IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-TS-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

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

ORAL ARGUMENT IS REQUESTED

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THE SUPREME COURT OF MISSISSIPPI

NO. 2006-TS-01127

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

v.

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

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 McDermott, Esq., and Page, Mannino, Peresich & McDermott, PLLC, 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

POINT SOUTH LAND TRUST,
DEAN ROFFERS, TRUSTEE

BY: _____
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I. The trial court erred in granting Defendants' Motion for Summary Judgment as to Point South Land Trust's claim for Specific Performance by Order dated January 30, 2006.

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal from the Partial Summary Judgment Order and Final Judgment entered by the Chancery Court for the Second Judicial District of Harrison County, Mississippi ("Chancery Court") in favor of Appellees, Ramon Gutierrez, Bayview Gutierrez, LLC and Back Bay Casino of Biloxi, LLC (collectively hereinafter "Sellers") dismissing Appellant Point South Land Trust's (hereinafter "Point South") Complaint seeking specific performance on a real estate contract executed between the parties.

II. Course of Proceedings and Disposition Below

Point South filed a Complaint in Chancery Court seeking specific performance on a real estate contract executed between the parties under which Point South was to buy 9.2 acres of real property located in Biloxi, Mississippi ("Gutierrez Property") for $3,500,000.00 to be paid at closing and additional consideration of at least $1,500,000.00. (R. at 1 - 26). Sellers filed their Answer and Affirmative Defenses to Point South's Complaint and a Counterclaim alleging slander of title and interference with prospective business advantage. (R. at 27 - 36).

Sellers filed their Motion for Summary Judgment seeking dismissal of Point South's claim for specific performance and summary judgment on its counterclaims. (R. at 40 - 132). Point South filed a response to Sellers' Motion for Summary Judgment and the Motion was heard on December 15, 2005. (R. at 132-136). On January 30, 2006, the Chancery Court entered an interlocutory order granting partial summary judgment in favor of the Sellers on Point South's claim for specific performance and transferring Sellers' counterclaims to the Circuit Court of Harrison County, Second Judicial District. (R. at 137-143).

On March 1, 2006, Point South timely filed, pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure, a Motion for Reconsideration in Circuit Court requesting that the court

set aside the Partial Summary Judgment in favor of Sellers, or in the alternative, transfer the matter to the Chancery Court.[1] (R. at 149-160). Thereafter, the Circuit Court dismissed the remaining counterclaims, pursuant to a Motion to Dismiss filed by Sellers, and transferred the matter back to Chancery Court for further proceedings on Point South's Motion for Reconsideration. (R. at 161). By Order dated June 19, 2006, the Chancery Court denied Point South's Motion for Reconsideration. (R. at 189-192). A Final Judgment was entered by the Chancery Court on June 23, 2006. (R. at 193). Accordingly, Point South timely filed its Notice of Appeal on June 28, 2006. (R. at 194-196).

III. Statement of Facts

The Gutierrez Property which Point South seeks to purchase consists of five (5) parcels of real property represented by Sellers to consist of 9.2 acres, including certain portions of an allegedly vacated City of Biloxi right-of-way for the city street, Fountain Lane. (R. at 121-128). The Gutierrez Property has access to the waters of the Back Bay of Biloxi and as such demands considerable market value as a potential gaming site.

Subsequent to purchasing the Gutierrez Property, Mr. Gutierrez created an entity—Back Bay Casino of Biloxi, LLC—for the primary purpose of obtaining various federal, state and local permits necessary to make the site "gaming ready." (R. at 139). Beginning in 1999, Back Bay Casino of Biloxi, LLC, began obtaining such permits including Department of the Army Permit Number MS99-02838-U ("Army Permit"), Mississippi Department of Marine Resources Permit Number DMR-M 99165-P ("MDMR Permit") and a Mississippi Department of Environmental Quality Certification Letter dated December 22, 1999 ("MDEQ Certification"). (R. at 75-110). Between 1999 and the date of the parties' Contract, Back Bay Casino of Biloxi, LLC obtained in

[1] Up to this time, Point South was represented by Mr. Charles H. Weissinger, Jr. Point South's current counsel entered their appearance in this matter on March 1, 2006.

total at least three (3) and as many as eighteen (18) governmental permits for the Gutierrez Property. (R. at 111).

