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SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MONTY C. FLETCHER AND SANDRA L. FLETCHER **APPELLANTS**

VS. **CASE NO. 2007-CA-00949**

JIMMIE L. LYLES, LEONEZE C. LYLES AND KELLY DABBS REALTY, INC. **APPELLEES**

REPLY BRIEF

COME NOW, Monty C. Fletcher and Sandra L. Fletcher, Appellants, by and through the undersigned counsel, and file this their Reply Brief in response to the Brief of Appellee Kelly Dabbs Realty, Inc. and the Brief of Appellees Jimmie L. Lyles and Leoneze C. Lyles (Deceased) and in support thereof would say and show unto this Honorable Court the following, to wit:

In this brief, the following words will mean as indicated:

"Fletcher" means Monty C. Fletcher and Sandra L. Fletcher;

"Dabbs" means Kelly Dabbs Realty, Inc.;

"Lyles" means Jimmie L. Lyles and Leoneze C. Lyles;

"Subject property" or "property" means 136 Bridge Water Drive, Madison, Mississippi;

"Simmons" means Kenny Simmons, the property owner prior to Lyles;

"Walker" means Don Walker, the home inspector for Rodriguez; and

"Rodriguez" means Dr. Alfredo Rodriguez and Mary Rodriguez, prospective buyers when Simmons owned the property.

"Advanced Engineering" means Advanced Engineering Resources, Inc.

"MREC" means Mississippi Real Estate Commission

III. REPLY

Dabbs argues that the Fletchers were satisfied with the condition of the property after the AmeriSpec report. Dabbs brief, page 3. The AmeriSpec report did note cracks in the garage floor/slab. However, it identified those cracks as "common" cracks. It is not unusual to have cracks in the surface of a garage floor/slab. Walker stated in his report: "Some conditions were observed that would suggest the entire home has leaned or settled to the rear... This all appears to indicate that the entire home has compressed the fill material brought in to level the lot... This movement may be all that is going to take place but this cannot be predicted with certainty [a]s the conditions that would effect this are in and under the fill material." (Rec., page 0191) Based on Walker's report, Rodriguez hired a structural engineering company to inspect the property. (Rec., page 0304) The law and the Contract required Lyles to disclose and produce the Walker report. *Miss. Code Ann. § 89-1-501(1)* (1972, as amended) (Rec., page 0015) Lyles did not. The rules of the Mississippi Real Estate Commission required Dabbs to "keep on file for three years following its consummation complete records relating to any real estate transaction." *Mississippi Real Estate Commission Rules & Regulations IV. B. 6.* (Now IV. B. 7.) Dabbs should have retained Walker's report, the Advanced Engineering report and the cancelled Rodriguez contract and should have given the reports to Fletcher. Dabbs did not. There is no Mississippi case law that supports the trial court's ruling that the cause of action accrued against Dabbs when Fletcher received

their own home inspection report, as Dabbs argues.

Fletcher's home inspector was not an engineer and reported less about the condition of the foundation than Walker did. The trial court held that the controlling date for the accrual of Fletcher's claims was either the date of the execution of the contract, September 16, 2000, or the date of the independent home inspection report. The trial court erred. Dabbs did not have documents in its files from the Rodriguez contract as evidenced by the fact that Dabbs did not provide those documents to the Fletchers before they purchased the subject property. The closing date is the applicable date to begin the running of the statute of limitations, because before that date the Fletcher's had no cause of action against Dabbs or Lyles. Dabbs had a duty to obtain and maintain the contract and both the Walker report and the Advanced Engineering report. Dabbs states that Mississippi case law supports the trial court's ruling that the Fletcher's receipt of a home inspection gave rise to cause of action against Dabbs. (Dabbs Brief, page 7) There is no Mississippi case law to support that statement or the lower court's ruling.

Dabbs claims that Fletcher's "Motion to Amend Complaint and/or the trial court's denial of same are neither timely nor properly before this Court." (Dabbs Brief, page 7) This Court has ruled that a notice of appeal was sufficient to appeal a prior order even though the prior order was not named. *Hamm v. Hall*, 693 So.2d 906, 912 (Miss. 1997). The Court will note that an interlocutory appeal was filed and denied in the instant case after the Motion To Amend was denied in the court below. Dabbs' argument of futility is based on its statute of limitation defense. Fletcher should be allowed to amend.

