IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-00641

JAMES C. P. HARTMAN, Deceased — APPELLANT

V.

NED G. MCINNIS, JR. — APPELLEE

ON APPEAL FROM THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI
HONORABLE SEBE DALE, JR., CHANCERY JUDGE

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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I. Introduction

Appellees Ned G. McInnis, Jr. and Mary Deane McInnis (collectively, the "McInnises"), agree that they lack standing to sue on the Note and Deed of Trust. Instead, they assert alternative theories. These theories are not supported by law, nor are they rooted in any evidence presented at trial.

As more thoroughly addressed in the Brief of Appellant, Hartman, at pages 17-20, Hartman has shown that the McInnises lack standing, and therefore cannot state a cognizable claim against Hartman. Accordingly, this Court should reverse the award of $582,218.49 on the Note against James C.P. Hartman ("Hartman") and dismiss the McInnises' claims against him.

Even if the McInnises did have standing to sue, they cannot recover against Hartman, because they have no damages.

Additionally, the McInnises have presented no evidence that voids Hartman's defenses. The McInnises fraudulently and negligently misrepresented to Hartman the value of the Ronson properties and the repairs needed thereon, inducing him to sign a personal guarantee on the Note for the purchase of the properties. Hartman's defenses remain viable.

Finally, the McInnises have presented no credible evidence to support the Chancery Court's attorney's fee award.

BancorpSouth Bank ("the Bank") has filed a Reply Brief in the companion case, *BancorpSouth Bank v. Ned G. McInnis, Jr., et al*, No. 2006-TS-00641. In its Brief, the Bank mischaracterizes the trial record, and continues to rely on the much-maligned *Summers v. Consolidated Capital Special Trust* case. The Bank's arguments are meritless.

II. Factual Disputes.

A. The sale of the Ronson Properties.

The McInnises fundamentally misunderstand the November 14, 2003 Agreement – between the Bank, Ron Nelson ("Nelson"), Ronson Construction Systems, Inc. ("Ronson"), Hartman, and the McInnises – and the subsequent closing on the Ronson properties. Hartman never intended to own those properties. The undisputed evidence demonstrates that in order to complete the sale on the Ronson properties, Hartman had to purchase eighteen properties from the McInnises for a total price of $960,000.00, in part to generate enough funds to complete the wraparound mortgage. At closing, four properties were sold to satisfy the McInnises' outstanding debts, (Tr. 110-11); and the Ronson properties were conveyed to Ronson, which executed the Note in favor of the McInnises for the purchase of the properties. (Tr. 145).

In spite of the evidence presented at trial, and their own acknowledgment, (Brief of Appellees, at 8), the McInnises seek to inject a nefarious purpose into the wraparound mortgage transaction. Nothing in the record support their argument that Hartman did more than broker the deal between the McInnises and Nelson for the purchase of the Ronson properties. *See* (Brief of Appellees, at 8).

B. The relationship between Hartman and Nelson prior to closing.

The McInnises emphasize the fact that Hartman misrepresented the value of the Ronson properties to Nelson, not them. This is a red herring. Hartman concedes that he was the conduit through which the McInnises' misrepresentations were conveyed to Nelson. All of the information that Hartman relayed to Nelson came from documents and statements provided by the McInnises. There is no evidence that Hartman misrepresented to Nelson any information that he received from the McInnises.

C. The Wraparound Mortgage.

The Bank claims that Hartman presented the idea of a wraparound mortgage to Joe Anthony, former president of the Bank's Lamar County operations. (Reply Brief of Appellant, BancorpSouth, at 1). But Anthony admitted at trial that "[i]t was the bank's idea . . . I don't remember the conversation, but I am under the impression that the bank asked for this [the wraparound mortgage] to be done." (Tr. 26). The Bank's mischaracterization of the author of the wraparound mortgage proposal is not supported by the record, and should be dismissed.

III. Argument

A. The McInnises Have No Standing to Sue Under the Note.

To secure the Bank's approval of the transaction, the McInnises unconditionally assigned their interest in the Note and Deed of Trust to the Bank. (Tr. 30); (R.E. 60-61). Although the McInnises concede that the assignment divested them of all legal interest in the Note and Deed of Trust, they claim that they have standing to sue on the November 14, 2003 Agreement, or as a third party beneficiary of the Note, or in equity. The McInnises are wrong.

