

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-CA-01127**

**POINT SOUTH LAND TRUST,
DEAN ROFFERS, TRUSTEE**

APPELLANT

VERSUS

**RAMON GUTIERREZ,
BACK BAY CASINO OF BILOXI, LLC
and BAYVIEW GUTIERREZ, LLC**

APPELLEES

**ON APPEAL FROM THE CHANCERY COURT OF
HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT**

**BRIEF OF APPELLEES
RAMON GUTIERREZ, BACK BAY CASINO
OF BILOXI, LLC and BAYVIEW GUTIERREZ, LLC**

ORAL ARGUMENT IS REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Point South Land Trust, Dean Roffers, Trustee, Appellant;
2. Ramon Gutierrez, Appellee;
3. Back Bay Casino of Biloxi, LLC, Appellee;
4. Bayview Gutierrez, LLC, Appellee;
5. Steven B. Carter, Managing Member, Bayview Gutierrez, LLC;
6. H. Rodger Wilder, Esq., Thomas C. Anderson, Esq., Leo E. Manuel, Esq., and Balch & Bingham, Counsel for Appellant;
7. Les W. Smith, Esq., Michael B. McDermott, Esq., and Page, Mannino, Peresich & McDermott, P.L.L.C., Counsel for Appellees;
8. Charles H. Weissinger, Jr., Esq., prior Counsel for Appellant;
9. The Honorable Carter O. Bise, Chancellor, Harrison County Chancery Court, Second Judicial District; and
10. Dean Roffers.

RAMON GUTIERREZ, BACK BAY
CASINO OF BILOXI, PLLC and
BAYVIEW GUTIERREZ, LLC

BY:


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STATEMENT OF THE CASE

Course of proceedings below

On April 4, 2005, Appellant Point South Land Trust, Dean Roffers Trustee [hereinafter, *PSLT*], a Florida Trust, filed its Complaint in the Chancery Court Harrison County, Mississippi [hereinafter, *Chancery Court*], seeking specific performance of a real estate contract between Ramon Gutierrez [hereinafter, “Mr. Gutierrez”], the owner of waterfront property suitable for gaming development, Bayview Gutierrez, LLC [hereinafter, *Bayview*], the holding company created to accept title from Mr. Gutierrez, and Back Bay Casino of Biloxi, LLC [hereinafter, *BBCB*], the holder of various federal and state permits necessary to develop property protected by what is popularly known as “The Wetlands Act”¹ [Appellees collectively hereinafter, *Sellers*]. (R. 1-26).² On April 11, 2005, Mr. Gutierrez and Bayview filed their Answer to Complaint and

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Specifically, the United States Army Corp of Engineers issued Permit Number MS99-02838-U on January 6, 2000. The Mississippi Department of Marine Resources issued Permit Number DMR-M 99165-P on July 20, 1999. The Mississippi Department of Environmental Quality, charged with oversight of the Federal Water Pollution Control Act, issued its compliance certification on December 22, 1999. Each permit has been duly renewed / extended as necessary. (R. 75-110).

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Throughout this Brief of Appellees, the following abbreviations shall be used to identify the pertinent record sources: R = Record; RE = Record Excerpts; TR = Hearing transcription.

Counterclaim against PSLT asserting claims for slander of title and interference with prospective business advantage. (R. 27-36). BBC filed its Answer to Complaint on April 12, 2005. (R. 33-36).

On October 25, 2005, Sellers filed their Motion for Summary Judgment. (R. 40-131). On November 22, 2005, the Court Administrator set the matter for hearing on December 15, 2006. On the morning of the Hearing, six weeks following service of the Sellers' Motion, and three weeks following the setting of the Hearing, PSLT hand delivered to the Court its response to the Motion. (R. 132-136; 138). The Sellers moved to strike PSLT's responsive documents as being untimely, and the Court granted that Motion. (R. 238). On January 30, 2006, the Chancery Court granted the Sellers' Motion for Summary Judgment as to PSLT's suit for specific performance, and transferred the' counter-claims to the Harrison County Circuit Court, Second Judicial District [hereinafter, *Circuit Court*] for resolution. (R. 142-44).

