' debt to Bowling, a copy of the vendor's lien deed conveying the property from

Bowling to the Colemans, a copy of the deed conveying a partial interest in the property from the Colemans to Frederick and Sparks, and a copy of certain e-mail correspondence. In relevant part, Bowling's affidavit stated:

> "6. On or about September 1, 2018, I conveyed the Property to Defendants Michael Scott Coleman and Robin Russell Coleman via Vendor's Lien Deed ..., subject to my mortgage to Wells Fargo.
>
> "7. As part of the consideration for the purchase of the Property, simultaneous with my execution of the Vendor's Lien Deed, the Colemans executed a promissory note to me in the amount of $580,000.00, bearing an interest rate of 4% per annum -- 1.125% higher than my interest rate on my Promissory Note to Wells Fargo ....
>
> "8. The promissory note the Colemans signed to me provides for 360 monthly payments (30 years) of $2,769.00 and has a maturity date in August of 2048. Therefore, under the terms of the Colemans' note to me, as of this month I am owed approximately 325 more monthly payments for a total of approximately $899,925.00 over the life of the loan.
>
> "9. Under no circumstances will I allow the Colemans to pay me off early and deprive me of the future income I am entitled to under the promissory note. Under no circumstances will I release my vendor's lien on the Property securing my promissory note from the Colemans. Under no circumstances will I request a payoff for my mortgage to Wells Fargo. I intentionally included language restricting the Colemans' ability to sell the Property in the Vendor's Lien Deed to the Colemans for this very reason. I intentionally excluded a provision allowing for pre-payment in the promissory note from the Colemans."

(Emphasis in original.)

In July 2021, Anderson filed an amended complaint adding Bowling and Wells Fargo as defendants with an interest in the property. The record on appeal indicates that those parties were served with the amended complaint, and Wells Fargo filed an answer in response to the amended complaint asserting, among other things:

> "[A]ny enforcement of [the] purchase agreement between such parties shall in no way affect, extinguish, interfere with, or diminish Wells Fargo's superior interest, other than full and complete satisfaction of the debt .... Otherwise, any such transactional purchase of the Property shall remain inferior and subject to Wells Fargo's mortgage of record."

Later, Anderson filed a response to the motion to dismiss filed by the sellers. Anderson attached to her response documents in addition to those that she had attached to her initial complaint and in addition to those submitted by the sellers in support of their motion to dismiss. Anderson later submitted an affidavit she had executed. In relevant part, Anderson's affidavit averred:

> "I have not received a title commitment from the Sellers under the Agreement. The first mention of any issue with the title to the Property was in an email sent from the Defendant's attorney ... to my attorney ... on May 7, 2021. This was a month after Robin Coleman's email refusing to honor the contract. The Sellers have not sent me any information from a title company or other neutral party showing that the title

> to the property is unmarketable. After the filing of this case, I obtained a title commitment[,] ... which is attached to my response."

The sellers subsequently filed a supplement to their motion to dismiss, attaching an affidavit executed by Mark Taupeka, an attorney whose company had prepared the title commitment referenced in Anderson's affidavit. In relevant part, Taupeka's affidavit averred the following:

> "In late May or early June 2021, [my company] was asked to run a title search for certain property owned by [the sellers] ....
>
> "... [My company] prepared a draft preliminary title commitment based on a title search conducted by [my company]'s underwriter[,] ... which revealed the presence of a Vendor's Lien Deed from ... Bowling ....
>
> "... The initial title search did not reveal the presence of the active first priority mortgage but has now been revised to also reflect the presence of the Mortgage originally from ... Bowling ... to Merchant's Bank .... The revised title commitment is attached hereto as Exhibit A.
>
> "... I have reviewed the issues relevant to this transaction and concur with the [sellers] in the matter of Anderson v. Coleman, et al., currently pending in the Circuit Court of Baldwin County[. I] can attest that title to this property is unmarketable and uninsurable without exception for the Vendor's Lien and Mortgage, as pursuant to Alabama law, and ... Bowling ... cannot be compelled to accept an early payoff and release his Vendor's Lien securing his promissory note from the Colemans based on the terms therein.

