IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-01127

POINT SOUTH LAND TRUST,
DEAN ROFFERS, TRUSTEE — APPELLANT

V.

RAMON GUTIERREZ;
BACK BAY CASINO OF BILOXI, LLC;
BAYVIEW GUTIERREZ, LLC — APPELLEES

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

REPLY BRIEF OF APPELLANT POINT SOUTH LAND TRUST, DEAN ROFFERS, TRUSTEE

H. Rodger Wilder (MB No. [redacted]
Thomas C. Anderson (MB No. [redacted]
Leo E. Manuel (MB No. [redacted]
BALCH & BINGHAM LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501
Telephone: (228) 864-9900
Facsimile: (228) 864-8221

ATTORNEY FOR APPELLANT,
POINT SOUTH LAND TRUST,
DEAN ROFFERS, TRUSTEE

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This civil action involves a complex $5,000,000.00 real estate transaction for the purchase of a potential gaming site. Point South seeks specific performance of its agreement with the Sellers to purchase this property. The record before the Chancery Court contained numerous disputed issues of material fact concerning whether the requirements stated in the Contract were met by the Sellers and whether Point South failed to meet its obligations, precluding summary judgment and necessitating a trial on the merits. As the record establishes: (1) the Sellers failed to cure multiple title defects prior to closing as required by the Contract; (2) the Sellers failed to establish that all permits held were assignable and that the governmental agencies had acknowledged assignment met with their approval; and (3) questions of fact existed concerning Point South's alleged failure to comply with its obligations under the Contract. Further, in granting summary judgment, the Chancery Court improperly relied upon documents submitted by the Sellers which did not meet the requirements of Rule 56 as they were inadmissible, lacked appropriate authentication, were not "sworn or certified" and in some instances, were incomplete resulting in a gross miscarriage of justice. For these reasons, the Final Judgment in favor of the Sellers should be reversed, and this civil action remanded to the Chancery Court for discovery and a trial on the merits.

ARGUMENT

I. Standard of Review

The grant of partial summary judgment is reviewed *de novo*. *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26 (Miss. 2003). Therefore, the standard used by this Honorable Court is the same as that utilized by the Chancery Court as set forth in Rule 56(c) of the Mississippi Rules of Civil Procedure. *Id.* In conducting a de novo review, this Court analyzes all affidavits, admissions in pleadings, interrogatory answers, depositions and other

matters of record, and considers all such evidence in the light most favorable to the party against whom the motion for summary judgment was made. *Short v. Columbus Rubber and Gasket Co.*, 535 So. 2d 61, 63 (Miss. 1988).

A motion for summary judgment is not a substitute for trial of disputed fact issues. Accordingly, the Chancery Court could not try or determine issues of fact on a Rule 56 motion; it could only determine whether there were issues to be tried. *Dennis v. Searle,* 457 So. 2d 941, 944 (Miss. 1984). Rather than make a determination that no issue of material fact existed, the Chancery Court instead proceeded to make findings of fact. (R. 138–141). A court may only properly grant a motion for partial summary judgment when, after viewing 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 as to any material fact and that the moving party is entitled to judgment as a matter of law." MISS. R. CIV. P. 56(c); *Wilner v. White*, 929 So. 2d 315, 318-319 (Miss. 2006). Sellers carried the burden of demonstrating that no genuine issue of material fact existed, and the Chancery Court was required to give Point South the benefit of the doubt as to the existence of a material fact issue. *See Price v. Purdue Pharma Co.*, 920 So. 2d 479, 483 (Miss. 2006).

II. The trial court erred in granting Sellers' Motion for Partial Summary Judgment

Disputed issues of material fact exist in the record making the Chancery Court's grant of summary judgment in favor of Sellers improper. At the summary judgment stage, all evidence must be viewed in the light most favorable to Point South as the non-movant, and the Court must presume that all evidence in Point South's favor is true. *See Downs v. Choo*, 656 So. 2d 84, 85 (Miss. 1995) (quoting *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993)). As explained below, a review of the record in this case will clearly indicate that the Sellers' own evidence

presented in support of its Motion for Summary Judgment failed to eliminate all genuine issues of material fact and as such was not entitled to summary judgment as a matter of law.

A. Because Point South initially presented each argument and assignment of error to the trial court, Sellers' procedural arguments of waiver do not apply.

The Sellers do not address for this Court the disputed issues of material fact created by the very documents Sellers submitted in support of their Motion for Summary Judgment. Instead, Sellers seek to preserve the Chancery Court's partial summary judgment by offering two misplaced procedural arguments in attempt to persuade this Court from conducting a *de novo* review of the record.[1] For the reasons set out below, Sellers' procedural arguments are contrary to Mississippi law and should be rejected.