On February 3, 2006, Mr. Gutierrez and Bayview moved to dismiss the transferred counter-claims. (R. 147-48). On March 1, 2006, PSLT filed a Motion for Reconsideration of the Partial Summary Judgment. (R. 149-60). On March 13, 2006, the Harrison County Circuit Court, Second Judicial District, Hon. Kosta N. Vlahos Presiding, issued an Order recusing himself from the matter, granting Mr. Gutierrez and Bayview's Motion to Dismiss Counterclaims, and transferring PSLT's Motion for Reconsideration back to Chancery Court for resolution. (R. 160-61).

On April 6, 2006, PSLT's Motion for Reconsideration was heard by the Chancery Court, and on June 19, 2006, the Court issued its Order denying same. Final Judgment was entered on June 23, 2006, and PSLT filed its Notice of Appeal on June 28, 2006.

Statement of facts

On January 24, 2005, PSLT and Dean Roffers, individually, executed an unconditional Promissory Note in the amount of \$100,000.00, made payable to Mr. Gutierrez on February 23, 2005, as a non-refundable down payment towards the purchase of the subject property, which was believed to be comprised of 9.2 acres.³ (R. 5, 49, 51).

On January 25, 2005, Mr. Gutierrez, BBCB, and PSLT executed the Contract for the Sale and Purchase of Real Estate Lots and Lands [*hereinafter*, "Contract"]. (R-5-9). The Contract provided that closing was to be held on January 31, 2005. (R. 6). The Contract also provided the following:

- A. All federal, state, county, city permits, U.S. Army Corps and Department of Marine Resources permits that Seller now holds that are required to obtain authorization to develop a casino on subject property must be assignable from seller to Point South Land Trust and the related governmental agencies must acknowledge assignment is acceptable to them. Purchaser acknowledges that there is no tidelands lease in existence at this time.
- B. Evidence of satisfaction of all obligations of the limited liability corporation.
- C. Certificate of clean fee simple title in the land.
- D. Seller to guarantee the proper legal description of the property due to the discrepancies noted between the survey description and that in the public records.

(R. 9; RE. 14). The Contract expressly provided that "time is of the essence ...". (*Id.*).

On January 28, 2005, Point South's attorney, James L. Schmidt, Esq., sent a letter to Defendants' attorney, Michael B. McDermott, Esq., via facsimile transmission [*hereinafter*, "fax", *or*, "faxed"], setting forth a list of obstacles to timely closing as contemplated by Point South. (R. 111-12). In summary, the correspondence identified matters concerning the

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Roffers / Point South never honored the obligation embodied in the Promissory Note.

transferability of the various permits held by BBCB and a discrepancy between the legal description utilized in a survey prepared by the engineering firm formally known as Moran & Seymour, and the legal descriptions contained within the land records.

On that same date, PSLT faxed correspondence stating that, among other things, pursuant to paragraph 11 of the Contract, it was entitled to a thirty (30) day extension of the closing date provided that a lender's financing commitment letter was furnished to Mr. Gutierrez prior to the closing deadline. (R. 113).⁴

An extension of thirty days was agreed to by the parties to cure defects in the title so as to satisfy Plaintiffs' concerns regarding a discrepancy between a survey and the legal description.⁵ (R. 49). An American Land Title Association certified survey was performed by Moran & Seymour which cured the purchaser's objection to the discrepancy and a title commitment was issued by First American Title Company on February 22, 2006. (R. 115-27, 128-30; RE 38-40). On February 28, documentation was supplied to Point South acknowledging that the various governmental permits held by Defendants transfer with the property. (R. 49, 57-59; RE 21, 29-30). All LLC documents demonstrating authority to effectuate the transfer were prepared for

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In actuality, the Contract provided that "[c]losing date shall be extended up to thirty (30) days if any of the following occurs: ... [t]he terms of the purchase contract require a new mortgage and the lender issues a commitment no later than the closing date but with a mortgage loan closing after the contract closing date". (R. 7; RE 15). Sellers can find no "term of the purchase contract [which] require[s] a new mortgage".

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Specifically, the subject property is comprised of several individual parcels which, when plotted together, did not align perfectly so as to leave a gore. While the survey was being performed, an issue arose concerning the status of a platted street which had been closed without appropriate notation in the land records. (R. 49; RE 21). A copy of City of Biloxi, Mississippi's Resolution No. 465-94 was provided to the Plaintiff demonstrating the street had indeed been closed so as to present no defect of title. (R. 49, 52-54; RE 21, 24-26).

execution at the closing. (R. 129; RE 39). Any outstanding indebtedness which encumbered the subject property would be satisfied at the closing. (*Id.*).

