Rel: September 30, 2019

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

1171194

Ex parte S. Mark Booth

PETITION FOR WRIT OF MANDAMUS

(In re: City of Guin

v.

S. Mark Booth)

(Marion Circuit Court, CV-17-900134)

STEWART, Justice.

S. Mark Booth petitions this Court for a writ of mandamus directing the Marion Circuit Court ("the trial court") to

dismiss an action filed against him by the City of Guin ("the City"). We grant the petition in part, deny it in part, and issue the writ.

Background

On January 17, 2008, Booth and the City entered into a contract entitled "Commercial Development Agreement" ("the agreement"). The agreement provided that the City would sell Booth approximately 40 acres of real property located in Marion County at a price of $5,000 per acre. Booth, in turn, promised to subdivide the property into lots for commercial development. The agreement included a provision granting the City the right to repurchase the property should Booth fail to develop the land within three years following the execution of the agreement. Section 4.4 of the agreement, which set forth the duration of the agreement, stated:

> "(a) The covenants in this Agreement shall not terminate until they have been fully performed or have expired by their terms. All covenants, representations, and warranties shall survive the closing of this Agreement and the delivery of any deeds.
>
> "(b) [Booth] agrees that [he] will proceed diligently to develop the Site. In the event that the construction of at least one commercial facility is not completed on the Site within three (3) years from the Effective Date of this Agreement, then, and

> in such event, the City may exercise its option, herein granted, to purchase all portions of the Site then still owned by [Booth] or any affiliate thereof at and for a purchase price of $5,000 per acre, prorated for portions of an acre."

The agreement became effective on January 17, 2008, the date it was executed by both parties. In January 2008, the City purportedly executed a statutory warranty deed conveying the property to Booth.[1]

On December 11, 2017, the City sued Booth, asserting a claim for specific performance under Section 4.4(b) of the agreement and referring to that section as "an option to repurchase" the property. The City alleged that Booth had failed to construct at least one commercial facility on the property within three years from the effective date of the agreement. The City alleged that it had "timely tendered the purchase price to [Booth] and requested a conveyance of the

[1]In the materials provided to this Court on mandamus review, the parties have supplied only a copy of an unexecuted warranty deed conveying the property from the City to Booth. Neither party contests the validity of the conveyance, and we infer from the parties' arguments that the warranty deed ultimately was executed. The deed provided "[t]hat for and in consideration of the sum of One Dollar and other good and valuable consideration to [the City], in hand paid by [Booth], the receipt whereof is acknowledged, the [City] does hereby grant, bargain, sell, and convey unto [Booth], [the property]."

real property described in the contract but [that Booth] refused to accept the tender or to make the conveyance."

on January 7, 2018, Booth filed a motion to dismiss the City's complaint pursuant to Rule 12, Ala. R. Civ. P., arguing that, although he had fulfilled his obligations under the agreement by developing a hotel on the property,[2] the City's complaint seeking to specifically enforce the repurchase of the property pursuant to its option to repurchase in Section 4.4(b) of the agreement was time-barred by the two-year statutory limitations period for such options in § 35-4-76(a), Ala. Code 1975. On January 19, 2018, the trial court entered an order setting Booth's motion to dismiss for a hearing to be held on June 27, 2018.

On June 11, 2018, the City filed an amended complaint in which it restated verbatim its claim for specific performance of Section 4.4(b) and asserted additional claims against Booth of rescission, fraud, and breach of contract. The City's rescission claim consisted of a single statement in which the City alleged that it, "being a municipal corporation, did not

[2]Booth does not argue that the City's action should be dismissed because he has fulfilled his obligation under the agreement. His arguments center on the applicable statute of limitations.

possess lawful authority to dispose of real property to [Booth]." Regarding the fraud claim, the City alleged that it had detrimentally relied on Booth's allegedly false assurances in the agreement that he would "proceed diligently" toward the commercial development of the property and that Booth "failed to construct a commercial facility upon the site since taking title in 2008. Due to that failure, [the City has elected to exercise its right of repurchase, but [Booth] has failed and refused to grant said right of repurchase, even though [the City] has tendered the purchase price." As to the breach-of-contract claim, the City alleged that Booth "has breached the agreement by failing to construct at least one commercial facility within three (3) years from January 17, 2008. [The City] has offered to purchase all portions of the site owned by [Booth], which [Booth] has refused."