In late 2004, Bayview Gutierrez, LLC, was created to take title of the Gutierrez Property from Ramon Gutierrez and convey title to any prospective purchaser(s). (R. at 48). The managing member of Back Bay Casino of Biloxi, LLC and Bayview Gutierrez, LLC is Steven B. Carter, Ramon Gutierrez's son-in-law. (R. at 48). Mr. Carter was at all times relevant authorized by Ramon Gutierrez as his agent to conduct any and all negotiations necessary to sell the Gutierrez Property. (R. at 43, 48).

In January of 2005, Dean Roffers, trustee of Point South, entered into negotiations with Ramon Gutierrez and Steven Carter concerning a possible sale of the Gutierrez Property to Point South. As a result of these negotiations, on January 24, 2005, Point South executed a promissory note in the amount of $100,000 in favor of Ramon Gutierrez as a down payment on a contract for the sale of the Gutierrez Property ("Promissory Note"). (R. at 51). As stated on the Promissory Note, payment of the principal and interest was initially due on February 23, 2005 and was included in the total purchase price of the property. (R. at 51).

On January 25, 2005, after execution of the Promissory Note, Point South executed a Contract for the Sale and Purchase of Real Estate Lots and Land (the "Contract") with Ramon Gutierrez and Back Bay Casino of Biloxi, LLC to purchase the Gutierrez Property and any and all related governmental permits for the purpose of developing the property as a gaming site. (R. at 5-9). The Contract and all of its attachments were prepared on the forms and stationary of the Seller's broker, Gray Slay. (R. at 5 – 9). The purchase price of the Gutierrez Property was $3.5 million and the Contract required a $100,000.00 down payment to be paid at closing with the balance to be paid at closing by cashier's check or wire transfer. (R. at 5). Additional

consideration of at least $1,500,000.00 was to be paid over the next 12 months. (R. at 9). The Contract contained the following relevant provisions:

Section 2:

THE SELLERS(S) RAYMON GUTIERREZ , BACK BAY CASINO OF BILOXI, LLC AGREES TO SELL AND THE PURCHASER(S) POINT SOUTH LAND TRUST , DEAN ROFFERS, TRUSTEE AGREES TO BUY the property as described:
BACK BAY CASINO DEVELOPMENT SITE, BAYVIEW AVENUE, BILOXI, MS, CONSISTING OF 9.2 ACRES AS DESCRIBED IN ATTACHED EXHIBIT "A" (FULL LEGAL DESCRIPTION)

Section 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.

Section 8:

SELLER TO FURNISH: (Check as appropriate)
☒ WARRANTY DEED ☐ SPECIAL WARRANTY DEED ☐ LEASE AGREEMENT ☐ BILL OF SALE
Reasonable time shall be given for examination of title. Should examination of title reveal defects which can be cured, Seller hereby obligates himself to cure same as expeditiously as possible and to execute and tender Warranty Deed in accordance with the terms herein.

Section 11:

CLOSING DATE SHALL BE January 31, 2005, buy may be earlier by mutual consent.
CLOSING DATE SHALL BE EXTENDED up to thirty (30) days if any of the following occurs:
A. Mutually agreed to,
B. Title defects are reported which may be reasonably cured,
C. The 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.

Section 17:

OTHER PROVISIONS:
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 LEAS IN EXISTENCE AT THIS TIME.

B. EVIDENCE OF SATISFACTION OF ALL OBLIGATIONS FO 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 RECORD.
E. SELLER/ LLC. MUST PROVIDE PROOF OF BEING IN GOOD STANDING WITH THE STATE AND CORPORATE RESOLUTION AND OR SHAREHOLDER RESOLUTIONS MUST BE EXECUTED PERMITTING THE SALE OF THE PROPERTY AND THE TRANSFER OF ALL PERMITS. (SEE EXHIBIT "B") ADDITIONAL "COMPENSATION TO SELLERS" ATTACHMENT.

(R. at 5-6).

Section 11 to the Contract set the original closing date for January 31, 2005, but required thirty (30) day closing extensions upon the satisfaction of certain conditions. (R. at 6). According to the express terms of the Contract, Point South had one material obligation—to pay a $100,000.00 down payment at closing and bring $3,400,000.00 in funds to closing in the form of a cashier's check or by wire. (R. at 5-9).