On March 2, 2005, the terminal date for the closing, as extended, Point South's lender, Capital Financing Services, Corp. [*hereinafter*, "Capital Financing"] sent correspondence to PSLT advising that due to the results of an appraisal based upon the revised acreage as revealed through the Moran Seymour survey, another survey would be required before financing could be finalized. (R. 49; RE 21). On March 4, 2005, two days after the extended deadline for the closing, Michael B. McDermott received notification from Plaintiff's closing agent that due to Plaintiff's failure to pay a funding fee, Capital Finance had canceled the loan commitment. (R. 129; RE 39).

On March 8, 2005, Ramon Gutierrez sent a letter to Dean Roffers declaring default upon the \$100,000.00 Promissory Note, and demanding payment. (R. 43-44; RE 18-19). No response was made to this demand. On March 16, 2005, Point South requested that the closing deadline be extended through March 31, 2005. (R. 50, 59; RE 22, 31). After consideration, the Sellers offered to extend the closing deadline to March 31, 2005, but only upon execution of a release and an additional promissory note in the amount of \$50,000.00. (R. 50, 60-65; RE 22, 32-37). and Exhibit "5" thereto). Plaintiff failed to execute the extension agreement, the release, or tender the \$50,000.00 note. On April 4, 2005, PSLT filed its Complaint seeking specific performance of the Contract and lodged a *lis pendens* so as to encumber the subject property. (R. 1, 30).

SUMMARY OF ARGUMENT

At the Summary Judgment Hearing, the Chancery Court was presented with significant probative evidence that PSLT was unable to tender performance and had defaulted upon the terms of the Contract and Promissory Note. PSLT failed to present any evidence, or to demonstrate through argument from the evidence already before the Court, that a genuine issue of material fact existed. Because error may not be assigned based upon arguments never raised before the Chancery Court, or upon objections waived below, the Chancery Court Partial Summary Judgment Order as against PSLT's claim for specific performance must be affirmed.

ARGUMENT

Standard of Review

PSLT correctly states that a trial court's order of partial summary judgment, as with all summary judgment orders, is reviewed by this Court *de novo*. See, Brief of Appellant, Point South Land Trust, Dean Roffers, Trustee [hereinafter, *PSLT's Brief*] (citing *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26 (Miss. 2003)). PSLT also correctly states that summary judgment should be awarded where, after reviewing the facts in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." PSLT's Brief, at p. 9 (citing, Miss. R. Civ. P. 56(c)).

It should also be remembered that the Movant's burden upon summary judgment is, however, one of production and persuasion. *Fipps v. Glenn Miller Const. Co., Inc.*, 662 So. 2d 594 (Miss. 1995). That is, the Movant need demonstrate the absence of a genuine issue of material fact and persuade that it is entitled to judgment as a matter of law in order to sustain the

burden imposed upon it. *See e.g., Owen Corning v. R.J. Reynolds Tobacco Co.*, 868 So. 2d 331 (Miss. 2004). It is then incumbent upon the non-moving party to set forth, by affidavit or some other form of sworn statement, specific facts which give rise to genuine issues which should be submitted to the trier of fact. *See e.g., Anglado v. Leaf River Forest Products, Inc.*, 716 So. 2d 543 (Miss. 1998). PSLT appears, however, to treat the *de novo* standard as if this Court's review were wholly divorced from the proceedings before the trial court. *See generally*, PSLT's Brief, at 10-20. Because arguments not presented to the trial court upon summary judgment, and unasserted objections to material submitted in support of a motion for summary judgment, are waived, the Chancery Court's Order granting Sellers Partial Summary Judgment must be affirmed. *Watts v. Horace Mann Life Ins. Co.*, ___ So. 2d ___, 2006 WL 2948071, ¶ 21 (Miss. App. 10/17/2006) (NO. 2005-KA-00782-COA)(arguments not presented to trial court on summary judgment motion may not be asserted upon appeal); *Board of Education of Calhoun County v. Warner*, 853 So. 2d 1159 (Miss. 2003)(objection to affidavits and authentication of documents submitted in support of summary judgment are waived absent motion to strike).⁶

