

agreement or, in lieu of the sale, ordered the defendants to pay Vanessa money damages within 45 days of its order.

¶ 3 KLC and Timothy appeal the circuit court's order, arguing that the settlement agreement did not constitute a valid and enforceable contract, that the circuit court had no authority to order the sale of land or payment to Vanessa, and that the circuit court's factual findings were against the manifest weight of the evidence. We affirm as modified.

¶ 4 BACKGROUND

¶ 5 In 2009, the circuit court entered a judgment of dissolution of marriage, dissolving Fred and Vanessa's marriage and, *inter alia*, awarding property and maintenance to Vanessa. Pursuant to the dissolution proceedings, the circuit court directed Fred not to sell, transfer, or otherwise encumber certain property.

¶ 6 On September 9, 2010, Vanessa filed a complaint for preliminary injunction and to set aside transfers of real estate. In the complaint, Vanessa asserted that pursuant to the judgment of dissolution of marriage, she was a creditor of Fred's and had a right to preserve her ability to enforce the judgment of dissolution of marriage and property division against Fred's assets, including real estate which had required protection pending the resolution of the dissolution appeal. Vanessa asserted, however, that in 2010, Fred, as president and sole shareholder of GAFF, improperly transferred property to KLC, which was owned by Timothy, and Waterfowler, a corporation solely owned by Jon, who is Fred's son.

¶ 7 In count I, Vanessa sought a court order restraining Fred, GAFF, Waterfowler, KLC, Timothy, and Jon from transferring, selling, or otherwise encumbering the real estate that Fred and GAFF had recently transferred to KLC. In count II of Vanessa's complaint, she requested, pursuant to the Uniform Fraudulent Transfer Act (740 ILCS 160/8(a)(1) (West 2010)), that the court enter an order setting aside the transfers of real estate by Fred, individually, and as president of GAFF.

¶ 8 On April 14, 2011, the circuit court entered an agreed order for preliminary injunction regarding count I of the plaintiff's complaint. The parties agreed that the preliminary injunction would remain in full force and effect pending a trial on the plaintiff's action to set aside transfers of real estate in count II of her complaint. Despite the existence of the agreed preliminary injunction, KLC and its members scheduled an auction for the sale of the subject real estate while the injunction was in place. On February 21, 2012, Fred and GAFF filed a separate action against the other defendants for imposition of a constructive trust, preliminary injunction, and temporary restraining order.

¶ 9 In March 2012, Vanessa, Fred, GAFF, Keck's Marsh Incorporated, KLC, Jon, Timothy, and Waterfowler entered into a settlement agreement to resolve the claims in the two cases. The agreement contemplated the auction of lands scheduled for March 24, 2012. In the settlement agreement, KLC agreed to pay Vanessa \$925,000 from the proceeds of the sale, and Vanessa and Fred agreed to dismiss their court actions. Paragraph two of the settlement agreement provided as follows: if "the proceeds of the sale net of amounts due on current mortgages on the property and the cost of sale *** amount[ed] to less than nine hundred twenty-five thousand dollars (\$925,000.00) then [KLC] will pay the difference." Paragraph 12 of the settlement agreement provided as follows:

"If for any reason the scheduled sale of property referred to in paragraph 1 hereof does not take place, or if the purchasers at that sale fail or refuse to close, then [KLC], Jon Keck, Timothy Emerick, and [Waterfowler] shall have no obligation to pay the [\$925,000] or any other amount to Vanessa Keck. Further, in such event all obligations and undertakings by all the parties to this [a]greement shall be terminated and be held null and void. All releases shall be void, and Case Number 12-CH-08 and Case Number 10-CH-44 shall be reinstated without prejudice, and all parties shall be restored to the status quo as it was at the conclusion of a hearing in Case Number

12-CH-08 on March 13, 2012."

¶ 10 On March 24, 2012, the public auction of the various tracts of land was held. Jon, individually, successfully bid on two groups of properties (tracts 1-5, 14, 16, and 17 for \$4,125,000 and tract 11 for \$90,000), outbidding other buyers, and thereby entered into two purchase contracts with KLC. However, Jon did not secure financing for the tracts on which he was a successful bidder. All tracts were sold, and all the bidders, except Jon, paid according to the purchase contracts. As a result of the sale, approximately \$3,791,334 was paid to Peoples National Bank toward the mortgage held by KLC. KLC and its members refused to pay Vanessa \$925,000.