> "... I have handled hundreds of transactions involving Baldwin Realtors' standard form Residential Purchase Agreement and I'm intimately familiar with its contents, procedures, requirements and remedies.
>
> "... I concur with the [sellers] in the aforementioned case that the purchase agreement should be deemed terminated due to unmarketable title and that [Anderson]'s sole remedy is a refund of her earnest money."

On August 26, 2021, the circuit court entered a judgment disposing of the action in its entirety:

> "[Sellers]' motion to dismiss is hereby granted, and all causes of action set forth in [Anderson]'s complaint are hereby dismissed with prejudice. The purchase agreement made the basis of this action is terminated[,] and the earnest[-]money deposit is to be refunded to [Anderson] as [her] sole remedy. Costs taxed as paid."

Anderson appealed. The sellers are the only appellees who have filed an appellate brief.

Standard of Review

On appeal, the parties agree that, because the circuit court considered matters outside the pleadings in deciding to grant the sellers' motion to dismiss, the motion was converted to a summary-judgment motion. See Rule 12(b), Ala. R. Civ. P. ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim

upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 ....").

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

Analysis

Anderson raises four arguments on appeal. We address each in turn.

I. Contract Language

Anderson first argues that the plain language of the purchase agreement states that it shall terminate only "upon written instructions signed by Buyer and Seller" and that, therefore, the purchase agreement should not be terminated until Anderson and the sellers have signed written instructions for the refund of Anderson's earnest-money deposit. (Emphasis added.) Anderson cites absolutely no authority in support of this argument.

> "'"It is well established that general propositions of law are not considered 'supporting authority' for purposes of Rule 28[, Ala. R. Civ. P.] Ex parte Riley, 464 So. 2d 92 (Ala. 1985)." S.B. v. Saint James Sch., 959 So. 2d 72, 89 (Ala. 2006). This Court will not "create legal arguments for a party based on undelineated general propositions unsupported by authority or argument." Spradlin v. Spradlin, 601 So. 2d 76, 79 (Ala. 1992). Further, it is well settled that "'[w]here an appellant fails to cite any authority for an argument, this Court may affirm the judgment as to those issues, for it is neither this Court's duty nor its function to perform all the legal research for an appellant.'" Spradlin v. Birmingham Airport Auth., 613 So. 2d 347, 348 (Ala. 1993)(quoting Sea Calm Shipping Co., S.A. v. Cooks, 565 So. 2d 212, 216 (Ala. 1990)).'

"Allsopp v. Bolding, 86 So. 3d 952, 960 (Ala. 2011)."

Harris v. Owens, 105 So. 3d 430, 436 (Ala. 2012). Therefore, Anderson's argument in this regard does not demonstrate reversible error by the circuit court.

II. Implied Duty

Next, Anderson argues that there is a genuine issue of material fact regarding whether the sellers made a good-faith effort to discharge the encumbrances on title to the property, namely the unsatisfied interests in the property possessed by Wells Fargo and Bowling. The only case Anderson cites in support of this argument is Lloyd Noland Foundation, Inc. v. City of Fairfield Healthcare Authority, 837 So. 2d 253, 267 (Ala. 2002):

> "'Where a contract fails to specify all the duties and obligations intended to be assumed, the law will imply an agreement to do those things that according to reason and justice the parties should do in order to carry out the purpose for which the contract was made.' Sellers v. Head, 261 Ala. 212, 217, 73 So. 2d 747, 751 (1954). '"There is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract; ... in every contract there exists an implied covenant of good faith and fair dealing."' Id."

Anderson's citation to only general principles of law is not sufficient to demonstrate reversible error by the circuit court. See Harris, 105 So.