On June 24, 2018, Booth filed a motion to dismiss the City's amended complaint pursuant to Rule 12 in which he incorporated the arguments he made in the motion to dismiss the original complaint regarding the City's specific-performance claim. He also requested dismissal of the City's fraud and breach-of-contract claims on the ground that those

claims were time-barred by the applicable statute of limitations. He further sought dismissal of the City's rescission claim on the ground that the City possessed the legal authority under the law to sell and convey real property. On June 25, 2018, the trial court set Booth's second motion to dismiss for a hearing to be held on June 27, 2018, the same date the trial court had set to hear Booth's motion to dismiss the original complaint. On August 13, 2018, the trial court entered an order denying Booth's motion to dismiss. Booth filed a timely petition for a writ of mandamus with this Court.

Standard of Review

A writ of mandamus is an extraordinary remedy available only when the petitioner can demonstrate: "'(1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court.'" Ex parte Nall, 879 So. 2d 541, 543 (Ala. 2003) (quoting Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001)).

Analysis

Booth contends that Section 4.4(b) of the agreement contains an option reserved by the City to repurchase the property and that the City's claim for specific performance of Section 4.4(b) was filed after the expiration of the two-year statute-of-limitations period for enforcing option contracts under § 35-4-76(a). Booth also argues that the City's fraud and breach-of-contract claims are time-barred by § 6-2-38(l) and § 6-2-34, respectively. Booth further contends that the City's claim for rescission is due to be dismissed because, he says, the City has authority under Alabama law to enter into contracts for the sale of land. The City asserts that the trial court correctly denied Booth's motion to dismiss because Booth failed to comply with the requirements of Rule 6(d), Ala. R. Civ. P., by failing to serve the motion no later than five days before the June 27, 2018, hearing.

Generally, a petition for a writ of mandamus is not the appropriate means to seek review of whether a claim is time-barred by the expiration of a statute of limitations, but mandamus review of such a claim may be proper if the face of the complaint indicates the claim is untimely. In Ex parte Hodge, 153 So. 3d 734 (Ala. 2014), this Court permitted review

by petition for a writ of mandamus where the defendants were "faced with the extraordinary circumstance of having to further litigate this matter after having demonstrated from the face of the plaintiff's complaint a clear legal right to have the action against them dismissed based on the four-year period of repose found in § 6-5-482(a)[, Ala. Code 1975]." 153 So. 3d at 749. This Court stated in Hodge that "[t]his case is not to be read as a general extension of mandamus practice in the context of a statute-of-limitations defense; rather, it should be read simply as extending relief to the defendants in this case where they have demonstrated, from the face of the complaint, a clear legal right to relief and the absence of another adequate remedy." Id. Accordingly, a writ mandamus will issue as to Booth's statute-of-limitations defenses only if it is clear from the face of the City's amended complaint that Booth has a clear legal right to have the claims against him dismissed under § 35-4-76, § 6-2-3, and § 6-2-34. We address in turn Booth's motion to dismiss as to each claim asserted by the City in the amended complaint, and we also address the City's argument that Booth failed to comply with the procedural requirements of Rule 6(d).

A. Rule 6(d), Ala. R. Civ. P.

Before we address the merits of the petition for a writ of mandamus, we first address the City's argument that Booth's motion to dismiss the City's amended complaint was not in compliance with Rule 6(d) and was thus due to be denied. Rule 6(d) states, in pertinent part:

> "A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application."

The Committee Comments on 1973 Adoption to Rule 12, Ala. R. Civ. P., state that a motion to dismiss "must be served at least five days before the specified time for hearing. Rule 6(d)."