1. The November 14, 2003 Agreement was extinguished by the Note and Deed of Trust.

Without any legal authority, the McInnises contend that the November 14, 2003 Agreement remains viable as a basis on which they may maintain this suit. This contention directly contradicts established Mississippi law. The November 6, 2003 Agreement memorializes the parties' negotiations for the sale of the Ronson properties. Upon closing, agreements for the sale of land are merged into the deed of conveyance and are extinguished. *Knight v. McCain*, 531 So. 2d 590, 595 (Miss. 1988) (citing *West v. Arrington*, 183 So. 2d 824, 827 (Miss. 1966), and *Brown v. King*, 58 So. 2d 922, 923 (Miss. 1952)). The merger doctrine is explicit on this point, "[T]he acceptance of a deed tendered in the performance of a contract to convey land merges or extinguishes the covenants and stipulations contained in the contract." *Id.*

The rationale for the merger doctrine is clear. A contract or agreement for the sale of land gives a purchaser rights in the parcel of land, not actual possession. *Patterson v. Holleman*, 917 So. 2d 125, 137 (Miss. 2005). Stated differently, a contract for the sale of land is "an agreement to sell title to the land." *Jones v. Hickson*, 37 So. 2d 625, 629 (Miss. 1948). Thus, contracts for the sale of land are fully satisfied once title to the land is conveyed to the purchaser.

Here, the November 14, 2003 Agreement memorializes the terms for the sale of the Ronson properties. In fact, the enactment clause of the Agreement states:

> [T]he undersigned agree that the transaction described in that certain Contract for Sale entered into by and between Sellers and Guarantor, for and on behalf of the now designated Buyer, dated November 6, 2003, may be carried out in accordance with the terms and conditions set forth.

(Ex. 19). The Agreement was satisfied when the Note and Deed of Trust were executed in favor of the McInnises, and subsequently conveyed to the Bank. The Agreement was fully satisfied, merged, and extinguished, and no longer provides a basis for the McInnises' claims.

2. The McInnises are not third party beneficiaries of the Note and Deed of Trust.

The McInnises lack standing to sue as third party beneficiaries. They were privy to the contract for the sale of land, the Note, the Deed of Trust, and the Assignment of the Note and Deed of Trust. Because the Note was executed in favor of the McInnisses, they were direct beneficiaries thereof. (Ex. 20). Their signatures are on the other three documents. *See* (Ex. 18); (Ex.19); (Ex. 20). A third party beneficiary lacks privity to the contract on which he sues. *Adams v. GreenPoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006); *Aladdin Constr. Co., Inc. v. John Hancock Life Ins. Co.*, 914 So. 2d 169, 179 (Miss. 2005); *MS High School Activities Ass'n, Inc. v. Farris*, 501 So. 2d 393, 395-96 (Miss. 1987); *Burns v. Washington Sav.*, 171 So. 2d 322, 325 (Miss. 1965). The McInnises were a party to every contract, agreement, and assignment that predicated this lawsuit.

The third party beneficiary principle states that "one not a party to a contract can sue for a breach thereof only when the condition which is alleged to have been broken was placed in the contract for his direct benefit." *Aladdin Constr.*, 914 So. 2d at 179; *Hartford Accident & Indem. Co. v. Hewes*, 199 So. 93, 95 (Miss. 1940). The McInnises cannot avail themselves of this principle, because they were party to the Note, Deed of Trust, and the Assignment of the Note and Deed of Trust.

Moreover, the McInnises' argument that they could assign all of their rights in the Note and Deed of Trust, yet still sue on those documents as third party beneficiaries makes no sense. An assignment of a debt "conveys the entire interest of the assignor to the assignee, and thereafter the assignor has no interest therein." *EB, Inc. v. Allen*, 722 So. 2d 555, 564 (Miss. 1998). An unqualified assignment of the kind the McInnises made here operates "to transfer to the assignee all the right, title, or interest of the assignor in the thing assigned." *Id.*; *see also McKinley v. Lamar Bank*, 919 So. 2d 918, 928 (Miss. 2005). The McInnises cannot have it both ways. They cannot assign their interest in the Note and Deed of Trust to the Bank, while simultaneously relying on the same documents on a third party beneficiary theory. Assignments would have no meaning if assigners could retain their substantial rights even after conveying away all of their legal interest in the documents at issue.

