

VIRGINIA:

In the Supreme Court of Virginia Held at the Supreme Court Building in the City of Richmond on Thursday the 19th day of October, 2017.

Tamika Atkins, Appellant,

against Record No. 161322
Circuit Court No. CL14-3511

A.H. Electric Contractors, LLC, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Richmond.

Upon consideration of the record, brief of appellant,¹ and argument of counsel, the Court is of opinion that the judgment of the circuit court should be reversed.

I.

A.H. Electric Contractors, LLC (“the LLC”) filed a complaint against Tamika Atkins (“Atkins”) for enforcement of a mechanic’s lien against her home.² The complaint alleged that the LLC entered into a written contract with Atkins in 2014 under which the LLC would perform certain home repairs and that Atkins had refused to pay “for the amount of the final draw, \$25,497.72.” Atkins filed a counterclaim in which she asserted a claim for breach of contract alleging that the LLC failed to complete its work under the contract in a substantial workmanlike manner.

On April 23, 2015, the parties entered into a written settlement agreement providing that “[c]ounsel for parties will contact Christopher Neary to evaluate work needed . . . to bring [Atkins’] home into compliance with his original estimate,” which was attached as an exhibit to the settlement agreement.³ The settlement agreement stated that “[c]ounsel will also provide Mr.

¹ The appellees did not file a brief in this Court.

² The complaint also named the following defendants: Virginia Housing Development Authority; Wade and Wade, P.L.C, Substitute Trustee; Beneficial Financial I Inc.; and Thomas W. Harriman, Trustee.

³ Christopher Neary is an insurance adjuster who inspected the fire-related damage sustained by Atkins’ home and prepared the estimate of cost of repairs.

Neary with a copy of [the underlying contract]” and that “Ms. Atkins will cooperate with Mr. Neary to make her home available for inspection” but “will not be present during the inspection.” The settlement agreement identified a list of items that “Neary’s estimate shall not include” and stated that “Neary shall provide the above-referenced estimate to counsel for the parties.” Under the terms of the settlement agreement, the cost of the estimate was to be “split” between the parties.

The settlement agreement obligated Atkins to take steps to obtain certain funds from Atkins’ current contractor and required Atkins’ counsel to “hold the funds in escrow to be distributed” as specified in the terms of the settlement agreement. According to those terms, if Neary’s estimate exceeded \$25,497.72, the funds in escrow were to be distributed to Atkins and the excess paid by the LLC to Atkins; if Neary’s estimate was less than \$25,497.72, the estimate amount was to be paid to Atkins and the balance of the funds distributed to the LLC. The settlement agreement obligated the parties to execute mutual releases “[u]pon payment of the amounts contemplated herein.”

After the settlement agreement was signed, “the deal fell apart” when Atkins’ counsel received a voicemail message from Neary stating “that he would not perform the follow up inspection contemplated in the agreement.” The parties resumed litigation and engaged in discovery for more than a year. In May 2016, the LLC served discovery responses upon Atkins revealing that the LLC did not hold a contractor’s license at the times it entered into the underlying contract with Atkins and filed its mechanic’s lien.⁴ Shortly thereafter, the LLC filed an amended complaint that no longer sought enforcement of the mechanic’s lien, but instead sought specific enforcement of the settlement agreement. Atkins filed an amended counterclaim against the LLC and added a counterclaim against Anthony Holmes, manager of the LLC, alleging breach of contract and violations of the Virginia Consumer Protection Act.

The parties appeared before the circuit court on June 13, 2016. At the outset of the proceedings, the circuit court directed the parties to limit their evidence and argument to the

⁴ A.H. Electric Contractors, LLC was issued a Class A contractor’s license on February 10, 2016. The license referenced in the underlying contract, the LLC’s memorandum for mechanic’s lien, and the LLC’s complaint against Atkins was a Class B contractor’s license issued to Anthony Holmes, doing business as A.H. Electric Contractors, a sole proprietorship.

issue of the settlement agreement.⁵ After hearing evidence and argument, the circuit court ruled that it would enforce the settlement agreement. The circuit court explained that “[t]o the extent there was any ambiguity as to the third party inspection,” it would “order that the parties return to mediation” so that “the parties can or the court can select a third party for the inspection.” The circuit court also ruled that “the underlying contract for the work to be performed . . . was a valid contract . . . ratified by both parties.” The circuit court stated it would dismiss with prejudice Atkins’ counterclaims as “barred” by the ruling on the settlement agreement.

The circuit court entered an order finding the settlement agreement “a valid and enforceable agreement.” The circuit court further found that the inability of Neary to perform the inspection “does not void” the settlement agreement. The circuit court ordered the parties to “confer and agree on another independent third party to perform the inspection” or, if they were unable to agree, to “attend a settlement conference before the Honorable Robert G. O’Hara, Jr. to determine an independent third party to perform the inspection.” On July 12, 2016, the circuit court entered an order, nunc pro tunc, stating that the June 13 order was amended to provide that Atkins’ amended counterclaims were dismissed with prejudice.

II.

On appeal, Atkins argues that the circuit court erred in granting specific performance of the settlement agreement and dismissing her counterclaims. We agree.