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That PSLT may not get a "second bite at the apple" on appeal by raising objections and asserting arguments not presented to the Chancery Court is clear by examination of the standard for reconsideration of summary judgment at the trial court level. Because Mississippi treats a motion for reconsideration of summary judgment as a motion for a new trial, it is the vehicle which allows a trial court the opportunity to correct its own error so as to avoid an unnecessary appeal. *Brooks v. Roberts*, 882 So. 2d 229, 233 (Miss. 2004)("A motion for reconsideration is to be treated by the trial court as a post-trial motion under M.R.C.P. 59(e)."); *Boyles v. Schlumberger Technology Corp.*, 792 So. 2d 262, 265 (Miss. 2001)("[a] petition for reconsideration is treated as motion to amend judgment pursuant to M.R.C.P. 59(e)" (*quoting In re: Estate of Stewart*, 732 So. 2d 255, 257 (Miss. 1999))). In order to prevail upon a motion for reconsideration, the movant must show, (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law. *Brooks v. Roberts*, 882 So. 2d 229, 233 (Miss. 2004); *see also Allen v. Mayer*, 587 So. 2d 255, 261 (Miss. 1991). A resifting of the evidence already before the trial court through new arguments is insufficient. *See LeClerc v. Webb*, 419 F.3d 405, 412 at note 13 (5th Cir. 2005). If an aggrieved party were allowed to assert new arguments in opposition to summary judgment

A. The Sellers met their burden of production and persuasion that they had satisfied their requirements under the Contract.

1. Alleged title defects

PSLT argues that the Sellers “were obligated to cure all defects in the title but failed to do so prior to the expiration of the first closing date extension of March 4, 2005 When the Sellers failed to satisfy these conditions precedent to closing, the Sellers were required to extend the closing.” Appellant’s Brief, p. 11.

First, as an initial matter, the plain language of the Contract provided for closing on January 31, 2005, and for an extension of “up to thirty (30) days ... if ... [t]itle defects are reported which may be reasonably cured” (R. 6; RE 14). The Contract further provides that “time is of the essence of this contract.” (R. 6; RE. 14). The *single* allowable extension contemplated by the contract expired on March 2, 2005. (TR 19-20). PSLT recognized that the closing date had passed and requested an extended contract with a closing date set on or before March 31, 2005. (R. 59; RE 31). An addendum and release was prepared by the Sellers’ attorney and sent to PSLT, but PSLT never executed those documents. (R.50, 60-61). At the Hearing on the Sellers’ Summary Judgment Motion, there was no argument raised that the Contract allowed for multiple thirty day extensions. (See generally, TR 15-24). Accordingly, any argument asserted here upon Appeal to that effect has been waived. It is a basic hornbook principle of law that courts will not write a new contract for the parties. *See Singer v. Tatum*, 171 So.2d 134, 150 (Miss. 1965). The period for closing expired, and the partes must be left where they stand.

upon appeal, and it would be render trial court reconsideration a futile, wasteful, and pointless process.

Nevertheless, PSLT asserts that several purported title deficiencies existed which should, somehow, extend the closing date. Specifically, PSLT argues that: (1) the First American Title Policy does not establish that Sellers had cured all the title defects; (2) nothing demonstrates a “gore” was cured; (3)(a) Mr. Carter’s Affidavit does not state when City of Biloxi Resolution No. 465-94 vacating a portion of Fountain Lane was provided to PSLT; (b) the Resolution is ambiguous; (4) a discrepancy existed between the acreage set forth in the Contract and the acreage revealed by the February, 2005 Moran & Seymour survey; and (5) no evidence that outstanding judgments against the Sellers had been resolved. PSLT’s Brief, p. 11-15. With regard to the first three issues, none of those arguments were raised at the hearing on the Sellers’ Summary Judgment Motion and cannot be asserted here⁷. See *Watts v. Horace Mann Life Ins. Co.*, ___ So. 2d ___, 2006 WL 2948071, ¶ 21 (Miss. App. 10/17/2006) (NO. 2005-KA-00782-COA).