3. The McInnises have no standing on which to sue Hartman in equity.

The McInnises claim a right to sue in equity, because "equity will not suffer a wrong to be without a remedy." (Brief of Appellees, at 17). As Hartman's Brief of Appellant demonstrates, the McInnises have suffered no "wrong."

The McInnises claim that they are entitled to roughly $272,000.00 in equitable relief, the difference between the $960,000.00 Hartman paid for the aggregate properties and the roughly $700,000.00 the McInnises owed the Bank on the properties at the November 14, 2003 closing.

(Brief of Appellees, at 19). Hartman concedes that there is a roughly $272,000.00 gap between the properties' purchase price and the McInnises' outstanding indebtedness to the Bank on the properties at the time. But the evidence at trial demonstrated that Hartman paid the McInnises $270,037.95 at closing. (Tr. 110). This cash was produced by Hartman's simultaneous sale of parcels 17 and 18 to Coolhart Properties, a company that he owned jointly with Ken Cooley; and the sale of Parcels 15 and 16 to Dave Ware. (Tr. 110-11). The McInnises used the $270,037.95 to pay off their indebtedness to Community Bank and certain other indebtedness to the Bank. (Tr. 76); (Ex. 35).

No judgment should place the McInnises in a better position than they would have occupied had the contract been fully performed. *McDaniel Bros. Constr. Co. v. Jordy*, 195 So. 2d 922 (Miss. 1967). Here, the Chancery Court's dismissal of the Bank's claims left the McInnises in the position they would have occupied had the contract been fully performed. In discharging the McInnises from their liability to the Bank and dismissing the Bank's deficiency claim against the McInnises, (R.E. 33), the Chancery Court ensured that the McInnises would suffer no harm from any nonpayment to the Bank arising out of Ronson and Hartman's failure to pay on the Note.

The McInnises have established no equitable grounds on which to recover against Hartman. Their assertion that equity warrants that they receive $272,000.00 is unsupported by any evidence, and should be dismissed.

B. Hartman's Intentional and Negligent Misrepresentation Defenses Claims Were Erroneously Denied.

The McInnises provide no basis to support their conclusion that the Chancery Court properly denied Hartman's defenses. Instead, without reference to the record, the McInnises offer their own interpretation of the evidence. (Brief of Appellees, at 20). There are no citations to the record to support the McInnises' Second Argument that "the chancery court properly ruled

against Hartman on his claims of intention or negligent misrepresentation." Further, there is no evidence to support the denial of Hartman's defenses. *See* (Brief of Appellant, Hartman, at 28-33).

The overwhelming evidence presented at trial demonstrates that the McInnises misrepresented material facts to Hartman, on which he relied to his detriment. The evidence clearly shows that prior to closing, Hartman asked the McInnises to provide him with information on the rental income generated by the Ronson properties – including a list of the properties, rents collected, property taxes, and insurance. (Tr. 115). The McInnises provided the information included in Exhibit 30. This information is in writing; it is objective; there is no factual dispute concerning its contents. According to the information provided, the Ronson properties generated $10,700.00 in monthly rental income. (Tr. 96); (R.E. 104); (R.E. 86-87). Mr. McInnis also represented that eleven of the properties were "generating" $8,335.00 in monthly rental income. (R.E. 91). The McInnises provided an updated matrix on the day of the closing, showing that the Ronson properties generated $9,500.00 in monthly rental income. (Tr. 98-99); (R.E. 89).

The evidence also shows that Mr. McInnis provided to Hartman a "Repair list: Looking ahead 5 years as well as immediate needs." (R.E. 93-94). The list identified needed repairs ranging from roofing needs to sheetrock repair to flooring replacement to painting needs. *Id.* However, the Ronson Properties had many electrical, plumbing, and gas problems that were not disclosed in Exhibit 30, or any other documents. (Tr. 184). These defects were then known to the McInnises. In fact, Mr. McInnis *admits* that he did not disclose all of the Ronson properties' defects to Hartman. *Id.* He stated at trial that, in creating the repair list, "if somebody was living there, I said, it's fine." (Tr. 213). The McInnises' argument that Hartman did not reasonably

rely on the incorrect information they provided to him is entirely fictitious; Hartman could, and did, and the McInnises cannot claim otherwise. (Brief of Appellees, at 4.)