A party seeking specific performance of a contract bears the burden of proving that all conditions have been fulfilled. *Denton v. Browntown Valley Assocs.*, 294 Va. ___, ___, 803 S.E.2d 490, 494 (2017); *Cox v. Cox*, 67 Va. (26 Gratt.) 305, 308 (1875). Conditions “are those facts and events, occurring after the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty and before the usual judicial remedies become available.” Catherine M.A. McCauliff, 8 Corbin on Contracts § 30.7, at 14 (Joseph M. Perillo ed., rev. ed. 1999) (emphasis omitted). “There can be no specific performance of a contract which is subject to a condition unless the condition has been fulfilled.” *Cushman v. Fitz-Hugh*, 199 Va. 234, 240, 98 S.E.2d 706, 709 (1957). “The non-

⁵ When Atkins argued that enforcement of the settlement agreement with the LLC would not resolve Atkins’ counterclaim against Holmes, the circuit court disagreed, provided it found that Holmes “acted as an agent at all times of his company” and permitted counsel to examine Holmes and Atkins on this question.

occurrence of a condition will prevent the existence of a duty in the other party; but it may not create any remedial rights and duties at all, and it will not unless someone has promised that it shall occur.” McCauliff, *supra*, § 30.12, at 23-24.

The obligations of the parties under the settlement agreement were conditioned on the performance of an inspection by Neary “to evaluate work needed to [Atkins’ home] to bring [her] home into compliance with his original estimate” and Neary’s preparation of a new estimate of the cost of such work. Prior to the inspection, the only obligations upon Atkins were to “cooperate with Mr. Neary to make her home available for inspection” and “not be present during the inspection.” Because Neary was unwilling to evaluate the repairs necessary to comply with his original estimate and prepare a revised estimate, this condition could not be fulfilled and its non-occurrence prevented the existence of any duty in Atkins. Therefore, the circuit court erred in ruling that the LLC was entitled to specific performance of the settlement agreement. The circuit court compounded this error by compelling Atkins to execute a contract she did not make. “Equity cannot make or alter a contract for the parties and then execute it.” *Rison v. Newberry*, 90 Va. 513, 521, 18 S.E. 916, 919 (1894). Atkins entered into the settlement agreement with the condition that Neary conduct the inspection and prepare a new estimate of the cost of work needed to comply with his original estimate.⁶ There was no evidence that Atkins would have agreed to the settlement otherwise or that Atkins would have agreed to the terms of the agreement made by the circuit court. In replacing the condition of an inspection and estimate by Neary with a requirement that the parties confer and agree on another third party or attend a settlement conference for the determination of a third party to perform the inspection, the circuit court made a new agreement for the parties. “Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same.” *Rison*, 90 Va. at 521, 18 S.E. at 919 (quoting *Hunt v. Rhodes*, 26 U.S. 1, 14 (1828)).

⁶ Although the circuit court characterized the issue of the third party inspection as one of “ambiguity,” the language of the settlement agreement unambiguously provided for an inspection by Neary, who the LLC conceded was selected by the parties because he was the “best informed.” As the parties stipulated, the settlement agreement “does not provide for the use of any adjustor other than Christopher Neary.”

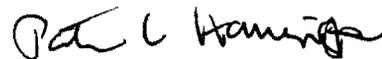
For the foregoing reasons, we reverse the circuit court's judgment, enter judgment for Atkins on the LLC's amended complaint, and reinstate Atkins' amended counterclaims.⁷ We remand this case for a trial on the merits of Atkins' amended counterclaims.⁸

Justice Goodwyn took no part in the resolution of this case.

This order shall be certified to the said circuit court.

A Copy,

Teste:



Clerk

⁷ Because the circuit court erred in ruling that the settlement agreement was enforceable, it erred in dismissing Atkins' amended counterclaims. Our holding renders it unnecessary to address Atkins' argument that enforcement of the settlement agreement did not bar her claims against Holmes. We note, however, that in raising the question of whether Holmes was acting as "an agent at all times of his company," the circuit court apparently misunderstood the nature of Atkins' claims against Holmes and the LLC, which raise the issue of whether the underlying contract was with Holmes, acting as the sole proprietor of A.H. Electric Contractors, or with the LLC.

⁸ Atkins also assigns error to the circuit court's conclusion that the underlying contract between Atkins and the LLC was valid, asserting that any ruling on the validity of the contract "was unnecessary and superfluous" given the circuit court's ruling that the settlement agreement was enforceable. While not memorialized in its orders, the record of the proceedings reflects that the circuit court made a finding with regard to the underlying contract that "there was a valid contract and it was ratified by both parties." Although the basis for this finding is unclear, it was neither necessary nor relevant to the determination of whether the settlement agreement was enforceable, and is vacated.

Noting that it is undisputed that the LLC was unlicensed when the contract was executed, Atkins invites us to find that the construction contract was illegal under Code § 54.1115(A)(1) and (3). We decline this invitation, however, since the legality of the contract remains an issue for determination by the circuit court upon hearing the evidence on Atkins' counterclaims.