Likewise, pursuant to Section 17 of the Contract, Sellers, in order to be paid $5,000,000.00, were obligated to perform certain duties and satisfy certain conditions listed therein. (R. at 6). Shortly after Point South began its due diligence it became apparent that the parties would be unable to close on January 31, 2005. As evidenced by a letter dated January 28, 2005, from James L. Schmidt, attorney for Point South, to Michael B. McDermott, attorney for Sellers, a number of outstanding issues remained regarding Sellers' obligations under the Contract. (R. at 111-112). These issues included:

a. The possible re-instatement of Bayview Gutierrez, LLC;

b. Identification of all permits issued to Back Bay Casino of Biloxi, LLC and assurance from each governmental entity that the permits will be assignable and transferable to Point South;

c. Curing the discrepancies between the survey and legal description; and

d. Resolution of a legal dispute between Back Bay Casino of Biloxi, LLC and Moran, Seymour and Associates.

(R. at 111-112). Thus, the parties mutually agreed to extend the closing date thirty (30) days to March 2, 2005,[2] to allow Sellers to satisfy all of their conditions under the Contract. (R. at 49).

The discrepancies between the original survey of the Gutierrez Property and the legal description created a gore. (R. at 128-129). According to the affidavit of Michael McDermott submitted by Sellers, a second survey was performed to cure the defect. (R. at 129). However, the second survey is not contained in the record, and in his affidavit, Mr. McDermott fails to state whether the survey did in fact cure the gore that created one of the title defects.

Before the second survey ordered by Mr. McDermott's office was complete, a second title defect was uncovered concerning the vacation of a City of Biloxi right-of-way for a city street, Fountain Lane. (R. at 49). Fountain Lane runs north and south and effectively cuts the Gutierrez Property in half. (R. at 123-124). The right-of-way represents approximately half an acre in total, and because of its location, questions of ownership would impede any development of the property. The affidavit of Steven Carter submitted by Sellers states that a copy of Biloxi City Council Resolution Number 465-94 ("Resolution") was delivered to Point South, but fails to state when this allegedly occurred. (R. at 49). Further, the Resolution provides no legal description of the portions of Fountain Lane that were vacated and does not cure the title defect. (R. at 52-56). Therefore, as evidenced by the requirements listed in the First American Title Commitment issued by Seller's counsel and the Lawyer's Title Commitment issued by counsel

[2] The Contract specifies that each closing date extension shall be up to thirty (30) days in length, which would make the expiration of the first extension on March 2, 2005. However, the Chancery Court found the closing to be extended until March 4, 2005, based on oral argument heard at the summary judgment hearing on December 15, 2005.

for Point South's lender, an amended resolution was required stating specifically that the portions of Fountain Lane lying within the legal description of the Gutierrez Property are vacated. (R. at 13, 118). There is no evidence that such an amendment was ever even proposed, much less passed by the City of Biloxi.

Upon completion of the second survey in late February, Point South learned that the Gutierrez Property was not 9.2 acres, but instead only 8.37 acres, or 9% less. (R. at 49, 135). Despite this decrease in acreage and other title defects, Point South continued to work with Sellers to achieve what was believed to be the common goal of closing the transaction. On March 2, 2005, the first extended closing date, Point South's lender, Capital Financing Services, Corp. ("Capital") sent a letter to Point South advising that, based on decreased acreage revealed by the second survey conducted by Moran Engineering, P.L.L.C., a second appraisal and updated third survey would need to be conducted prior to closing. (R. at 49 - 50).

Point South continued in good faith to work toward a closing. In fact, by letter dated March 16, 2005, Point South informed Mr. Carter that Capital would be ready to close on March 31, 2005. (R. at 59). However, Sellers refused to close prompting Point South to file a *lis pendens* and Complaint for specific performance of the Contract in the Chancery Court of the Second Judicial District of Harrison County, Mississippi.

SUMMARY OF THE ARGUMENT

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; (2) the Sellers failed to establish that all permits held were assignable or 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. 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.*

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 Defendants' Motion for 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. Point South will address below each of the grounds upon which the trial court based its Order. 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)).

A. The Record does not support the Chancellor's finding that Sellers satisfied all of their requirements under the Contract

As shown by the documents offered by the Sellers in support of their Motion for Summary Judgment, the Sellers failed to satisfy all of their requirements under the Contract.

1. Sellers did not cure all title defects prior to closing

With regard to the title to the property, the Contract required Sellers to convey the property to Point South by warranty deed and further provided that "[s]hould examination of the title reveal defects which can be cured, the Seller hereby obligates himself to cure same as expeditiously as possible, and to execute and tender [a] Warranty Deed in accordance with the terms herein." (R. at 5). In addition, the Contract requires "Seller to guarantee the proper legal description of the property due to the discrepancies noted between the survey description and that in the public record." (R. at 6).