Booth filed a motion to dismiss the City's amended complaint on June 24, 2018, which was three days before the hearing the trial court had scheduled on Booth's motion to dismiss the City's original complaint. The City argues that the trial court could have correctly denied the motion to dismiss the amended complaint on the basis that Booth did not follow the proper procedures for serving that motion on the

City within five days before the time for the hearing on the first motion. The City, however, overlooks the fact that the trial court sua sponte entered an order on June 25, 2018, setting the motion to dismiss the amended complaint for a hearing on June 27, 2018, which was the same date the trial court had set for a hearing on Booth's motion to dismiss the original complaint. Pursuant to the authority granted it by Rule 6(d), the trial court, by setting the motion for a hearing on June 27, modified the period for service of the amended motion to dismiss prescribed by Rule 6(d). Furthermore, there is nothing in the materials submitted showing that either party objected to the trial court's order setting the motion to dismiss the amended complaint for a hearing to be held on June 27, 2018. A review of the case-action summary shows that the City did not file a response to Booth's motion to dismiss the amended complaint, it did not file a motion to strike that motion, and it did not file a motion seeking a continuance of the hearing after Booth filed the motion or after the trial court entered the order setting the motion for a hearing. The trial court acted within the discretion provided it by Rule 6(d), and the City failed to

object to the trial court's order setting the motion for a hearing. We conclude that Booth complied with Rule 6(d).

B. Specific Performance

Booth contends that Section 4.4(b) of the agreement provided the City with an option to repurchase the land that would become enforceable if Booth failed to develop at least one commercial facility on the property within three years of January 17, 2008, the effective date of the agreement. Booth argues that, because the agreement did not establish a limit on the time for exercising the option set forth in Section 4.4(b), the City, pursuant to § 35-4-76(a), had two years from January 17, 2011, in which to commence an action to enforce the option. Section 35-4-76(a) states:

> "(a) No option to purchase any interest in land, other than an option limited in favor of a lessee and exercisable at a time not later than the end of the term of a lease or any extension or renewal thereof, or an option to repurchase reserved by the grantor in a deed, shall be valid or enforceable for a period of more than 20 years. If any such option may, by the terms of the instrument creating it, continue to exist for longer than 20 years, it shall terminate and cease to be enforceable 20 years after the time of its creation. Where the instrument creating any such option shall place no limit upon the duration of the option or otherwise state the terms controlling the duration of the option, the option shall cease to be enforceable two years after the time of its creation."

The City, on the other hand, argues that the agreement cannot be read to be an option contract and that the agreement in its entirety provides the City with the right to rescind or revoke the conveyance of the property to Booth in the event Booth failed to develop the property pursuant to the terms of the agreement. The City also contends that Section 4.4(b) of the agreement does not provide it with an option to repurchase the property; rather, says the City, Section 4.4(b) gives the City the possibility of reverter, which, because it vested with the execution of the agreement, is not subject to the rule against perpetuities. Thus, the City contends, the statute-of-limitations period in § 35-4-76(a) would not apply to the City's attempt to enforce Section 4.4(b). Because the nature of the rights created by Section 4.4(b) is in dispute, we must first examine whether Section 4.4(b) constitutes an option provision or whether, as the City suggests, Section 4.4(b) creates some other interest such as the possibility of reverter or a right to revoke the agreement.

An option to purchase real property is defined as

> "[a] contractual provision by which an owner of realty enters an agreement with another allowing the latter to buy the property at a specified price within a specified time, or within a reasonable time

> in the future, but without imposing an obligation to purchase on the person to whom it is given."

Black's Law Dictionary 1319 (11th ed. 2019).

> "Options are usually given in contemplation of an eventual buyer-seller relationship, but at times they are created as an incident to a present sale, with the seller reserving to himself a right or option to repurchase all or part of the subject property at some future time. Similarly, the parties to a sale of realty may validly contract that the purchaser shall have an option to require the seller to repurchase at a specified price and within a specified time. Options may also come into existence where an owner who has given to another party a so-called preemptive right, or right of first refusal, decides to sell and makes his offer to the other party. In any event, an option is a unilateral agreement which precludes the owner from withdrawing his offer until it expires, which imposes no binding obligation on the offeree to accept the offer, and which does not give rise to an actual contract of sale until and unless it is duly accepted. An option transfers no title or right in rem, but it does create an in personam right in the optionee which may be specifically enforced under proper circumstances."