As concerns the acreage difference between the 9.2 acres set forth in the contract, and the actual acreage of 8.5 acres as revealed by the February 2005 Moran & Seymour survey, even pursuant to PSLT’s theory (*i.e.*, that somehow, by operation of law, a new, extra-contractual, thirty-day extension was created), this is not a “title defect which may be reasonably cured”: Sellers cannot be made to convey title to more property than they own. See *e.g.*, *Buckley v. Meer*, 146 N.E. 227 (Mass. 1925)(specific performance unavailable where vendor unable to convey title

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To be sure, PSLT’s former counsel did argue that the Moran-Seymour survey performed in February 2005, was not delivered to Land America Lawyers Title until sometime in mid-March, 2005. (TR 14-15). However, at the Hearing, PSLT admitted that the survey cured the title problem. (TR 14). No argument was asserted that the February survey was not delivered to First American Title Company prior to the end of February, 2005. Further, PSLT was attempting to argue without identifying any record evidence, that Land America Lawyers Title, rather than First American Title Company, was to perform the title examination. (TR 14-15). However, nothing in the Contract mandated that Land America Lawyers Title provide title coverage.

through no fault of his own).⁸ That PSLT's financier desired that a new appraisal be conducted before issuing a new commitment is *not* a contingency contemplated by the Contract or a fault of the Sellers. Accordingly, by March 4, 2005, the date that the Sellers' attorney was notified that PSLT's lender cancelled its loan commitment, the period for closing had expired. (R. 131; RE 41). Sellers were under no duty to convey the subject property.

With regard to the outstanding judgments against the Sellers, the only evidence presented to the Court was that set forth in the Affidavit of Michael B. McDermott, Esq.. Mr. McDermott stated "[a]ll indebtedness of the sellers which were encumbrances against the subject property would be, and customarily are, satisfied at closing. The contemplated proceeds from the subject transaction were sufficient to extinguish all encumbrances." (R. 129; RE 39). Because all encumbrances would be satisfied at the closing, this alleged deficiency is a red herring.

The expert Affidavit of Mr. McDermott, a title attorney with twenty-five years experience involving commercial real estate transactions in Harrison County, Mississippi, was submitted in support of the Sellers' Motion for Summary Judgment. (R. 128-130; RE. 38-40). Mr. McDermott states unequivocally that "[b]y the end of February, 2005, ... sellers were ready, willing, and able to tender performance." (R. 129; RE. 39). This sustained the Sellers' burden. No objection to Mr. McDermott's Affidavit, in whole, in part, or to any document attached

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Similarly, with regard to PSLT's position concerning the allegedly defective City of Biloxi Resolution No. 465-94 vacating a portion of Fountain Lane, even *if* PSLT had asserted such an argument at the Summary Judgment Hearing, Miss. Code Ann. § 21-37-7 places the authority for vacation of streets within municipal boundaries squarely within the discretion of municipal governing authorities. Miss. Code Ann. § 21-37-7 (West 2000). Sellers have no control over decisions made by the Mayor and City Council of the City of Biloxi, Mississippi. Therefore, even if PSLT were not barred from raising this argument in this Appeal, the Chancery Court's Partial Summary Judgment Order would have to be affirmed because, specific performance cannot be ordered if the Sellers were unable to convey clear title. *See e.g., Buckley v. Meer*, 146 N.E. 227 (Mass. 1925).

thereto, was asserted at the Hearing, and again, any purported deficiency now raised by PSLT here on Appeal has been waived.⁹ *Board of Education of Calhoun County v. Warner*, 853 So. 2d 1159 (Miss. 2003). Accordingly, Sellers met their summary judgment burden, PSLT presented nothing to the trial court to demonstrate a triable issue of material fact, and this assignment of error is without merit.

2. Sellers' permits were assignable

As with the majority of PSLT's arguments set forth in the portion of its Brief concerning alleged title defects, its argument that there was no evidence that the various permits were assignable was never asserted at the Summary Judgment Hearing; it has also been waived. *See Watts*, ___ So. 2d ___, 2006 WL 2948071, ¶ 21 (Miss. App. 10/17/2006) (NO. 2005-KA-00782-COA). However, even if this argument were not barred upon Appeal, the sole evidence presented to the Chancery Court at the Hearing was that on February 28, 2005, documentation was supplied to Point South acknowledging that the various permits held by the Sellers were assignable. (R. 48-49, 57-58; RE 29-30). This portion of PSLT's argument is also, therefore, without merit.