Dabbs states that the following assertions made in Fletchers' principal brief "are simply not true." Fletcher "did not know of the report from Advanced Engineering until January 3, 2006" and

"this disclosure was possible only after the deposition of Mary Rodriguez." And "Walkers' identity was not known with certainty until after Simmons was deposed." Dabbs Brief, Page 9. Dabbs failed to submit any evidence to disprove these facts. The Fletcher's principal brief and the record document the truth of these statements

Dabbs claims that the Fletchers' cause of action accrued on the date of the Dual Agency Confirmation, the Contract or the Seller's Disclosure Statement. Dabbs Brief, page 10. Dabbs made no representations as to the condition of the property in those documents. Those documents could not give rise to a cause of action against Dabbs until the Fletchers purchased the subject property. Neither the Seller's Disclosure Statement nor the Contract to purchase gave rise to a cause of action against Lyles or Dabbs until the Fletchers purchased the subject property. The Dual Agency Confirmation was part of the Contract by law and disclosed the fact that Dabbs represented both Lyles and Fletcher. Dabbs was not a party to the contract between Lyles and Fletcher. The cause of action against Lyles could not arise until the sale because it was not discovered that misrepresentations had been made until after the purchase by the Fletchers of the subject property.

Dabbs claims that Fletcher is incorrect in their application of the cited case law. Dabbs brief, page 11. Specifically, *Citifinancial Mortg. Co. Inc. v. Washington*, 2005-IA-00311-SCT (Miss. 2007) 967 So. 2d 16, 19. Dabbs should note that the case does support Fletchers' argument. On page 19 of the opinion, the Court held that "In a contractual claim, a cause of action accrues on the date of actual injury, the date the facts occurred which enable the Plaintiffs to bring a cause of action." *Oaks v. Sellers*, 953 So.2d 1077, ¶¶ 10-11 (Miss.2007) The date the cause of action accrued in the Citifinancial case was the date the money was borrowed and the loan contract was signed by the borrowers. Dabbs cited other cases involving loan contracts. Borrowers signing loan documents is the equivalent of the Fletchers buying the property.

Dabbs also cites an Ohio case, *Arbor Village Condominium Association v. Arbor Village, Ltd.*, 642 N.E.2d 1124 (Ohio Ct. App. 1996) to support its argument that the Fletchers' cause of action accrued when the representation or disclosure was made. The Ohio court ruled that in the instance of a case governed by statute, the cause of action accrues when the violation of the statute occurs. *Id.* P. 1129. This is clearly not the law in Mississippi. See cases cited in Fletchers' principal brief.

Prior to the closing, the only cause of action that could have been had by the Fletchers was one of breach of contract. If Lyles had breached the contract by failing to perform any of their obligations thereunder, Fletcher would be able to recover any damages they suffered due to that breach.

Dabbs argues that Fletcher has failed to offer any admissible evidence that Dabbs ever actually received or had possession of either Walker's report or Advanced Engineering's report. Rodriguez deposition testimony was that the report was given to the real estate agent. Joan Thomas was an agent of Dabbs and the knowledge of Thomas is imputed to Dabbs as the responsible broker. Joan Thomas' picture was identified by Simmons in his deposition. (Rec., page 0310) Thomas was an agent of Dabbs and Dabbs was the agent for Simmons and therefore would have received a copy of the report in order to relinquish the Rodriguez earnest money.

Custom and practice in the real estate industry dictate that for a buyer to cancel a contract for an unsatisfactory inspection report, the buyer must produce the report to the agent and seller. That holds true in this case. At the time of the Fletchers' contract, Dabbs was using a copyrighted contract form with a license from the copyright owner K. F. Boackle. This version of the form was last updated prior to the Fletcher contract in 1994. (Rec., page 0015). The last two lines of paragraph 13 read as follows: "If inspection report(s) is (are) not acceptable to Buyer, Buyer may

terminate this transaction by written notice delivered to Seller or Seller's agent, together with copies of all inspection reports within 72 hours of Buyer's receipt of said report." It is then highly unlikely that Dabbs would have used a different form 14 months earlier when Dabbs had the property listed for Simmons and Rodriguez entered into a contract with Simmons.

Dabbs argues that he never received the Walker report. Dabbs brief, page 14. That is an admission that Dabbs breached the Rules of the Mississippi Real Estate Commission. Dabbs was required by law and contract to have the Rodriguez cancelled contract and report(s) upon which the Rodriguez relied to cancel the contract. If these had been produced to the Fletchers, they would not have purchased the subject property. "Complete records relating to a real estate transaction" surely means for the Broker to keep a copy of an inspection report which was the basis of the cancellation of a previous contract on the same property."