3d at 436. She cites no authority in support of her specific assertion that the sellers had an implied duty under the purchase agreement to make a good-faith effort to discharge the encumbrances on the property. Therefore, Anderson's argument in this regard likewise does not demonstrate reversible error by the circuit court.

III. Unmarketability

Next, Anderson argues that a genuine issue of material fact exists regarding whether the property is unmarketable.

> "Unless otherwise qualified, a 'good title' means a marketable title, a title 'that can be sold to a reasonably prudent man who might desire the property, or a title that can be mortgaged to a person of reasonable prudence.' Note to Justice v. Button (Neb.) 38 L.R.A. (N.S.) 1; Fagan v. Hook, 134 Iowa 381, 105 N.W. 155, 157 [(1905)], 111 N.W. 981 [(1907)], and cases therein cited."

Boylan v. Wilson, 202 Ala. 26, 28, 79 So. 364, 366 (1918).

Anderson argues that the interests encumbering the sellers' title to the property can be discharged, thereby rendering the sellers' title marketable within the meaning of the termination provision of the purchase agreement. She first addresses Bowling's interest in the property before turning to Wells Fargo's interest in the property.

Anderson's argument regarding Bowling's interest begins with her contention that, although the promissory note evidencing the Colemans' debt to Bowling does not contain any provisions allowing for prepayment of the Colemans' debt, the vendor's lien deed conveying the property from Bowling and the promissory note should be viewed together, she says, as one instrument. In support of her assertion, she cites Thompson v. Thompson, 257 Ala. 10, 12, 57 So. 2d 393, 394 (1952)("The note and mortgage although separate instruments were executed at the same time, in the course of and as parts of the same transaction. The mortgage refers to the note as evidencing the indebtedness secured by the mortgage. Accordingly the two instruments are to be read and construed together as if one in form.").

Relying on certain language set out in the vendor's lien deed, Anderson argues that there is a genuine issue of material fact regarding whether the Colemans are permitted to prepay their remaining debt to Bowling, thereby extinguishing Bowling's interest in the property. The specific language upon which Anderson relies was also quoted in the "Background" section above:

> "[T]he [Colemans]' right to convey [their] interest [in the property] is subject to the procurement of [Bowling]'s prior

> written consent thereto for so long as the latter retains his vendor's lien therein. Upon the [Colemans]' entering into a contract for the sale of all or a portion of the realty hereinabove described without such prior written consent, all payments aforementioned shall immediately become due and payable."

Based on the foregoing language, Anderson argues that, by entering into the purchase agreement with Anderson without Bowling's prior written consent, the Colemans triggered an obligation to immediately satisfy Bowling's interest in the property by paying to him all sums due under the terms of the promissory note that the Colemans had executed in Bowling's favor. Therefore, Anderson argues, the Colemans are required to satisfy their obligation to Bowling, thereby removing that encumbrance on the sellers' title to property.

However, as the sellers point out on page 26 of their appellate brief, Anderson's argument ignores another provision in the vendor's lien deed:

> "That upon the happening of a default in the payment of said indebtedness or of any installment of principal or interest thereon or upon any default in the performance of any of the obligations herein imposed on the [Colemans], [Bowling] shall have the right, at [Bowling]'s election, to declare all of the unpaid installments of said indebtedness immediately due and payable ...."

(Emphasis added.)

Thus, the language from the vendor's lien deed quoted in the sellers' brief indicates that, upon defaulting on their obligation to refrain from entering into a contract for the sale of the property without his written consent, Bowling could elect whether to declare all the unpaid installments immediately due and payable. As noted above, the sellers attached to their motion to dismiss a copy of an affidavit executed by Bowling, in which Bowling averred: "Under no circumstances will I allow the Colemans to pay me off early and deprive me of the future income I am entitled to under the promissory note. Under no circumstances will I release my vendor's lien on the Property securing my promissory note from the Colemans." (Emphasis in original.) Thus, there is no genuine issue of material fact regarding whether Bowling will elect to declare the Colemans' unpaid installments of their indebtedness immediately due and payable; it is clear from the undisputed evidence in the record that he will not.