Under the Contract, 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.[3] When the Sellers failed to satisfy these conditions precedent to closing, the Sellers were required to extend the closing. (R. at 5). Initially, discrepancies between the public land records and a survey description existed which included (i) a gore between the individual land parcels comprising the Gutierrez Property, as acknowledged by Sellers, and (ii) the absence of public record of the vacation of Fountain Lane. (R. at 129, 49). In addition to these defects, just prior to the March 4, 2005, closing date, a third title defect—a discrepancy in acreage—was also discovered. None of the title defects had been cured by Sellers at the expiration of the first closing date extension.

a. The unauthenticated First American Title Policy does not establish that Sellers had cured all title defects as required by the Contract

In the Order granting Partial Summary Judgment, the Chancery Court erred by finding that:

"On February 22, 2005, First American Title Company issued a title commitment based upon a survey made by Moran & Seymour as certified by American Land Title Association." (R. at 140–141).

The record contains no evidence that a survey certified by the American Land Title Associate was performed prior to February 22, 2005. The unauthenticated First American Title Policy ("the title policy") submitted by Sellers was based upon the survey which reflected only 8.37 acres of property, not the 9.2 acres which Point South contracted to purchase. (R. at 115–127). Further, the Title Commitment issued by First American identified a seller different than the seller named in the contract. (R. at 115). The commitment does not identify the form of the

[3] The Contract specifies that each closing date extension shall be up to thirty (30) days in length, which would make the expiration of the first extension on March 2, 2005. However, the Chancery Court found the closing to be extended until March 4, 2005, based on oral argument heard at the summary judgment hearing.

coverage being provided or whether the coverage has a co-insurance component. (R. at 115–127). Additionally, on its face, the title policy states that it required "14. Receipt of an Amended Resolution concerning vacation of Fountain Lane specifically describing what is shown as Parcel 5 on Exhibit 'A' hereto." (R. at 118).

Contrary to Mississippi law, Sellers claim that their requirements to convey clear and marketable title under the Contract were met by the mere issuance of a title policy commitment prior to closing. Mississippi courts have recognized, however, that the issuance of a title policy is insufficient to satisfy the requirement of 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).

b. Nothing in the record establishes the "gore" was cured

The record does not support the Chancellor's finding that the gore 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

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

simply does not support the conclusion that the gore was cured, and thus creates a genuine issue of material fact for resolution by trial.

c. The Fountain Lane Vacation was a problem which Sellers' Title Insurer required Sellers to resolve yet there is no evidence this occurred

Another defect—the vacation of 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. This argument fails, however, on two independent bases. First, although the affidavit of Steven Carter referenced providing a copy of Resolution No. 465-94 to cure the problem which arose concerning the status of a platted street which was closed without appropriate notation in the land records, Mr. Carter's affidavit omits the critical fact of when this information was provided. (R. at 49). Even if sufficient to cure a title defect for a $5,000,000.00 property transaction, Point South submits that receipt of this resolution had not occurred until after March 4, 2005, and thus a genuine issue of material fact exists as to the time of receipt of the resolution.

Nonetheless, Resolution No. 465-94 is insufficient on its face to cure the defect arising out of the vacation of Fountain Lane. This resolution evidences a Biloxi City Council vote to vacate "an unimproved portion of the north end of Fountain Lane." (R. at 53). This description is ambiguous because it contains no legal description and provides no basis to determine what portions of Fountain Lane were "unimproved" at the time the Resolution was passed. Any reliance on this Resolution would constitute guess work at best. This ambiguity was known by Sellers because one of the requirements to coverage listed in the First American Title Commitment was "[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' own title insurer required this issue to be resolved, yet there is no evidence this occurred. The

record contains no such amended resolution because no such amended resolution has been passed by the Biloxi City Council. As such, Sellers cannot contend that an amended resolution was obtained prior to March 4, 2005. Therefore, a genuine issue of material fact exists as to whether the title defect concerning the vacation of Fountain Lane had been cured at the expiration of the initial closing date extension.

d. The new discrepancy in the acreage to be conveyed to Point South

In addition, 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). Sellers contracted to convey 9.2 acres but the property description contained in the First American Title Commitment issued on February 22, 2005 (just ten (10) days before closing) contained only 8.37 acres. (R. at 124-127). 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.