First, Sellers cite *Anglado v. Leaf River Forest Products, Inc.*, 716 So. 2d 543 (Miss. 1998), for the proposition that Rule 56 requires the non-moving party to present evidence in opposition of a summary judgment and the failure to do so *automatically* entitles the moving party to the relief sought. *Anglado* does not support this proposition, but merely recognizes that a party against whom a motion for summary judgment has been made remains silent at its peril. *Anglado,* 716 So. 2d at 547. Point South did not remain silent - it directed the Chancery Court to the multitude of disputed fact issues created by the very documents which Sellers offered in support of its motion on the issues which Sellers bore the burden of proof at trial. Further, as the Sellers' own authority indicates, this position is contrary to this Court's longstanding interpretation of Rule 56 holding that:

> [I]f any document before the court presents a material fact issue, the grant of summary judgment is improper. Here, granting

[1] Point South was represented at the hearing on the Motion for Summary Judgment by Mr. Charles H. Weissinger, Jr. Point South's current counsel entered their appearance in this matter on March 1, 2006.

> summary disposition based solely on any failure by Allen to file a written response was error.

Allen v. Mayer, 587 So. 2d 255, 259 (Miss. 1991) (emphasis added) (citing *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983)). The record *sub judice* clearly shows that the Sellers failed to meet their burden of showing that no genuine issue of material fact exists and therefore, the grant of partial summary judgment was clear error.

Second, the Sellers unpersuasively suggest that many of the "arguments" contained in Point South's Brief are procedurally barred because they were not initially presented to the trial court. The Sellers state "[b]ecause 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." As supported by the record, every argument contained in Point South's Appellate Brief was presented to the trial court:

a. Sellers did not cure all title defects prior to closing (TR. at 17, 22; R. at 151 – 55).

b. The unauthenticated First American Title Policy does not establish that Sellers had cured all title defects as required by the Contract. (R. 155).

c. Nothing in the record establishes the "gore" was cured. (TR. at 35; R. 152).

d. The Fountain Lane Vacation was a problem which Sellers' Title Insurer required Sellers to resolve yet there is no evidence this occurred. (TR. at 33; R. at 152 – 153; 176).

e. The discrepancy in the acreage to be conveyed to Point South. (TR. at 17, 31 – 32; R. at 153).

f. No evidence the outstanding judgments against Sellers had been resolved. (TR. at 22; R. at 153).

First, the record does not support the Chancellor's finding that the gore in the property description was cured. Sellers state in the defective affidavit of Mr. McDermott[4] that "to cure this discrepancy, a survey was performed by Moran & Seymour Engineering which was certified by the American Land Title Association." (R. at 129). The record does not contain a copy of this survey and Mr. McDermott's Affidavit is conspicuously silent concerning whether the gore was in fact cured by the survey, stating only that a survey was performed. In addition, the gore between the individual land parcels comprising the Gutierrez Property, would not be insured by the title policy commitment relied upon by Sellers to provide "marketable title", as it failed to include American Land Title Association Endorsement form 19 addressing the contiguity of multiple parcels. The absence of this endorsement rendered the commitment ineffective. The evidence simply does not support the conclusion that the gore was cured, and thus creates a genuine issue of material fact for resolution by trial.

Second, the title defect created by the ambiguous City of Biloxi resolution vacating Fountain Lane was not cured on or before March 4, 2005. Sellers claim that the defect was cured when a copy of Resolution No. 465-94 of the Biloxi City Counsel was delivered to Point South. As discussed in Point South's Brief, this argument must fail because (i) the record does not support Sellers' contention that a copy of Resolution 465-94 was delivered to Point South prior to closing, and (ii) Resolution 465-94 is insufficient on its face to cure the defect arising out of the vacation of Fountain Lane. As more fully explained in Point South's Brief, Resolution 465-94 evidences a Biloxi City Council vote to vacate "an unimproved portion of the north end of Fountain Lane." (R. at 53). This description, however, is ambiguous because it contains no legal description and provides no basis to determine what portions of Fountain Lane were

[4] The affidavit of Michael McDermott presented to the Court was defective and therefore, inadmissible. The defective affidavit is discussed in detail, *infra*.

"unimproved" at the time the Resolution was passed. Further, this description was insufficient for the Seller's title insurer to issue coverage requiring "[r]eceipt of an Amended Resolution concerning vacation of Fountain Lane specifically describing what is shown as Parcel 5 on Exhibit "A" hereto." (R. at 118).