Anderson's appellate brief completely ignores the second provision of the vendor's lien deed quoted above, and she includes no analysis regarding how the second quoted provision and the first quoted provision should be interpreted together. Moreover, Anderson cites no authority

on appeal demonstrating that Bowling is required to accept prepayment of the debt that is secured by his lien on the property. It is not this Court's function to construct an argument for reversal on Anderson's behalf. See Harris, 105 So. 3d at 436. Therefore, Anderson's argument in this regard likewise does not demonstrate reversible error by the circuit court.

Anderson also argues that the vendor's lien deed, by which Bowling conveyed his interest in the property to the Colemans, contained warranties against encumbrances and that, in light of Wells Fargo's preexisting mortgage interest in the property, Bowling is liable to the Colemans for a breach of those warranties. Anderson argues that the sellers could use the proceeds from the sale of the property to her to discharge Wells Fargo's mortgage interest in the property, thereby removing that encumbrance, and thereafter seek an award of damages as indemnification from Bowling for his breach of the warranties set out in the vendor's lien deed.

However, as the sellers argue in response, even assuming, without deciding, that Anderson's argument in this regard is theoretically correct, she has failed to demonstrate, as explained above, that Bowling's lien on the property can be discharged to allow for a conveyance of the sellers'

unencumbered interest in the property to Anderson. Consequently, even if Wells Fargo's mortgage interest in the property could hypothetically be discharged in an effort to consummate the purchase agreement, we cannot reverse the circuit court's judgment and hold that the sellers' title to the property is definitely marketable. Therefore, we will not reverse the circuit court's judgment based on this argument.

IV. Equitable Principles

Next, Anderson argues that equitable principles should prevent the sellers from relying on the termination provision of the purchase agreement to rescind the agreement. In response to Anderson's argument, the sellers point out that it is undisputed that Bowling will not accept prepayment of the Colemans' outstanding balance required to satisfy Bowling's lien on the property. They further argue that, under these circumstances, their title should not be deemed marketable, and therefore subject to conveyance under the purchase agreement, solely because Anderson is willing to accept it. They cite this Court's decision in M & F Bank v. First American Title Insurance Co., 144 So. 3d 222, 232 (Ala. 2013):

> "'"The rule that the title must be free from reasonable doubt does not require a title absolutely free from all suspicion or

> possible defect, but only requires a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. The fact that in the action between the vendor and the purchaser the court may consider the title good does not render it marketable. In the absence of an express stipulation therefor, a marketable title does not mean a title which satisfies the purchaser, or which his attorney pronounces marketable."'"

(Quoting Messer-Johnson Realty Co. v. Security Savings & Loan Co., 208 Ala. 541, 543, 94 So. 734, 735 (1922), quoting in turn 39 Cyc. 1450(c) (emphasis added).) The sellers argue that no reasonable buyer would be willing to accept title to property "in such a dismal state" as their title to the property at issue in this case. The sellers' brief at 32.

Although the sellers have identified an appropriate definition of "marketable title," they have cited no case in which this Court has applied the definition articulated by this Court's decision in Messer-Johnson Realty Co., 208 Ala. at 543, 94 So. at 735, to invalidate a contract for the sale of property when the buyer is fully informed of potential defects in the seller's title to the property but nevertheless wishes to purchase the property and fulfill her obligations under the contract. Our research has revealed none. See M & F Bank, 144 So. 3d at 232-33