e. No evidence the outstanding judgments against Sellers had been resolved

Outstanding liens against the Gutierrez Property, resulting from litigation against Sellers, also existed prior to the March 4, 2005, closing date. (R. at 115-120). The Mississippi Supreme Court has recognized that a contract to sell and convey real estate ordinarily requires a conveyance of the fee simple title which is free and clear of all liens and encumbrances, unless

restricted by other provisions of the contract. *Jones v. Hickson*, 37 So.2d 625, 629 (Miss. 1948); *Union & Planters Bank & Trust Co. v. Corley*, 133 So. 232 (Miss. 1931). The Contract in question does not contain a restrictive provision. When the seller agrees to convey 9.2 acres of property by warranty deed, he warrants that the title conveyed is without defect, i.e., clear and marketable. "The word 'warrant' without restrictive words in a conveyance shall have the effect of embracing all five covenants known to the common law, to wit: seizin, power to sell, freedom from encumbrances, quiet enjoyment and warranty of title." MISS. CODE ANN. § 89-1-33 (2006). Because the Contract obligated the Sellers to render a warranty deed for 9.2 acres, they possessed an affirmative duty to render to Point South a fee simple title to that acreage which was clear and marketable. (R. at 5).

Further, because the Contract expressly provides a reasonable opportunity for the Sellers to cure discovered defects in title, the Sellers' failure to cure constitutes a material breach of the contract. As discussed above, numerous defects were discovered by the parties. The record, however, does not contain evidence sufficient to conclude that no genuine issue of material fact exists as to whether the Sellers cured all defects discovered during the original Contract term and the initial 30-day extension granted by mutual assent of the parties.

2. The record does not support the finding on summary judgment that all permits held by the Seller were assignable and the related governmental agencies had approved such assignment

The Chancery Court 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 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 discussing the permits in general. (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 Court could not properly make these findings at the summary judgment stage.

3. Affidavit of Michael B. McDermott is invalid

In rendering Partial Summary Judgment, the Court also relied on the "Affidavit of Michael B. McDermott" submitted by the Sellers. (R. at 128–130). 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 certain 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. (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 did 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 inappropriate to support summary judgment.

B. The Court erred in finding that an alleged default on the promissory note created an independent basis to find that Point South breached its duties under 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."[5] (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 submitted by the Sellers admits, the Contract modified the note and the note was not payable until closing. (R. at 49). 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

[5] Although Sellers filed a counterclaim in this action on April 11, 2005, neither made a claim against Point South for collection of the Promissory Note. Instead, on May 25, 2005, Sellers filed a separate action in the Circuit Court of the Second Judicial District of Harrison County, Mississippi seeking collection under the Promissory Note ("the Circuit Court action"). The Circuit Court action was dismissed without explanation on July 27, 2006.

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.[6] 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 v. Banks*, 648 So. 2d 1116, 1121 (Miss. 1994). 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). The Mississippi Supreme Court has also held that at the summary judgment stage 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).

The Chancery Court apparently found that because Point South failed to close, the Sellers were excused from performance under the Contract. Because terminating a contract is an extreme remedy, it should be granted sparingly, and is not proper absent a material breach. *UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp., Inc.*, 525 So. 2d 746, 756 (Miss. 1987). A breach is only material where there is "a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially

[6] Arguments were made by Sellers' counsel at oral argument that Gray Slay was not Sellers' agent, but the Contract clearly states in Section 20 that the broker represents the Seller as their client. (R. at 7.)

defeats [the purpose of the contract]." *Gulf South Capital Corp. v. Brown*, 183 So. 2d 802, 805 (Miss. 1966); *McCoy v. Gibson*, 863 So. 2d 978, 980 (Miss. Ct. App. 2003).

In this case, Point South was attempting to close, but was delayed as a result of the defects in the title and other issues caused by Sellers' acts or omissions. Sellers had an obligation under the Contract to correct these defects and pursuant to the Contract closing was extended until such defects were cured. Point South was not in breach of the Contract because of Sellers' delays.

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 Final Judgment entered on or about the 23rd day of June, 2006, and remand this civil action for discovery and a trial on the merits.

RESPECTFULLY SUBMITTED, this the 6th day of December, 2006.

POINT SOUTH LAND TRUST,
DEAN ROFFERS, TRUSTEE

BY: BALCH & BINGHAM, LLP

BY: _____
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CERTIFICATE OF SERVICE

I, Thomas C. Anderson, attorney for Appellant, Point South Land Trust, Dean Roffers, Trustee, certify that I have this the 6th day of December, 2006, served and filed the original and three copies, as well as a copy thereof on electronic disk in Microsoft Word format, of the 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
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This the 6th day of December, 2006.

Of Counsel