Mark S. Dennison, Optionee's Timely Exercise of Option to Purchase Realty, 60 Am. Jur. Proof of Facts 3d 255, at § 2 (2001). "[A]n option, originally is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another, that he shall have the right to buy the property at a fixed price within a time certain."

Fullenwider v. Rowan, 136 Ala. 287, 303, 34 So. 975, 979 (1903).

> "An option to purchase real estate is, by its nature, unilateral when entered into. However, when the option is exercised in accordance with its terms mutuality of obligation is created and the option becomes a binding contract of purchase and sale enforceable in equity by specific performance. [Citations omitted.] And it has been held that the filing of a bill for specific performance within the time given for exercising an option constitutes an acceptance of it, thus ripening the option into a mutually binding contract of purchase and sale."

Kennedy v. Herring, 270 Ala. 73, 75, 116 So. 2d 596, 598 (1959). See also Jenkins v. Thrift, 469 So. 2d 1278, 1280 (Ala. 1985)(concluding that the filing of a counterclaim for specific performance of an option agreement constituted acceptance of the option that "ripened into a mutually binding contract of purchase and sale enforceable in equity by specific performance"). Furthermore, other courts have determined that an option can reserve for the grantor a right to repurchase contingent upon the occurrence of other events specified in the contract. See Central Delaware Cty. Auth. v. Greyhound Corp., 527 Pa. 47, 54, 588 A.2d 485, 488-89 (1991); see also Ebsco Gulf Coast Dev., Inc. v. Salas as Tr. of Salas Children (No. 3:15CV586/MCR/EMT, Sept. 29, 2016)(N.D. Fla.

2016)(not selected for publication in F. Supp.)(relying on Florida law for the proposition that "[a]n option may provide that it can be exercised only upon the occurrence of specified events" and, "[i]f those events occur, then the optionee may elect to exercise his option to purchase the property at any time before the option expires. Options are not bilateral, enforceable contracts unless and until the optionee complies with the terms and conditions required to exercise the option.").

We conclude that Section 4.4(b), in clear and unequivocal terms, provides the City with an option to repurchase the property. The City retained the right in Section 4.4(b) to purchase the property for a specified price after the passage of three years, contingent on Booth's failure to develop at least one commercial facility on the property within those three years. Section 4.4(b) itself states that the City may "exercise its option to repurchase" the land. (Emphasis added.) Furthermore, this Court has recognized the importance of the language used by the parties in the pleadings to determine whether a provision in a contract constituted an option. See Holk v. Snider, 294 Ala. 318, 321, 316 So. 2d

675, 677 (1975)(concluding that an offer to purchase real estate was an option contract where the record showed that the parties considered it to be an option and where the complaint referred to the provision in question as an option to purchase). In both the initial complaint and the amended complaint, the City referred to Section 4.4(b) as providing an "option to repurchase." In paragraph 5 of the complaint and the amended complaint, the City stated that "[Booth] granted an option to repurchase as set forth in Section 4.4(b)." (Emphasis added.) In paragraph 11 of the amended complaint, in which the City asserted its fraud claim, the City stated that it "was granted an option to repurchase the said real property for $5,000 per acre." (Emphasis added.) In the count of the amended complaint asserting a claim of breach of contract, the City quoted directly from Section 4.4(b), including the language that "the City may exercise its option ... to purchase" the property. (Emphasis added.)

We are unpersuaded by the City's argument that Section 4.4(b) provided it with a future interest in the property through the possibility of reverter. "'A possibility of reverter is the interest left in a transferor who creates a

fee simple determinable.'" Earle v. International Paper Co., 429 So. 2d 989, 993 (Ala. 1983)(quoting C. Moynihan, Introduction to The Law of Real Property 95 (1962)). A possibility of reverter

> "is a mere possibility that the preceding interests or estate will all terminate, and that title to the property subject to the interest will revert back to the grantor or his successors. It is an interest that gives the right of termination or reentry. Since the interest is not an estate in land, it is generally considered inalienable by conveyance. The possibility of reverter is associated with the fee simple determinable estate and is generally created by words which indicate the automatic termination of the underlying or preceding interests. ...
>
> "Possibilities of reverter are not subject to the Rule against Perpetuities. The possibility of reverter, though inalienable, is considered vested upon creation and would, therefore, not be subject to the operation of the Rule against Perpetuities."