Sellers now argue in their Reply Brief that because the City of Biloxi has the sole authority to vacate streets within the Biloxi City Limits, Sellers were unable to convey clear title:

> Sellers have no control over decisions made by the Mayor and City Council of the City of Biloxi, Mississippi. Therefore, . . . 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.

(Sellers' Reply Brief at 10 n.8.). In support of this proposition, the Sellers cite no Mississippi authority, but rely exclusively *Buckley v. Meer*, 146 N.E. 227 (Mass. 1925), which is clearly distinguishable based upon its facts. The reasoning of the Massachusetts' Court in *Buckley* does not apply since the Sellers in this case had an affirmative duty under Contract to cure all defects in the title — a duty that was not imposed upon the sellers in *Buckley*. The Sellers entire argument fails to recognize their duty to cure under the Contract. While it is true that the Sellers do not "control" the City of Biloxi, the Sellers are perfectly within their rights to *request* the City of Biloxi to amend Resolution 465-94 to clarify the ambiguities contained therein, just as Sellers were able to initially request the vacation of Fountain Lane in the first place. The record establishes that Sellers breached this duty by failing to even attempt to cure the defect created by Resolution 465-94.

Finally, a survey conducted in February, 2005 by Moran & Seymour Engineering alerted the parties for the first time to a third title defect—a discrepancy between the stated contract acreage of 9.2 acres and the survey acreage of 8.37 acres. (R. at 135). Due to this approximate 9% decrease in land area to be conveyed, a new title defect was created by Sellers. Financing or

bonding of Point South's anticipated project was impeded as a result of this newly discovered title defect and as such a new appraisal and more comprehensive ALTA survey were required to fully cure the defect. (R. at 135). Therefore, a genuine issue of material fact existed as to the amount of property to be conveyed and whether the Defendants cured such defect prior to the March 4, 2005, closing date, entitling Point South to a second thirty (30) day closing date extension.

In making the finding of fact that Sellers had met all of their obligations under the Contract (despite the numerous documents before the trial court creating disputed issues of material fact), including Sellers duties to cure all defects and to convey clear and marketable title, the Chancery Court relied heavily upon the title commitment issued by First American Title Company through Sellers' counsel on February 22, 2005. (R. at 140-141). This was also a clear error of law. As explained in Pont South's Brief: (i) the underlying survey that the commitment is based is not in the record, (ii) there were a number of errors in the commitment, including a discrepancy in acreage, and (iii) under Mississippi law the issuance of a title policy is insufficient to satisfy Sellers' requirement to convey marketable title. *Willow Ridge Ltd. P'ship v. Stewart Title Guar. Co.*, 706 F. Supp 477, 486 n.22 (S.D. Miss. 1988), *aff'd*, 866 F.2d 1419 (5th Cir. 1989) (the fact that a title insurance company, reputable or not, would agree to insure a title has little bearing on the marketability of that title).

C. The record does not support the finding on Partial Summary Judgment that all permits held by the Seller were assignable or that the related governmental agencies had acknowledged their assignability as required by the Contract

The Chancery Court also erred by finding that:

"As of February 28, 2005, all of the particulars of the contract of sale had been met by Gutierrez et al. Documentation had been provided that the applicable permits to use the Bayview property for a gaming facility were assignable . . . ." (R. at 141).

The "documentation" in the record, however, does not establish or support the Court's finding. The Contract not only requires that all permits held by Sellers be assignable but also requires that "the related govermental [sic] agencies must *acknowledge* asignment [sic] is acceptable to them." (R. at 6) (emphasis added). In the Reply Brief, Sellers completely ignore their obligation under the Contract, committing only one sentence to the issue: "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." The Sellers' support for this contention is the following three documents contained in the record: (1) the Affidavit of Steven B. Carter (R. at 48-49); (2) Letter from Terry Moran, P.E. dated February 9, 2005 (R. at 57); (3) Letter from Mississippi Department of Marine Resources dated February 28, 2005. (R. at 58).

In the affidavit relied upon by Sellers, Carter states that "[o]n February 28, documentation was supplied to Point South acknowledging that the various permits held by Defendants transfer with the property." (R. at 49). The "documentation" attached to his affidavit consists of a letter dated February 28, 2005, from the Mississippi Department of Marine Resources stating the MDMR Permit is assignable and a letter dated February 9, 2005, from Terry Moran generally discussing all of the permits. (R. at 57–58). No similar evidence, or evidence of any kind, for that matter, is found in the record regarding any other permit held by Sellers. For example, the record contains no letter to this effect from the United States Army Corp of Engineers regarding the Army Permit or from the Mississippi Department of Environmental Quality regarding the MDEQ certification. The acknowledgment of the

assignment by the respective governmental agencies was a material requirement of the contract. Because the record provides no evidence that all governmental agencies had acknowledged that assignment of the permits held by Sellers was acceptable, a genuine issue of material fact exists as to whether Sellers satisfied their obligations under the Contract. Therefore, based on the facts in the record, the Trial Court could not properly make these findings at the summary judgment stage.