(holding that title to certain property was marketable in an action between a mortgagee bank and its title-insurance company); Prestwood v. City of Andalusia, 709 So. 2d 1173, 1180 (Ala. 1997)("Had the city been sincerely concerned with these alleged defects in its title and eager to cure them, it could have filed a claim under its title insurance policy. The city filed no claim under that policy. It chose instead to attempt to portray James Prestwood's statements as fraud, in order to provide itself with a basis for rescinding the transaction. The city hardly qualifies as a 'reasonable purchaser ... willing and anxious to perform his contract.' Messer-Johnson Realty Co., supra, 208 Ala. at 543, 94 So. at 735."); Espalla v. Lyon Co., 226 Ala. 235, 146 So. 398 (1933)(citing Messer-Johnson Realty Co., 208 Ala. at 541, 94 So. at 734, in examining whether evidence presented at trial in an action between a broker and the seller of land materially differed from the broker's pleadings regarding whether the purchasers' attorneys' approval of title was required to complete the sale); Smith v. Blinn, 221 Ala. 24, 26 and 29, 127 So. 155, 157 and 159 (1929)("A 'marketable title' is a good title, one free from defects which subject it to reasonable doubt or which will lead a prudent man on competent legal advice to reasonably expect litigation thereon. One

entitled to such title is not compelled to buy a probable lawsuit. Messer-Johnson Realty Co. v. Security Savings & Loan Co., 208 Ala. 541, 94 So. 734 ...." "Our decision ... is that the cumulative clouds and defects of title as shown on the abstract cast such substantial doubt thereon that [the buyer] was within his rights in rejecting the same."); Baker v. Howison, 213 Ala. 41, 104 So. 239 (1925)(citing Messer-Johnson Realty Co., 208 Ala. at 541, 94 So. at 734, for the proposition that contracts for the sale of land generally imply a duty by the seller to establish good title but holding that a purchaser was not entitled to an award of damages based on the seller's alleged failure to provide an abstract of title); and Messer-Johnson Realty Co., 208 Ala. at 544-45, 94 So. at 736-37 (holding that a purchaser acted reasonably in declining to accept title that was necessarily predicated on a claim of adverse possession because a deed was missing in the chain of title).

On appeal, Anderson argues:

> "If the Sellers have the ability to discharge the encumbrances, they cannot destroy the contract by refusing to do so.
>
> "If the [sellers] do not have the ability to discharge the encumbrances, since the marketability of title requirements in the contract are for the benefit of Anderson, Anderson should be allowed to waive the requirements and require performance with an abatement of the purchase price for the

> value of the encumbrances. The trial court erred by allowing the [sellers] to rely on [the termination provision of the purchase agreement] to terminate the contract before giving Anderson the opportunity to waive the requirement of marketable title."

Anderson's brief at 27-28. In support of her argument, Anderson cites Mitchell v. White, 244 Ala. 603, 14 So. 2d 687 (1943), and a case cited by the Mitchell Court, Minge v. Green, 176 Ala. 343, 58 So. 381 (1912). Mitchell also involved a contract for the sale of land. A provision of that contract stated:

> "'In the event that the abstract of title furnished by the vendors to comply with this agreement does not show a good and marketable title to said land, as herein provided, it is agreed that they will refund to the vendee the cash payment this day made, and this agreement shall thereupon immediately become null and void.'"

244 Ala. at 605, 14 So. 2d at 687.

After inquiry by the buyer's attorney, it was determined that the pertinent seller, who had inherited his interest in the land at issue, was personally liable to the federal government for estate taxes in connection with his inheritance. The seller conceded that, by virtue of that tax obligation, a lien existed on the land. Invoking the quoted provision of the contract, the seller declined to convey the property and refunded the buyer the $1,000 the buyer had paid pursuant to the contract. The circuit

court dismissed the buyer's action for specific performance under the contract, apparently relying on the contractual language asserted by the seller.