Jesse P. Evans III, Alabama Property Rights & Remedies § 3.10 (4th ed. 2010)(footnotes omitted). See also Mt. Gilead Church Cemetery v. Woodham, 453 So. 2d 362, 365 (Ala. 1984)(concluding that a fee simple determinable conveyed to a church left a possibility of reverter in the grantor if the church ceased to exist). Section 4.4(b) did not automatically terminate the City's conveyance to Booth, and it did not require the automatic reversion of the property to the City in

the event Booth failed to develop the property. Instead, Section 4.4(b), with the use of the discretionary phrase "the City may exercise its option," provided the City with the right to elect to repurchase the property in the event Booth did not develop the property within three years. The use of the word "may" denoted that the City had a choice either to exercise or to waive its right to repurchase. See Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc., 873 So. 2d 1091, 1098-99 (Ala. 2003)("[T]his Court has long recognized that words such as 'may' and 'at its option' denote permissive alternatives, not mandatory restrictions. ...[S]ee also Mobile Eye Ctr., P.C. v. Van Buren P'ship, 826 So. 2d 135, 138 (Ala. 2002) (renewal provision that stated that the lease 'may' be renewed did not operate automatically to renew lease)."). Because the agreement did not require automatic termination of the City's conveyance of the property to Booth or reversion of the property to the City, Section 4.4(b) did not create a possibility of reverter of the property to the City.

The City further argues that the entirety of the agreement gave the City the right to rescind and revoke the conveyance of the property to Booth in the event Booth failed

to develop the property under the agreement. The City directs this Court to other provisions of the agreement, including Section 4.4(a), which, as noted supra, provides that the promises made in the agreement "shall not terminate until they have been fully performed or have expired by their terms," and Section 4.10 of the agreement, which provides that "[f]ailure on the part of either party to complain of any act or failure to act of the other party or to declare the other party in default, irrespective of how long such failure continues, shall not constitute a waiver by such party of its rights hereunder." The City correctly notes that the agreement, as a whole, is not strictly an option contract. The agreement was a contract for the sale of real property in which the purchaser made promises to develop the land for commercial use. Any future interest the City retained in the property, however, was created in Section 4.4(b), which we have concluded to be an option, and it is this provision of the agreement on which the City bases its claim for specific performance.

Having concluded that Section 4.4(b) created an option to purchase in favor of the City, we now consider whether it is

clear from the face of the City's complaint that its specific-performance claim is time-barred by the statute of limitations. When a contract is silent as to the duration of an option to purchase land, Alabama law establishes a two-year limitations period on the enforcement of the option. As noted supra, § 35-4-76(a) provides, in pertinent part, that "[w]here the instrument creating any such option shall place no limit upon the duration of the option or otherwise state the terms controlling the duration of the option, the option shall cease to be enforceable two years after the time of its creation."[3] Although the agreement in this case established a three-year time frame before the option could be exercised, the agreement did not place a limit on the duration of the option itself. The City's option to repurchase was contingent on Booth's failure to develop at least one commercial facility on the

[3]We note that § 35-4-76 exempts from its operation "an option to repurchase reserved by the grantor in a deed." Although the City, the grantor in this case, reserved a right to repurchase the property, the option was not reserved in the deed. Rather, the City's option was reserved as a part of the agreement, and that agreement did not merge with the deed. McLemore v. Hyundai Motor Mfg. Alabama, LLC, 7 So. 3d 318, 336 (Ala. 2008)("[T]he mere execution and delivery of a deed does not merge the consideration in the contract of sale into the deed."). Therefore, the exception stated in the statute is not applicable to this case.

property within three years of January 17, 2008, the effective date of the agreement. Stated otherwise, assuming that the City's allegation that Booth failed to develop at least one commercial facility on the property within three years is true, the City's right to exercise and enforce the option to repurchase the property manifested on January 17, 2011. Upon timely enforcement by the City, the option would be mutually binding on the parties. Without any limitation on the duration of the option, however, "the option might well last indefinitely. In other words, ... the duration of the option is uncertain." Hipp v. Marston, 420 So. 2d 39, 41 (Ala. 1982). Section 35-4-76(a), therefore, applied, and the City's option was enforceable for two years--through January 17, 2013. The City filed the initial complaint asserting a claim for specific performance of Section 4.4(b) on December 11, 2017, nearly five years after the running of the statute of limitations. Thus, the City's specific-performance claim is time-barred by § 35-4-76(a).