¶ 11 On May 11, 2012, at a special meeting held by KLC, Emerick Brothers, LLC, was authorized to farm the property owned by KLC, Jon was replaced by Timothy as manager of KLC, and attorneys were retained and authorized to take action on Jon's default of the purchase contract. Jon attended that meeting and made the motion to elect Timothy as the new manager, to change the registered agent, and to change the lease regarding farming the real estate. On May 15, 2012, KLC, represented by attorney Ronald Osman, sent a letter to Jon, declaring that the purchase contracts from the sale were terminated.

¶ 12 On June 12, 2012, Vanessa filed her motion to enforce the settlement agreement naming as the defendants Fred, GAFF, Waterfowler, KLC, Timothy, and Jon. Vanessa asserted that Timothy and Jon, individually and on behalf of KLC, failed to act in good faith pursuant to the settlement agreement because they did not require Jon to pay earnest money on the contracts, improperly prevented the purchase of the real estate by other ready, willing, and able buyers, and had taken no action against Jon to enforce the purchase contracts. Vanessa further asserted that Jon had improperly refused to close on the sale of the real estate. Vanessa asserted that the defendants benefitted from the terms of the settlement agreement in that the mortgage with Peoples National Bank was nearly paid in full and upon

Jon's alleged failure to obtain financing, they retained possession of over 1,100 acres of real estate, continuing to receive income therefrom. Vanessa asserted that she had not received any portion of the funds from the auction. Vanessa requested that the court order the defendant to pay her \$925,000 or, in the alternative, order sale of the real estate to an able third-party purchaser or by public auction, or order specific performance on the purchase contracts entered into between KLC and Jon.

¶ 13 In June, July, August, and September 2012, the circuit court heard evidence on Vanessa's motion to enforce the settlement agreement. At the hearing, Todd Hewing testified that he was involved in the auction of the 23 tracts of land at issue. Todd testified that he worked with Jon during the course of the sale, going back and forth between the big sale room where all of the other bidders were and the motel room where Jon was stationed. Todd testified that Jon was in the room with Fred, an unidentified male, Michael Keck, who is Fred's brother, Lorin Kirk, who is Fred and Vanessa's daughter, and Doug Knebel, a banker at Midland States Bank.

¶ 14 Todd testified that eight bidders, including Jon, had prior arrangements that allowed them to bid without depositing the 10% down payment generally required for bidding. Todd testified that Jon had told him that he had insufficient funds to pay the 10% payment required to bid. Todd testified that he felt comfortable not taking the 10% down because he believed that Fred or an individual by the name of Charlie Potter would provide the funds for Jon to close on the transaction. Specifically, Todd testified that he understood that Charlie Potter would "handle the money to do a bridge loan until everything was done." Todd testified that he had to convince Timothy to allow Jon to bid because Timothy was concerned that Jon did not have sufficient funds.

¶ 15 Todd testified that Jon bid and failed to close on approximately 700 acres and that but for Jon's bidding, there would have been other buyers who would have purchased the

property. Todd testified that because Jon failed to close, KLC still owned the property, with Timothy, Jon, or Benji, Timothy's son, farming it.

¶ 16 Todd testified that he would expect the property to currently sell for less than at the prior auction because it had failed to close, because corn was selling for a lower price, and because of the ongoing litigation. Todd testified that it would also be difficult to find a company to advertise it well, considering the lower acreage. Todd testified, however, that he could sell the property again by listing it in tract. Todd testified that the property would sell for at least \$925,000.

¶ 17 Lorin testified that Jon approached the family and offered to purchase the property and distribute portions after closing. Lorin testified that Jon did not approach Vanessa but that she communicated to Vanessa what Jon wanted to do. When asked whether there was discussion with Jon about how high he would bid for the family and still complete his end of the bargain and close, Lorin answered: "No. But that would have been a great idea."