On appeal, this Court reversed the circuit court's decision. The Mitchell Court noted that, "as a general rule such stipulations in a contract of this character are made for the benefit of the purchaser, and subject to waiver." 244 Ala. at 607, 14 So. 2d at 689. Applying this rule, the Mitchell Court reasoned:

> "In the instant case the [buyer] is ready, and indeed, anxious, that the contract entered into should be carried out. The correspondence between the parties ... so discloses. In a letter to the [seller], the [buyer] makes three proposals, the first and third proposing an extension of time that the tax may be paid, or a payment of the consideration with the exception of a sum estimated to be sufficient to cover the tax. The second alternative was as follows: 'I am willing to perform the contract now and pay the consideration agreed upon with the understanding that you are to pay the tax.' We interpret this to mean that the [buyer] is willing that the trade be consummated and that he will accept the warranty deed which, of course, would obligate the [seller] to pay the tax and thus remove the incumbrance.
>
> "... There is not here involved a question of an unexpected outstanding defect in [the seller's] title which requires the expenditure of money to secure, and against which the parties may be said to have contracted. The requirement that [the seller] pay this tax is a requirement fixed upon [the seller] by law. Though the liability for this tax may have escaped for the moment the [seller]'s notice, yet he

is charged with a knowledge of the law, and certainly presumed to have better knowledge of the value of the gross estate of his mother.

"In a court of equity the [buyer] is looked upon and treated as the owner of the land, and the [seller], though the owner of the legal title, holds it as a trustee for the [buyer]. Vol. 2, Pomeroy's Equity Jurisprudence, 5th Ed., Section 368. It would be unreasonable to assume that the [seller], holding the legal title in trust for the [buyer], should be permitted, by his own default, to thus destroy the entire contract. Speaking to a somewhat analogous situation, the Illinois court in Hunt v. Smith, 139 Ill. 296, 28 N.E. 809, 811 [(1891)], observed: 'It would be absurd to suppose that the parties intended to make a breach by the vendor of his own undertaking a ground upon which he would have a right to declare the contract void. Such construction would, in effect, make the performance of the contract a matter dependent upon the mere will or caprice of the vendor, as it would always be within his power, if he should see fit to do so, to tender to the purchaser an imperfect title, and thus avail himself of his option to rescind.'

"....

"Our case of Minge v. Green, supra, illustrates that the courts are loathe to strike down a deliberate and solemn contract of this character, and Eaton v. Sadler, supra [215 Ala. 161, 110 So. 13 (1924)], discloses that it will not be done by any mere collateral agreement which does not affect substantial rights of the parties. In this latter case it was further observed: 'Generally speaking, the purchaser of property will not be compelled to take it subject to a lien or incumbrance. But it is well settled that, "if an incumbrance can be removed merely by the application of the purchase money, and the court is able to provide for the conveyance of a clear title to the vendee, the mere fact that incumbrances exist which the vendor has not yet removed, or even is unable to remove without the application of the purchase money for

> the purpose, will not prevent a decree for a specific performance."'"

244 Ala. at 607-08, 14 So. 2d at 690-91.

Regarding this Court's decision in Minge, 176 Ala. at 343, 58 So. at 381, the Mitchell Court summarized that case as follows:

> "The contract in that case contained a clause very similar to that here involved. It was as follows: 'Title to be good and merchantable or contract void and earnest money to be refunded. Sale to be complied with thirty (30) days from date.' There the wife of the vendor, refusing to sign the deed, thus left an inchoate dower right outstanding which was an incumbrance upon the title, and the defendant vendor invoked the foregoing clause that the title was to be good and merchantable or the contract void as a complete defense to the suit for specific performance in behalf of the vendee. The holding of the court, however, was to the effect that the purchaser could require performance with an abatement of the price for the value of an outstanding dower right, unless such right was removed."

Mitchell, 244 Ala. at 607, 14 So. 2d at 689.

The sellers argue that Anderson's waiver of the marketability requirement of the purchase agreement's termination provision in this case and her acceptance of their encumbered title would be "foolhardy" because either Wells Fargo or Bowling could, the sellers say, invoke specific "due on sale" clauses in their respective instruments pertaining to the property and exercise rights of foreclosure based on the sellers'

conveyance of the property to Anderson. The sellers' brief at 30. In essence, the sellers argue that, by insisting on their specific performance under the purchase agreement, Anderson is not making a reasonable business decision. Anderson, however, appears willing to waive the potential defects in the sellers' title and to assume the risks associated with accepting title she knows to be encumbered by the interests of Wells Fargo and Bowling.