The McInnises' representations were highly material to Hartman's decision to guarantee the purchase of the Ronson properties. They were all false. The McInnises cannot now rewrite history based on their interpretation of the evidence.

C. The McInnises Are Not Entitled to $112,500.00 in Attorney's Fees.

The McInnises are entitled to no damages; but even if the McInnises were entitled to attorney's fees, they could recover no more than $22,074.00.

The McInnises argue that because they were unable to pay their attorney's stated fee, $22,074.00, they are entitled to a contingent fee award. (Brief of Appellees, at 25). This assertion is unsupported by any evidence, law, or reason. Contrary to their transcript cite, (Tr. 283); (Brief of Appellees, at 25), nothing in the record supports the McInnises' position that their counsel had agreed to represent them on a contingency fee basis. The only evidence of attorney's fees is the invoice submitted by Ray Price, Esq., which claims a fee of $22,074.00. An award of attorney's fees must be reasonable and must be supported by credible evidence. *Key Constructors, Inc. v. H & M Gas Co.*, 537 So. 2d 1318, 1325 (Miss. 1989). The only credible evidence of attorney's fees here is the invoice for $22,074.00. There is no other evidence in the record.[1]

D. The Bank has Suffered No Damages.

As stated in its Response Brief of Appellee in *BancorpSouth Bank v. Ned G. McInnis, Jr., et al.*, No. 2006-TS-00641, the Bank does not challenge Hartman's argument that where the holder of both mortgages forecloses on the junior mortgage, "the mortgagor's personal liability

[1] To be enforceable, contingent fee agreements must be in writing. MISS. R. PROF'L CONDUCT 1.5(c)("A contingency fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage."); *Lowery v. Will of Smith*, 543 So. 2d 1155, 1163 (Miss. 1989). The McInnises' failure to offer written evidence of such a contract is fatal to their claim on this issue.

for the debt secured by the first mortgage is extinguished." OSBORNE ON MORTGAGES § 274 (2d ed. 1970); *see also* 55 AM. JUR. 2D *Mortgages* § 1347 (2006). *See* (Brief of Appellant, Hartman, at 21-24). Instead, the Bank offers the much-maligned opinion of the Texas Supreme Court in *Summers v. Consolidated Capital Special Trust*, 783 S.W. 2d 580 (Tex. 1989). (Reply Brief of Appellant, BancorpSouth, at 7-8). This holding is flatly wrong. It has never been endorsed or followed by any subsequent American court.

The Bank's own cited legal commentators have thoroughly savaged *Summers* as "bad law." *E.g.*, Frank A. St. Claire, *Wraparound Mortgage Problems in Nonjudicial Foreclosures*, 20 REAL EST. L.J. 221, 223 (1992) (cited by the Bank at page 7 of its Reply Brief of Appellant). In fact, St. Claire calls the *Summers* opinion "a somewhat tortured use of logic to reach an equitable result." *Id.*

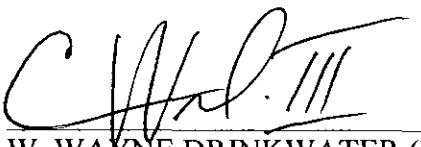
The chief problem with *Summers* is that it would provide a windfall to the Bank, or to any other mortgagee which forecloses under a similar wraparound mortgage. As argued in Hartman's Appellant Brief and Response Brief, this is obviously not the proper result, either in law or equity.

The Bank's attempt to achieve this unfair result was correctly rejected by the Chancery Court below, and must be rejected here as well. The Bank cannot both retain the property, with the equity it contains, and simultaneously sue Hartman for the debt. The property stands in place of the debt and extinguishes it.

CONCLUSION

For all these reasons, the judgment of the Chancery Court of Forrest County should be reversed.

RESPECTFULLY SUBMITTED, this the 16th day of April, 2006.



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