C. Fraud

Booth argues that the City's fraud claim is due to be dismissed because, he says, the two-year statutory limitations

period applicable to fraud-based claims had run when the City filed its complaint.

> "'Fraud' is defined as (1) a false representation (2) of a material existing fact (3) relied upon by the plaintiff (4) who was damaged as a proximate result of the misrepresentation. If fraud is based upon a promise to perform or abstain from performing in the future, two additional elements must be proved: (1) the defendant's intention, at the time of the alleged misrepresentation, not to do the act promised, coupled with (2) an intent to deceive."

Coastal Concrete Co. v. Patterson, 503 So. 2d 824, 826 (Ala. 1987)(citation omitted). Under § 6-2-38(l), fraud-based actions are subject to a two-year statute of limitations. The time for filing a fraud action, however, can be tolled by § 6-2-3, Ala. Code 1975, which provides that, "[i]n actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action."

"[A] complaint must contain the time and circumstances of discovery of the alleged fraud to toll the running of the limitations period and thereby entitle a plaintiff to relief from the bar of the limitations period." Smith v. National

Sec. Ins. Co., 860 So. 2d 343, 345 (Ala. 2003)(citing Angell v. Shannon, 455 So. 2d 823 (Ala. 1984); and Rule 9(b), Ala. R. Civ. P.). In Miller v. Mobile County Board of Health, 409 So. 2d 420 (Ala. 1981), this Court held:

> "The burden is on the plaintiffs to show they come within § 6-2-3. [Amason v. First State Bank of Lineville, 369 So. 2d 547 (Ala. 1979)]; Tarlton v. Tarlton, 262 Ala. 67, 77 So. 2d 347 (1955).
>
> "A motion to dismiss should be granted only when it appears on the face of the complaint the plaintiff can prove no set of facts entitling him to relief. Braggs v. Jim Skinner Ford, Inc., 396 So. 2d 1055 (Ala. 1981). Winn-Dixie Montgomery, Inc. v. Henderson, 371 So. 2d 899 (Ala. 1979). When, as in this case, the plaintiff's complaint on its face is barred by the statute of limitations, the complaint must also show that he or she falls within the savings clause of § 6-2-3. Amason v. First State Bank of Lineville, 369 So. 2d 547 (Ala. 1979). See Associates Financial Services Co. v. First National Bank, 292 Ala. 237, 292 So. 2d 112 (1974). Rule 9 of the Alabama Rules of Civil Procedure requires that fraud be alleged 'with particularity.' Garrett v. Raytheon Co., 368 So. 2d 516 (Ala. 1979). ... Although under modern rules of civil practice the pleadings only need to put the defending party on notice of the claims against him, Rule 9(b) qualifies the generalized pleadings permitted by Rule 8(a), [Ala. R. Civ. P.]. 'The pleading must show time, place and the contents or substance of the false representations, the facts misrepresented, and an identification of what has been obtained.' Rule 9(b), [Ala. R. Civ. P.], Committee Comments."

409 So. 2d at 422.

As a part of its fraud claim, the City alleges in its amended complaint that Booth falsely represented in the agreement that he would diligently develop commercial facilities on the property. The City contends that, in reliance on those allegedly false representations, it conveyed the property to Booth. Although the City does not identify a date on which Booth allegedly committed fraud, the City appears to be alleging that the false representations were made at or before the time the agreement was executed on January 17, 2008. But the City also does not allege any facts in the amended complaint that would have prevented it from discovering any facts relating to the alleged fraud that would toll the running of statute of limitations pursuant to § 6-2-3. See McCall v. Household Fin. Corp., 122 So. 3d 832, 837 (Ala. Civ. App. 2013)(concluding that the trial court properly dismissed the plaintiff's fraud claims for failing to "allege any facts in the complaint that would support the application of § 6-2-3, Ala. Code 1975, to suspend or toll the time period for filing a fraud claim"). The City's amended complaint "is wholly lacking in specificity and equally deficient as a means of saving the action from the bar of the statute of

limitations appearing on the face of the complaint." Smith, 860 So. 2d at 347. The fraud claim, thus, is barred by the statute of limitations.