In other words, Anderson's position appears to be that she understands that the sellers' title to the property is not objectively marketable but that she wants to purchase the property anyway. Based on this Court's decisions in Mitchell and Minge, Anderson has an equitable right to waive the protections that would otherwise be afforded to her by virtue of the marketability requirement of the termination provision and to accept the sellers' title to the property, even in its "dismal" state.[1] Accordingly, the circuit court's judgment enforcing the

[1]See McKenzie v. Sutton, 250 Ala. 447, 451-52, 34 So. 2d 825, 828 (1948)("We hold, therefore, that regardless of whatever may be the rule in some of the other states, in this jurisdiction under a contract such as here considered, and where, as here, the vendee at the time of the execution of the contract was unaware of any defect in the vendor's title, the vendee may waive full performance, elect to accept the title which the vendor is able to convey, and maintain a bill for specific performance

marketability requirement of the termination provision is due to be reversed because Anderson should be permitted to waive that requirement and maintain her action.

However, although we have determined that the defendants are not entitled to a summary judgment, we note that, at this stage, Anderson also is not entitled to a summary judgment requiring specific performance of the purchase agreement. On appeal, the sellers further argue that consummation of the purchase agreement "would not be possible in any event" because, they contend, "[i]t is unimaginable that any mortgage lender would agree to make a loan ... and take a third-position mortgage position behind (1) Wells Fargo's Mortgage and (2) Bowling's Vendor's Lien." The sellers' brief at 30-31. The sellers have cited no evidence in support of their specific assertions regarding

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accordingly. McCreary v. Stallworth, 212 Ala. 238, 102 So. 52 [(1924)]. Such is not the rule where the vendee at the time of the execution of the contract knew of the defect in the vendor's title. Weatherford v. James, 2 Ala. 170 [(1841)]."); and Ally Windsor Howell, Tilley's Alabama Equity § 8:4(a) and (e) (5th ed. 2012)("[I]f a vendor is unable to transfer a title to all the land that he contracted to convey, the purchaser may demand such specific performance as is within the vendor's ability." "While partial failure of title is a complete bar to specific performance when it is sought by the vendor, the vendee still may seek specific performance.").

financing, but, as noted in the "Background" section of this opinion, the sellers have produced an affidavit of an attorney whose company prepared a title commitment concerning the property, and he averred that the sellers' title to the property is "uninsurable."

Under the terms of the purchase agreement, the sellers' offer to sell the property to Anderson is contingent upon Anderson's ability to obtain financing for the purchase. In the absence of conclusive evidence in the record demonstrating Anderson's ability to secure the necessary financing, the sellers are not required to convey their interest in the property to Anderson in accordance with the other terms of the purchase agreement. See § 8-1-42, Ala. Code 1975 ("Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial and either entirely immaterial or capable of being fully compensated ...."). In short, genuine issues of material fact remain, and a summary judgment in favor of either side is not warranted at this juncture. See Dow, 897 So. 2d at 1038-39.

Conclusion

In light of the foregoing, this case is remanded for further proceedings. In so doing, we expressly make no holding regarding an appropriate purchase price considering the sellers' title to the property or whether the encumbrances on the property can, in fact, be discharged or satisfied in some way. Likewise, we express no opinion concerning any position that Bowling or Wells Fargo may take regarding their interests in the property on remand from this decision. Finally, as already noted, we do not hold that the circuit court must grant Anderson the equitable remedy of specific performance in this case.[2]

We hold only that the sellers cannot invoke the marketability requirement of the termination provision set out in the purchase agreement to unilaterally rescind the purchase agreement under the

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[2]The purchase agreement contains a section entitled "Default/Legal Remedies" providing that, in the event the sellers