¶ 18 Jon testified that Waterfowler owned approximately 45% interest in KLC, and that Timothy owned the remaining 55%. Jon testified that he had agreed with family members that he would attempt to purchase the ground at the auction and then sell it pursuant to agreements made with each. Jon entered a written agreement to provide a deed after closing with Vanessa in exchange for \$500,000, with Fred in exchange for \$630,000, with Lorin in exchange for \$166,700, and with Garrett Keck, Jon's brother, in exchange for \$166,700.

¶ 19 Jon testified that he had been designated to do the bidding, using Waterfowler's equity in the land. Jon testified that he did not directly discuss with Vanessa his plan to bid on the properties at the auction and that Vanessa did not assist or participate in the auction in any capacity. Jon testified that while in the auction room, he conferred with Fred, Lorin, and Garrett to determine reasonable bids for the properties.

¶ 20 Jon testified that KLC authorized him to forego paying the 10% down payment to bid.

Jon testified that he did not have the funds to acquire much of the property. Jon testified that although Fred had agreed to provide up to \$630,000 on the purchase price in exchange for a quitclaim deed executed two days after closing, he had misunderstood that Fred would provide the \$630,000 before the auction. Jon testified that he had also mistakenly believed that Charlie Potter had offered to provide a short-term loan to him and his family members to help purchase the ground at the auction, as long as Jon paid him in full within 90 days. Jon testified that he believed those funds would be sufficient to close on the property, and then he would execute the deeds pursuant to the various agreements he had with his family members. Jon testified that a week after the auction, he learned that Charlie Potter would not provide funds for the purchase. Jon further testified that he had assumed he would close on the contracts at the auction by using some of the equity in KLC, reaching an agreement with Timothy that would allow him to close without requiring much cash.

¶ 21 Jon testified that he met with Doug Knebel at Midland States Bank but was unable to secure the full purchase price of \$4.2 million. Jon testified that he also met with Casey McClure from Farm Credit Service, who indicated that Jon needed a cosigner, which Jon testified he was unable to secure. Jon testified that he did not inquire whether he could borrow less than the full amount of the purchase contracts.

¶ 22 Jon acknowledged that the purchase contracts for tracts 1-5, 14, 16, and 17 included his signature as individual buyer and his signature as a member of KLC. Jon acknowledged that he took no steps as the manager of KLC to enforce the purchase contracts against himself individually.

¶ 23 Fred testified that he and family members, including Lorin, her husband Joe, and Vanessa, had agreed prior to the auction that Jon would be bidding on their behalf. Fred testified that by the end of the day at the auction, Charlie Potter had stated that he was not going to contribute funds for the purchase.

¶ 24 Vanessa testified that prior to the auction, she did not have any discussion with Jon about acquiring any land for her at the auction. Vanesa testified that she communicated to Lorin that once she was awarded the \$925,000 from the auction proceeds, she would contribute \$500,000 of that money to purchase certain tracts sold to Jon in the auction. Vanessa testified that she thereafter agreed in writing that Jon would bid on the property and that she would contribute \$500,000 of the \$925,000 that she received from the sale. Vanessa testified that she did not attend the auction and did not interfere with it.

¶ 25 Timothy, the manager of KLC at the time of the hearing, testified that he had expressed concern to Todd regarding waiving the 10% cash requirement for Jon. Timothy testified that because Jon was allegedly pledging his equity in KLC as earnest money, he ultimately agreed to allow Jon to bid on those terms and waive the 10% cash requirement.

¶ 26 Timothy testified that he had also expressed concern regarding the Keck family's presence at the auction because, he alleged, the presence of a seller's family members has a negative impact on the outcome of the auction, because neighbors are hesitant to bid against them. He and Todd ultimately agreed, however, that the Keck family would be in a room on the premises, but off to the side and out of sight.

¶ 27 Timothy testified that approximately 2,300 acres were in the sale and that Jon successfully bid on 1,100-plus acres. Timothy testified that approximately \$9 million would have been realized had Jon closed. Timothy acknowledged that a portion of the \$4.2 million actually received went to refinance indebtedness owed by entities other than KLC, including Emerick Brothers, LLC, which he owned.