Dabbs cites *Lane v. Oustalet,,* 873 So.2d 926 (Miss. 2004). *Lane* can be distinguished from this case by the fact that the reports in the instant case that were not disclosed dealt with a previous contract on the subject property that was cancelled because of two (2) unsatisfactory inspection reports. Those reports and that cancelled contract were not maintained by Dabbs as required by the MREC Rules.

Dabbs states the duty of good faith does not cover the negotiation of terms leading to the agreement. Dabbs brief, page 15. This does not apply to Dabbs. Dabbs owed certain duties to the Fletchers as their agent. There was no negotiation of terms with Dabbs. Dabbs was not a party to the contract between Lyles and Fletcher. The Fletchers' claims against Dabbs are not based upon, nor do they arise out of the Seller's Disclosure Statement or the Contract. The cause of action against Dabbs arose when the Fletchers purchased the subject property. What claims could the Fletchers make against Dabbs from the Seller's Disclosure Statement or the Contract if the

transaction did not close? Fletcher does not argue that Dabbs made false representations. The issue is that Dabbs did not disclose what Dabbs was duty bound to maintain and disclose. Dabbs also did not fulfill his fiduciary duties. This will be proven at trial.

The claims against Lyles arose from the Sellers Disclosure Statement and the failure of Lyles to disclose the true condition of the property.

Dabbs argues that AmeriSpec thoroughly inspected the property for over two (2) hours. The average or normal time for a home inspection is about two hours, sometimes longer. The AmeriSpec report indicated that the exposed foundation was serviceable and concrete slab. It stated further "that the garage floor/slab was serviceable and concrete,: with "common cracks noted." "Common cracks" would not alert anyone to foundation problems and obviously did not in this case. Most home owners in the Metropolitan Jackson area have observed cracks in their garage that have nothing to do with foundation problems. Some local residences experience slight settlement that causes door frames to move just enough to prevent the door from closing evenly. That slight misalignment is not always indicative of foundation problems observed by the engineer in this case.

The case involves these issues: 1. Dabbs failed to maintain the reports and the cancelled Rodriguez contract as required by MREC rules. 2. Lyles failed to disclose and/or produce the report that he was given by Simmons and negligently represented the true condition of the property on the Seller's Disclosure Statement. 3. The fact that two negative reports were not disclosed by Dabbs or Lyles is negligence on their parts. 4. The fact that there were two negative reports that were not disclosed was material and significant, and relied upon by the Fletchers. 5. The Fletchers were damaged. Dabbs argues that Plaintiffs failed to meet the evidentiary burden for a claim of fraudulent representation. This case has yet to go to trial and the Fletchers have already proven that Dabbs failed to meet his obligation under the MREC rules.

Dabbs argues that the term "transaction" is a noun identifying " a) a business deal, b) a record of the proceedings of a society, etc..." Dabbs brief, pages 21-22. This is exactly what the Real Estate Commission intended when Rule IV(b)(7) was written. The MREC wanted and required every broker to maintain a complete record of a real estate transaction. A real estate transaction could be consummated with a listing that expired without the property selling. Thus "listings" is included in the Rule. A real estate transaction could be consummated by an option not exercised. Thus "options" is included. A real estate transaction could be consummated by an offer that is not accepted. Thus "offers to purchase" is included. A real estate transaction could be consummated by a contract of sale which may or may not be terminated with a closing. Thus "contracts of sale" is included. A real estate transaction could be consummated by escrow deposits being returned from a contract that did not close (as in the case of Rodriguez) or it could mean earnest money that was credited to the broker at closing as a part of the broker's commission (as in the case of Fletcher). Thus "escrow records" is included. A real estate transaction could be consummated by a closing and transfer of title. Thus "closing statements" is included in the Rule. The Mississippi Real Estate Commission even added the words "Includes, but is not limited to" prior to the list of items noted above. If Dabbs' argument that every Mississippi broker is only required to maintain records pertaining to closed transactions is correct, MREC Rule IV(b)(7) would have been worded much differently. Does it serve the public interest more to require all brokers to maintain complete records of every real estate transaction in which they are involved? When the entire Rule IV (b)(7) is read, it is clear that the word consummation in this context does not only mean "closed by transfer of title."