> "fail[] to consummate this executed/accepted Agreement, Buyer shall have the right to elect one of the following remedies: (1) to obtain the Earnest Money as liquidated damages, (2) to seek to enforce specific performance of this agreement, (3) to terminate this Agreement and thereafter seek to recover damages against Seller[s] for breach of contract or other remedies available at law or equity."

circumstances presented by the record because it appears that Anderson is willing to waive marketability of the sellers' title to the property to purchase whatever interest they are able to convey and because the sellers have expressly agreed to sell their interest in the property to Anderson, provided that the other pertinent contingencies of the purchase agreement are met. See Mitchell, 244 Ala. at 608, 14 So. at 690 ("[T]he courts are loathe to strike down a deliberate and solemn contract of this character ...."). Therefore, the circuit court's judgment is reversed, and this case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Bolin, Shaw, Wise, Mendheim, Stewart, and Mitchell, JJ., concur.

Parker, C.J., concurs in part and concurs in the result in part, with opinion.

Sellers, J., concurs in the result.

PARKER, Chief Justice (concurring in part and concurring in the result).

I concur in reversing the summary judgment. I agree that sellers Michael and Robin Coleman, France M. Frederick, and Thomas C. Sparks could not rescind the purchase agreement based on their own failure to obtain lienholder Robert S. Bowling III's consent, because the marketable-title condition was for the protection of buyer Terri Anderson.

I do not agree, however, with the main opinion's rationale as to the other issues. First, Anderson argues that the purchase agreement allowed termination only upon written instructions from both the sellers and her. The opinion disposes of this argument on the basis of Rule 28(a)(10), Ala. R. App. P., which this Court has interpreted as requiring appellants to cite relevant legal authority. But Anderson's argument is based on the language of the agreement. In my view, an argument based simply on the language of a contract needs no further citation to comply with Rule 28(a)(10), because the contract itself is legal authority that governs the parties.

Second, Anderson argues that the sellers had a duty to make a good-faith effort to discharge the encumbrances. Again, the opinion concludes

that Anderson failed to comply with Rule 28(a)(10) -- this time because the authority she cited was too general. But in my view, to comply with Rule 28(a)(10) a party need cite authority only for the major premise of the first syllogism in his line of reasoning. See generally Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 47 (1989) (explaining that, in legal reasoning, constitutions, statutes, and prior decisions provide the major premise). So long as subsequent syllogisms are valid, the authority that supports the initial major premise supports the argument. Although citing authority for subsequent premises is often important to persuade this Court, it is not required by Rule 28(a)(10). Indeed, it is not possible in many cases. In the logic-chain of a legal argument, subsequent premises often rest on principles of reasoning and common sense rather than on specific legal authority. Here, Anderson cites Lloyd Noland Foundation, Inc. v. City of Fairfield Healthcare Authority, 837 So. 2d 253 (Ala. 2002), for the proposition that, under the implied covenant of good faith and fair dealing, the law implies an agreement that parties to a contract will do what needs to be done to carry out the contract. That proposition is the initial major premise of Anderson's argument that the sellers had an implied duty to discharge

the encumbrances on the property. Thus, her argument complies with the minimum of Rule 28(a)(10).

Finally, Anderson argues that the title was potentially marketable because the vendor's lien deed provided that the debt to Bowling would be automatically accelerated if the Colemans contracted to sell the property without his consent. The main opinion essentially negates that provision by focusing on another provision that made acceleration optional for Bowling upon any default by the Colemans. But under the general/specific canon of interpretation, a specific provision prevails over a more general provision and operates as an exception to it. Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 183 (Thomson/West 2012). Here, the any-default provision applied generally to defaults; the contract-for-sale provision was a specific provision that applied only to the Colemans' default by contracting to sell without Bowling's consent. Thus, the contract-for-sale provision prevailed, and the Colemans' debt was automatically accelerated regardless of Bowling's refusal to consent. Accordingly, the Colemans were legally permitted to pay off the debt and thus remove that encumbrance.