D. Affidavit of Michael B. McDermott is invalid and the Chancery Court's reliance thereupon arises to a gross miscarriage of justice

In rendering Partial Summary Judgment, the Court also relied on the "Affidavit of Michael B. McDermott" submitted by the Sellers. (R. at 128–130). In their Reply Brief, the Sellers put equal weight on Mr. McDermott's affidavit:

> 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. Mr. McDermott states unequivocally that "[b]y the end of February, 2005, . . . sellers were ready, willing, and able to tender performance." This sustained the Sellers' burden.

Sellers' Reply Brief at 10. However, the affidavit of Michael McDermott was invalid on its face and made inadmissible ultimate conclusions of the issues presented. Further, the affidavit failed to attach the key documents to which it referred as required by Rule 56.

The "Affidavit of Michael B. McDermott" states in its opening paragraph that "RAMON GUTIERREZ" appeared and was sworn by the notary, not Michael B. McDermott, and is therefore invalid. (R. at 128). Even if accepted as evidence despite being invalid, the affidavit admits in paragraph 4 that discrepancies existed in the legal descriptions of the parcels. (R. at 128–129). The affidavit refers to a title commitment and a survey, but does not attach or provide "sworn or certified" copies of these papers as required by Rule 56. (R. at 129). The survey

provided by Moran & Seymour Engineering which apparently formed the basis for the title commitment issued on February 22, 2005, reflects the acreage as 8.37, not the 9.2 acres identified in the contract. (R. at 115–127). Paragraph 9 of the McDermott affidavit states that "all of the purchaser's conditions set forth [sic] Paragraphs "A" through "D" of section 11 of the Contract were met" yet section 11 of the contract contains no such conditions and has only paragraphs A – C. (R. at 129, 6). Finally, the McDermott affidavit relies upon an inadmissible and unauthenticated email. (R. at 131).

Additionally, there is no evidence to support the assertion that a survey certified by the American Land Title Association was performed. Numerous other documents in the record attached as exhibits by the Sellers and relied upon by the trial court do not meet the requirements of Rule 56(e). The exhibits submitted by the Sellers were inadmissible, lacked appropriate authentication, were not "sworn or certified" and in some instances, were incomplete and thus the reliance upon them in granting summary judgment was a gross miscarriage of justice. *See Brown,* 444 So. 2d at 365.

E. The Court erred in finding that an alleged default on a separate promissory note was a breach of the Contract

The Chancery Court erred by finding that "[t]he Promissory Note called for payment on February 23, 2005. Payment was non-refundable and was unconditional. That alone constitutes grounds to find that the Purchasers failed to perform and justifies summary judgment to the Sellers on the issue of specific performance." (R. at 142). This finding does what Mississippi law prohibits by imposing on Point South an obligation not contained in the Contract. The Contract contains no requirement that Point South tender any funds to the Defendants prior to the date of closing, specifically stating the following in paragraph 3:

PURCHASE PRICE: The purchaser will pay a total sum of $ 3,500,000.00
EARNEST MONEY: A sum attached to the contract in the amount of $ n/a
Cash ☐ Check ☐ deposited with N/A [Broker/Trustee].
will be held in trust presuming clearance of check.
Cash Down Payment: **Paid at closing and subject to adjustments and prorations** $ 100,000.00
BALANCE: Balance of purchase price $ 3,400,000.00
Balance is payable as follows: TO BE PAID IN FORM OF CASHIERS CHECK OR WIRE AT CLOSING OR PAYMENT INTO ESCROW.
If purchase of the property is subject to Purchaser being able to obtain financing, Purchaser shall within five (5) days after contract agreement, apply for and use Purchaser's best efforts to obtain a mortgage loan.

(R. at 5). Since Sellers refused to close, no money was due. The Contract dated January 25, 2005, could not have been breached by the alleged failure of Point South to make a payment under the Promissory Note dated January 24, 2005, as Courts cannot write into a contract that which fails to appear. *See Southern Natural Gas Co. v. Fritz,* 523 So. 2d 12, 18 (Miss. 1987).