¶ 28 Timothy testified that after learning that Jon could not close, he called a special KLC meeting. Timothy testified that, other than sending a letter of default, KLC had not enforced the contract of sale with Jon. Timothy stated that he "just didn't have the time." Timothy acknowledged that paragraph nine of KLC's purchase contract with Jon provided remedies

to KLC in case of breach. Specifically, the purchase contract allowed KLC to retain the earnest money as partial payment for damages caused by Jon's breach, to continue the contract in full force and effect and hold Jon liable for all damages resulting from the breach, or to continue the contract in full force and effect and demand specific performance of Jon. Timothy testified that he instead declared the contract to be terminated.

¶ 29 On September 28, 2012, the circuit court entered its order on Vanessa's motion to enforce settlement agreement. The circuit court held it undisputed that Jon individually purchased various tracts of land at the auction sale and that he failed to close on any of those purchases, which totaled over \$4 million. The circuit court held it undisputed that Jon's failure to close prohibited Vanessa from receiving the agreed \$925,000 under the settlement agreement.

¶ 30 In its order, the circuit court found that Jon had entered into agreements with family members, including Vanessa, to sell various tracts of ground after he was the successful bidder. The circuit court found that Jon did not expect any money from these family members until after he closed on all tracts and that, specifically, he would not receive the \$500,000 from Vanessa until she received her \$925,000. The circuit court determined that neither Vanessa nor her agent interfered with the sale.

¶ 31 The circuit court found that "Jon could not have reasonably believed that he could close on a \$4.2 million obligation." The circuit court determined that Jon signed the settlement agreement three times: once personally, once for Waterfowler, and once for KLC. The circuit court held that the failure of the condition precedent occurred because of the direct actions of Jon, a party to the settlement agreement. The circuit court concluded that Jon failed to operate in good faith and fair dealing to comply with the settlement agreement.

¶ 32 The circuit court determined that in simply bidding on a \$4.2 million purchase, Jon was not employing reasonable efforts to comply with the settlement agreement but instead

thwarted other available, *bona fide* purchasers at the sale. The circuit court determined that Jon continued to fail to exercise reasonable efforts to abide by the settlement agreement in failing to formally apply for a mortgage or attempt to buy part of the property to honor part of his sales contract.

¶ 33 The circuit court found that Timothy also failed to exercise reasonable efforts to comply with the settlement agreement in that he waived Jon's requirement to post 10% earnest money, thereby failing to discover that Jon had no ability to close on the property. The circuit court found that Timothy knew Jon had limited financial resources but still allowed him to bid on nearly half of the entire acreage. The circuit court found that Timothy's failure to exercise reasonable efforts continued postsale in that Timothy (with Jon's endorsement) replaced Jon as manager and registered agent for KLC, became the tenant farmer of much of KLC land, and took no further enforcement action under the purchase contract with Jon. The circuit court noted that Timothy testified that he simply had not had enough time to do so.

¶ 34 The circuit court concluded that although the settlement agreement called for a sale, only half of a sale occurred. The circuit court concluded that the other half was prevented by the defendants' actions or inactions. Finding that it was enforcing the settlement agreement, as opposed to reforming it, the circuit court ordered the defendants to either conduct another sale of the remaining properties on which Jon failed to close or pay Vanessa \$925,000, within 45 days of its order, in lieu of sale, under paragraph two of the settlement agreement. On October 23, 2012, KLC and Timothy filed a timely notice of appeal.

¶ 35 DISCUSSION

¶ 36 "We are guided by the fact that a settlement agreement is a contract, and construction and enforcement of settlement agreements are governed by principles of contract law." *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849,

¶ 18. The parties' intent must be determined from the plain and ordinary meaning of the language of the contract, unless the contract is ambiguous. *Id.* If there is no ambiguity in the language of a settlement agreement, the determination of the parties' intent is governed by the contract language alone. *Id.*

¶ 37 "It is well established that the duty of good faith and fair dealing is implied in every contract." *Gore v. Indiana Insurance Co.*, 376 Ill. App. 3d 282, 286 (2007). "Its purpose is to ensure that parties do not take advantage of each other in a way that could not have been contemplated at the time the contract was drafted or do anything that will destroy the other party's right to receive the benefit of the contract." *Id.*

¶ 38 KLC and Timothy argue that the circuit court had no authority to order the sale of land, or payment of \$925,000, under "color of contract enforcement."