B. PSLT's failure to honor the obligation embodied in the Promissory Note was a material breach.

PSLT argues that the Chancery Court erred in finding that PSLT's failure to honor the obligation embodied in the Promissory Note constituted a material breach. The evidence presented to the trial court at the Summary Judgment Hearing, was that on January 24, 2005, PSLT executed an unconditional Promissory Note in the amount of \$100,000.00 as a non-

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PSLT's arguments concerning Mr. McDermott's Affidavit set forth on pages 16-17 of its Brief have also been waived for this same reason.

refundable down payment towards the purchase of the subject property. (R. 49, 51; RE 21-23). The Note, on its face, is absolute, and became due on February 23, 2005. (R. 49, 51; RE 22-23). As set forth in the Affidavit of Mr. Gutierrez, demand was made for payment on March 8, 2005. (R. 43; RE 18). The obligation was never honored. The Note itself plainly states that it is “being issued as a non-refundable down payment on a Contract for Sale of Land relating to 9.2 acres owned by Raymon Gutierrez to Point South Land Trust in the amount of \$3,500,000 inclusive of this note payment”. (R. 51; RE 23).

According to PSLT, the Promissory Note was either: (1) modified by the Contract and despite its absolute terms, payment was only due upon closing; or (2) despite the language contained within the Note itself, it was a mysterious instrument, wholly immaterial to the land purchase. *See generally*, PSLT’s Brief, 17-20. PSLT cites no authority for either of these novel propositions, and this argument was never asserted at the Summary Judgment Hearing. *See Watts*, ___ So. 2d ___, 2006 WL 2948071, ¶ 21 (Miss. App. 10/17/2006) (NO. 2005-KA-00782-COA); *Brown v. State*, 534 So. 2d 1019, 1023 (Miss. 1999)(appellate court is under no obligation to consider arguments where no citation to authority is provided). Accordingly, this argument may not be considered on Appeal.

Nevertheless, PSLT’s position that a \$100,000.00 unconditional Promissory Note executed one day prior to the Contract is unrelated to the Contract or modified by the Contract is simply untenable. Through the Affidavits of Steven Carter and Mr. Gutierrez, the Chancery Court was presented with probative evidence that PSLT defaulted upon the Note, and that the Note was a material part of the purchase agreement. (R. 43-44, 48-51; RE 18-19, 20-23). It then became incumbent upon PSLT to come forward with evidence, or demonstrate through evidence before the Chancery Court, that a genuine issue of material fact existed. *See e.g., Anglado v.*

Leaf River Forest Products, Inc., 716 So. 2d 543 (Miss. 1998). PSLT failed to produce or demonstrate *anything* in response to the Sellers' Motion regarding the default on the Promissory Note. Accordingly, the Chancery Court's finding that this independently sufficient material breach excused the Sellers' performance was proper, and must be affirmed.




CONCLUSION

To date, PSLT has issued a promissory note which it has no intention of honoring, and signed a contract for sale of the subject property which it was unable to perform. Since that time, it has encumbered title to Sellers' property so as to twist their collective arm in an effort to extort transfer. The Sellers sustained their burden on the Summary Judgment Motion, and PSLT failed to produce evidence of, or demonstrate through evidence already before the Chancery Court, a genuine issue of material fact. Sellers look forward to the end of PSLT's tactics and submit that affirming the Chancery Court's Partial Summary Judgment Order is not only the necessary legal outcome, it is also the *right* thing to do.

RESPECTFULLY SUBMITTED, this the 7th day of February, 2007.

RAMON GUTIERREZ, BACK BAY
CASINO OF BILOXI, LLC and
BAYVIEW GUTIERREZ, LLC

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CERTIFICATE OF SERVICE

I, Les W. Smith, with the law firm of Page, Mannino, Peresich & McDermott, P.L.L.C., hereby certify that I have this day served and filed the original and three (3) copies, as well as a copy thereof on electronic disk in Word Perfect, of the Brief of the Appellees, to Ms. Betty Sephton, Clerk, Supreme Court of Mississippi, Post Office Box 249, Jackson, Mississippi 39205. I further certify that I have forwarded true and correct copies of the Brief of Appellees via United States Postal Service, First Class Delivery, postage prepaid, to H. Rodger Wilder, Esq., Thomas C. Anderson, Esq. and Leo E. Manuel, Esq., at their usual business mailing address of 1310 Twenty Fifth Avenue, Gulfport, Mississippi 39501 and Honorable Carter O. Bise, Chancellor, at his usual business mailing address of Post Office Box 1542, Gulfport, Mississippi 39502.

SO CERTIFIED, this the 7th day of February, 2007.


LES W. SMITH, MS BAR NO [REDACTED]

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