The Promissory Note on which the Court relied was dated January 24, 2005. The Contract for sale of the property was dated January 25, 2005. If the $100,000.00 cash down payment referenced in the Contract dated January 25, 2005, is the Promissory Note dated January 24, 2005, as the affidavit and Reply Brief submitted by the Sellers admit, the Contract modified the note and the note was not payable until closing. *Iuka Guar. Bank. v. Beard*, 658 So. 2d 1367, 1372 (Miss. 1995) (holding "a written contract may be modified by a subsequent agreement, but the law of the state is that such an agreement must be supported by new or additional consideration."). A review of the Promissory Note and Contract will easily show that the Sellers' consideration for the Note was $100,000.00 and the consideration to execute the Contract was the purchase price of the Gutierrez Property, to be paid at closing. Sellers do not and can not in good faith argue that the Contract was not supported by new or additional consideration. Therefore, under Mississippi law, the Contract modified the previously executed Promissory Note to become due and payable upon closing.

Alternatively, if the Promissory Note was not the cash down payment and was not modified by the Contract executed at a later date, then the Promissory Note and the Contract

must be viewed as stand alone agreements; and the alleged breach of the separate Promissory Note will be of no consequence to the Contract for the sale of the property. What is clear is that the alleged breach of a Promissory Note, the terms of which are in conflict with and never referenced by the real estate contract, cannot form the basis for the breach of the real estate contract. When interpreting such document, the Court's concern is not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy. *Simmons v. Bank of Miss.*, 593 So. 2d 40, 42-43 (Miss. 1992). In this case, the Contract clearly states that no money is due from Point South until closing and therefore Point South was not in breach of the Contract. (R. at 5).

In addition, the Contract was prepared by Sellers' broker. Under Mississippi law, when the terms of a contract are vague or ambiguous, they are always construed more strongly against the party preparing it. *Banks*, 648 So. 2d at 1121. Because of the inconsistencies between the Promissory Note and the Contract at the very least create ambiguity, there are questions of fact which must be determined and therefore summary judgment is improper. *See American Legion Ladnier Post No. 42, Inc. v. City of Ocean Springs*, 562 So. 2d 103 (Miss. 1990). In granting Partial Summary Judgment, the trial court did not follow Mississippi's well-established rules for summary judgment, because it resolved an ambiguity in the contractual terms in favor of the Sellers as the party moving for summary judgment, rather than the non-movant. By doing so, the trial court erred. *Short,* 535 So. 2d at 61 . At this stage of the proceedings, ambiguity in contractual terms must be construed in favor of the non-movant, in this case, Point South. *Burton v. Choctaw Co.,* 730 So. 2d 1, 5 (Miss. 1997).

CONCLUSION

For the above and foregoing reasons, the Appellant, Point South Land Trust, Dean Roffers, Trustee, respectfully requests that the Honorable Court reverse the Chancery Court's grant of Partial Summary Judgment and Final Judgment, and remand this civil action for discovery and a trial on the merits.

RESPECTFULLY SUBMITTED, this the 21st day of February, 2007.

POINT SOUTH LAND TRUST,
DEAN ROFFERS, TRUSTEE

BY: BALCH & BINGHAM, LLP

BY: _____
THOMAS C. ANDERSON

H. Rodger Wilder (MB No[redacted]
Thomas C. Anderson (MB N[redacted]
Leo E. Manuel (MB No.[redacted]
BALCH & BINGHAM LLP
1301 Twenty Fifth Avenue
Gulfport, MS 39501
Telephone: (228) 864-9900
Fax: (228) 864-8221

CERTIFICATE OF SERVICE

I, Thomas C. Anderson, attorney for Appellant, Point South Land Trust, Dean Roffers, Trustee, certify that I have this the 21st day of February, 2007, served and filed the original and three copies, as well as a copy thereof on electronic disk in Microsoft Word format, of the Reply Brief of the Appellant, Point South Land Trust, Dean Roffers, Trustee, Via FedEx, postage prepaid, to Ms. Betty Sephton, Clerk, Supreme Court of Mississippi, P.O. Box 249, Jackson, Mississippi 39205. I further certify that I have forwarded true and correct copies of the Brief of Appellant, Point South Land Trust, Dean Roffers, Trustee, by U.S. Mail, First Class, postage prepaid to the following persons at these addresses:

Honorable Carter O. Bise
Chancellor
P.O. Box 1542
Gulfport, MS 39502

Les W. Smith, Esq.
Page, Mannino, Peresich & McDermott, PLLC
759 Vieux Marche' Mall
Biloxi, MS 39530

This the 21st day of February, 2007.

Of Counsel