¶ 39 The parties do not suggest that the circuit court's order was one to enforce a judgment. See *Maniez v. Citibank, F.S.B.*, 383 Ill. App. 3d 38, 41 (2008) (Code of Civil Procedure "affords a means of collecting a judgment by forcing the sale of the judgment debtor's property, real or personal, or both, to the extent necessary to satisfy the debt and costs" (internal quotation marks omitted)). Instead, the court stated that it was enforcing the contract by ordering the sale of the property, thereby requiring the defendants to perform an affirmative act to fulfill the contract, or to pay Vanessa money in lieu of the sale.

¶ 40 "Specific performance is [the] equitable remedy requiring a defendant to perform an affirmative act in order to fulfill a contract." *Dixon v. City of Monticello*, 223 Ill. App. 3d 549, 560 (1991). "In order to be entitled to specific performance, plaintiff must allege and prove the following elements: (1) the existence of a valid, binding, and enforceable contract; (2) plaintiff has complied with the terms of his contract or is ready, willing, and able to perform his part of the contract; and (3) defendant failed or refused to perform his part of the contract." *Id.* at 561. "In reviewing the propriety of the court's decree of specific

performance, the essential inquiry is whether plaintiff[] ha[s] established the existence of a valid and enforceable contract." *Calvary Temple Assembly of God v. Lossman*, 200 Ill. App. 3d 102, 105 (1990). The court's function in a suit for specific performance is to enforce the contract made by the parties and not to make a contract for them and then enforce the contract thus made. *Id.* "In other words, '[t]he contract must be enforced according to its terms or not at all.'" *Butler v. Kent*, 275 Ill. App. 3d 217, 227 (1995) (quoting *Sweeting v. Campbell*, 8 Ill. 2d 54, 58 (1956)).

¶ 41 "However, even where the contract is clear and unambiguous, specific performance is not a matter of right." *Dixon*, 223 Ill. App. 3d at 561. "Instead, the granting of the remedy rests in the sound discretion of the trial court, as determined from all the facts and circumstances." *Id.* "The granting or denial of such relief is not to be done in an arbitrary or capricious manner." *Id.* "A court's decision to grant such relief will not be disturbed absent an abuse of discretion." *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 477 (2004).

¶ 42 "The principle underlying the specific performance remedy is to grant equitable relief where the damage remedy at law is inadequate." *Schwinder*, 348 Ill. App. 3d at 476. "If there is an adequate remedy at law, by way of damages, the request for specific performance will be denied." *Dixon*, 223 Ill. App. 3d at 560-61.

¶ 43 In ordering payment in lieu of sale, the circuit court implicitly found that Vanessa had an adequate remedy at law by way of money damages. We recognize that the settlement agreement contemplated the sale of land and that both a purchaser and a vendor of real estate may seek specific performance of a contract to buy and sell real estate. *Vincent v. Vits*, 208 Ill. App. 3d 1, 4 (1991). However, Vanessa was neither a land-contract purchaser nor vendor according to the agreement's terms. Pursuant to the settlement agreement, Vanessa expected to receive not land but money. Accordingly, if proper, the circuit court's award of actual

damages amounting to \$925,000 will serve to place Vanessa in the position in which she would have been had the contract been performed. *Lakshman v. Vecchione*, 102 Ill. App. 3d 629, 634 (1981). Thus, we need only decide whether the circuit court's award of damages was justified.

¶ 44 KLC and Timothy argue that the circuit court had no authority to order payment to Vanessa because the settlement agreement contained a condition precedent which failed to occur, thus rendering the agreement void and unenforceable. Specifically, they argue that paragraph 12 of the settlement agreement clearly provided that the purchasers of the sale property must close before the parties' obligations became due, the scheduled sale of the property did not take place as anticipated because Jon did not secure financing, and therefore, the agreement was null, void, and unenforceable.

¶ 45 "A condition precedent is defined as a condition in which performance by one party is required before the other party is obligated to perform." *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 668 (2007). "If the condition is not satisfied, the obligations of the parties end." *Grill v. Adams*, 123 Ill. App. 3d 913, 918 (1984). "When contracts contain express conditions precedent, strict compliance with such conditions is required." *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 668.