D. Breach of Contract

In the amended complaint, the City alleges that Booth breached the agreement by failing to construct at least one commercial facility on the property within three years of January 17, 2008. Pursuant to § 6-2-34, Ala. Code 1975, an action alleging breach of contract must be commenced within six years from the date of the breach. In its amended complaint, the City alleged that Booth "has breached the agreement by failing to construct at least one commercial facility within three (3) years from January 17, 2008. [The City] has offered to purchase all portions of the site owned by [Booth], which [Booth] has refused." The City ties the alleged breach to the provisions in Section 4.4(b). The City alleges in the amended complaint that Booth's failure to construct a commercial facility on the property by January 17, 2011, was a breach and that that breach occurred on that date. Thus, from the face of the City's amended complaint, the City's cause of action for breach of contract began accruing

January 17, 2011. Pursuant to § 6-2-34, the six-year statutory limitations period for the City's breach-of-contract claim would have run through January 17, 2017. Because the City's original complaint was not filed until December 11, 2017, the City's breach-of-contract claim is time-barred under § 6-2-34.

E. Rescission

As an alternative theory for relief, the City alleged that "being a municipal corporation, [it] did not possess lawful authority to dispose of real property to [Booth]" and that the agreement is due to be rescinded. In our view, the City's rescission argument is based on a questionable notion that it lacked corporate capacity to enter into the agreement. See 5 Samuel Williston and Richard A. Lord, A Treatise on the Law of Contracts § 11:10 (4th ed. 2009)("Corporations derive their power from the government which creates them, and if they act beyond the limits of power given to them by that government, their acts are at least unwarranted by law and, according to some authorities, absolutely void."). See also Brown v. W.P. Media, Inc., 17 So. 3d 1167 (Ala. 2009)(holding that party to a contract was estopped from denying the

corporate existence of the other party to a contract). In his motion to dismiss, Booth did not seek dismissal of the rescission claim on statute-of-limitations grounds. Rather, Booth argued in his motion, and he argues in his mandamus petition, that the City had lawful authority to enter into the agreement and to transfer the property to Booth.

This Court has not previously recognized that a writ of mandamus is an appropriate means by which to review a trial court's denial of a motion to dismiss that was based on the capacity of a party to enter into a contract. Accordingly, we deny the petition as to the City's claim for rescission. We note, however, for the convenience of the trial court, that § 94.01, Ala. Const. 1901 (Off. Recomp.), authorizes the governing body of any municipality to

> "[l]ease, sell, grant, exchange, or otherwise convey, on terms approved by the governing body of the county or the municipality, as applicable, all or any part of any real property, buildings, plants, factories, facilities, machinery, and equipment of any kind or industrial park project to any individual, firm, corporation, or other business entity, public or private, including any industrial development board or other public corporation or authority heretofore or hereafter created by the county or the municipality, for the purpose of constructing, developing, equipping, and operating industrial, commercial, research, or service facilities of any kind."

Additionally, Ala. Const. 1901 (Off. Recomp.), Local Amends., Marion County, § 4, a constitutional amendment of local application to Marion County, authorizes any municipality in Marion County to "lease, sell for cash or on credit, exchange, or give and convey any [real] property ... to any person, firm, association or corporation."

Conclusion

Booth's petition for writ for mandamus is granted as to the City's claims for specific performance and its claims alleging fraud and breach of contract, and the trial court is ordered to dismiss those claims. We deny Booth's petition insofar as it relates to the City's rescission claim.

PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

Parker, C.J., and Wise and Mitchell, JJ., concur.

Bolin, Shaw, Bryan, Sellers, and Mendheim, JJ., concur in the result.