¶ 46 "To ameliorate the strict enforcement of conditions precedent, courts have developed the following doctrine: 'Where the performance of the contingency or condition is within the control of a party to the agreement, the party for whose benefit the condition precedent runs is required to use "reasonable efforts" to have it occur.' [Citations.]" *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 671 (citing *Smith v. Vernon*, 6 Ill. App. 3d 434, 437-38 (1972) (where contract to purchase real estate was contingent upon plaintiffs securing a first mortgage, court found they failed to take "reasonable efforts" to fulfill the condition and entered judgment in favor of the defendants because the plaintiffs turned down reasonable

mortgage offer from bank)). "When a contract is contingent upon satisfaction of a condition, and the other party has discretionary power over that condition, it is in most circumstances quite reasonable to expect that party to take affirmative steps to see that the condition is satisfied." *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 672.

¶ 47 "This principle may be seen as an extension of the implied covenant of good faith and fair dealing contained in every contract." *Id.* at 671. "This covenant prohibits the parties from exercising their contractual discretion 'arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.'" *Id.* at 671-72 (quoting *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 112 (1993)). "Whenever the cooperation of one party is necessary for the other party's performance, there is an implied condition that such cooperation will be given." *Kipnis v. Mandel Metals, Inc.*, 318 Ill. App. 3d 498, 505 (2000).

¶ 48 Accordingly, a party taking advantage of his own conduct to claim a failure of a condition to defeat his contractual liability violates the duty of good faith and fair dealing. *Grill*, 123 Ill. App. 3d at 918. "[A] party who prevents the fulfillment of a condition upon which his own liability rests may not defeat his liability by asserting the failure of the condition he himself has rendered impossible." *Cummings v. Beaton & Associates, Inc.*, 249 Ill. App. 3d 287, 306 (1992).

¶ 49 "When a condition attached to a contract is waived by the parties' conduct, performance of the duty that was originally subject to its occurrence then becomes due. (Restatement (Second) of Contracts § 245 (1981).)" *Grill*, 123 Ill. App. 3d 913 (1984) (because defendants failed to use reasonable efforts to secure the exchange property to complete condition precedent, defendants' conduct was considered a waiver of the condition and they were obligated under the remaining terms of the agreement); *Cummings*, 249 Ill. App. 3d at 306. If one party willfully causes the condition to fail, the contract may be fully

enforced against that party. *Cummings*, 249 Ill. App. 3d at 306; *Hansen v. Johnston*, 111 Ill. App. 2d 88, 93 (1969); *Jordan v. Busch*, 285 Ill. App. 217, 225-26 (1936) (when cooperation of contracting party is necessary for condition to occur, party who does something to prevent the happening of the event causes the contract to become absolute and performable as though event had occurred).

¶ 50 Applying these principles to KLC's conduct in the case at hand, we conclude that the circuit court's award of money damages was not contrary to law. Paragraph 12 of the settlement agreement provided:

"[i]f for any reason the scheduled sale of property referred to in paragraph 1 hereof does not take place, or if the purchasers at that sale fail or refuse to close *** all obligations and undertakings by all the parties to this Agreement shall be terminated and be held null and void. All releases shall be null and void, and Case Number 12-CH-08 and Case Number 10-CH-44 shall be reinstated without prejudice, and all parties shall be restored to the status quo."

¶ 51 The settlement agreement thereby specifies a condition precedent, namely that if the scheduled sale of the property did not take place, or if the purchasers failed or refused to close, then the parties' obligations pursuant to the agreement were terminated. Pursuant to the settlement agreement, KLC had agreed to pay Vanessa \$925,000 from the auction proceeds. KLC reasons that because all purchasers did not close on the property, its contractual obligation to pay Vanessa was discharged.

¶ 52 Assuming, *arguendo*, that the contract's plain language provided that the parties' duties ceased if "[any] purchasers" failed to close, we find that KLC's contractual obligation to pay Vanessa was not discharged because KLC waived the condition by preventing the condition's fulfillment. The settlement agreement may therefore be fully enforced against KLC, with the performance of its duty to pay Vanessa \$925,000, which was originally

subject to the condition precedent, becoming due as though the scheduled sale of property took place and the purchasers at the sale closed. See *Cummings*, 249 Ill. App. 3d at 306. KLC argues that the circuit court lacked evidence to support such a conclusion. It argues that the trial evidence showed that it had no part in Jon's failure to close, highlighting Todd's testimony that he "had to convince Timothy to allow Jon to bid without [10% cash] down *** because [Timothy] was concerned about where it was going to come from."

¶ 53 The evidence presented at the hearing on Vanessa's motion to enforce the settlement agreement demonstrated that KLC prevented the condition precedent from occurring in violation of its duty of good faith and fair dealing. As noted by the circuit court, Jon, on KLC's behalf, executed the settlement agreement, which clearly provided that KLC's obligation to pay Vanessa relied on the closing of the purchase contracts. Yet, knowing his financial resources were limited, Jon concocted and executed a plan to individually bid on property worth \$4.2 million, made no formal applications for financing, made no attempts to borrow less than the full amount necessary, and knew prior to placing the bids and signing the purchase contracts that he lacked funding to close. Absent Jon's bidding, the land would have sold to other buyers who would have been able to close.

¶ 54 KLC, through Jon and Timothy, provided Jon the opportunity to thwart the sale. In waiving the down payment requirement, KLC allowed Jon to bid on nearly half of the entire acreage despite its knowledge of his limited financial ability to close. KLC's failure to exercise reasonable efforts continued postsale in that Timothy (with Jon's endorsement) replaced Jon as manager and registered agent for KLC, became the tenant farmer of much of KLC land, and, despite having remedies available to it pursuant to the purchase contracts with Jon, took no further enforcement action. Instead, Jon, acting on KLC's behalf, voted to declare himself in default of the purchase contracts, and KLC thereby terminated the purchase contracts, as opposed to enforcing them. As acknowledged by KLC and Timothy,

the record further shows that Timothy and Jon, KLC's members, thereafter agreed to pledge the land as collateral on existing loans to which they were both signatories to avoid foreclosure. The circuit court properly concluded that KLC failed to use reasonable efforts to effect the closing of the purchase contracts pursuant to the settlement agreement, violating its duty of good faith and fair dealing. KLC may not now complain that the nonperformance of the complete sale of the property precluded its liability. See *American Fidelity Fire Insurance Co. v. General Ry. Signal Co.*, 184 Ill. App. 3d 601, 607 (1989). The settlement agreement becomes absolute and performable as though all closings had occurred.

¶ 55 KLC argues that its actions were protected by the business judgment rule, which creates a presumption that in making a business decision a corporation's directors acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company. See *Sherman v. Ryan*, 392 Ill. App. 3d 712, 722 (2009). However, this presumption applies where there is no evidence of self-dealing in the usual sense of personal profit or betterment on the part of the directors. *Id.* Clearly, Jon and Timothy, as KLC's members, engaged in self-dealing, with Timothy and Jon bettering their financial statuses by thwarting the sale and failing to pay Vanessa.

¶ 56 We further note that the evidence supported the circuit court's conclusion that neither Vanessa nor her agent interfered with the sale. The evidence demonstrated that Vanessa was not present at the auction, did not interfere with its process, and did not agree to purchase property until after Jon closed, thus playing no part in his failure to do so.

¶ 57 We have therefore concluded that the parties' contract was valid and enforceable, with KLC's obligation to pay Vanessa becoming absolute due to its interference with the condition precedent. If the condition precedent had occurred, and the purchasers closed on the sale of all of the property, then KLC was obligated to pay Vanessa \$925,000. Accordingly, the circuit court properly ordered KLC to pay \$925,000 in damages to Vanessa. However,

because money damages are adequate to place Vanessa in the position she would have been in had the condition precedent occurred, we conclude that the facts and circumstances did not support the circuit court's alternative award of specific performance, which required the parties to conduct a second sale of the real property.

¶ 58

CONCLUSION

¶ 59 For the foregoing reasons, the judgment of the circuit court of Fayette County is hereby affirmed as modified.

¶ 60 Affirmed as modified.