Dabbs also makes a statement concerning "big, bad business." Dabbs brief, page 22. Fletcher is not talking about "big, bad business." They are talking about bad brokerage practices

contrary to MREC rules. Dabbs' argument that a home inspection report which was used to cancel a contract is not a document required to be kept under the MREC Rules is simply incorrect. The Rules require Dabbs to maintain these inspection reports if they were the basis for Dabbs returning the Rodriguez earnest money.

Dabbs argues that if it had a duty to retain documents for the incomplete Rodriguez contract, a home inspection report is not the type of document required to be maintained. Dabbs brief, page 24. Dabbs states that if "the Mississippi Real Estate Commission felt documents from incomplete dealings should be kept, it would have so specified. It did not." The argument fails. First, the MREC did not require documents from "incomplete" dealings. The MREC included the words "following its consummation" so everyone would understand that once a transaction was consummated or completed every broker is required to maintain complete records. Dabbs uses the word "incomplete." The definition of incomplete is 1. Lacking a part or parts; not whole; not full 2. Unfinished; not concluded ...." *Webster's New World Dictionary, Second College Ed.*, page 711. Therefore incomplete records are not required to be kept. This could explain the difficulty Dabbs had understanding the meaning of the word "consummation." Simple logic says the reason Rodriguez was able to secure a return of the earnest money would be the existence of negative or unsatisfactory inspection reports. The transaction was consummated when the contract was cancelled and the earnest money returned. Obviously, negative inspection reports would be of interest to all future prospective buyers of that property.

The argument that a home inspection report cannot be used by anyone except the person paying for the report is an issue which needs to be visited by the legislature and/or this Court. That issue concerns privity of contract between a home inspector and a person that hires him/her. In almost every case where an inspection report is used to secure the cancellation of a contract, the

contract requires the buyer to provide a complete copy of the report to the seller and/or their agent as a condition precedent to having their earnest money returned. This report covers the condition of the property and gives the seller notice of certain deficiencies in the condition of the property. This is the very reason most contract forms require the presentation of the report to the seller as a condition for the return of earnest money. This is probably the reason the Mississippi Real Estate Commission included the words "...but is not limited to..." in *Rule IV. B. 6.* (Now *IV. B. 7.*). *Miss. Code Ann. § 11-7-20* and *Century 21 Deep South Properties, Ltd. v Corson,* 612 So.2d 359 (Miss. 1992) abolished privity in certain types of cases. It would be this Court's prerogative to expand the applicability of that statute and that case to this situation.

Dabbs argues that even if Fletcher received the Walker report, it would not have mattered because Mr. Fletcher testified that he would have bought the property because his wife liked it so much. Most wives select homes for the family and most husbands buy homes that their wives like. If Mrs. Fletcher had knowledge of the foundation problems the house suffered, she would not have purchased the property. See Mrs Fletcher's Affidavit, which was Exhibit "A" to Fletcher's Response to Dabbs' Motion For Summary Judgment. Rec., page 0297.

Dabbs and Lyles each had other attorneys at the beginning of this case and their first respective attorneys did not file a motion to dismiss. If a statute of limitations was a viable and valid defense, why did the first experienced attorneys not file such a motion. No factual dispute would have saved the Fletchers' case more than three years after their cause of action had accrued. Counting the undersigned , three attorneys felt that the Complaint was filed within the time allowed by statute.

Instead of having the burden of proving that they did not discover the misrepresented facts of the Lyles until several days after the closing, the Fletchers simply filed their suit within three years

after the closing. The Fletchers had no cause of action prior to closing.

While a party to contract that does not close (result in a transfer of title) must file a breach of contract suit within three years of the date of contract, a party to a contract that does close has three years from the date that a misrepresentation is discovered. *Miss. Code Ann. § 15-1-49* (1972, as amended) Let us assume *arguendo* that a contract is signed on September 16, 2008 with a scheduled closing date of October 1, 2011. The transaction is closed and transfer of title occurs on October 1, 2011. If this Court accepts the argument of Dabbs and Lyles and affirms the lower court ruling, in this hypothetical the period within which to file suit has ended before the transfer of title. Could this be what the legislature intended in real estate transactions?

The main element in regard to the statue of limitations is the interpretation of " after the cause of such action accrued." The cause of action accrued in this case no earlier than the date of closing.

Lyles argues that the Fletchers have admitted that their breach of contract claim accrued on the date the contract was executed. Lyles brief, page 7. If this case involved a simple breach of a contract that did not close, a breach of contract would be the only claim the Fletchers could make. When the facts concerning the foundation problems, the termite damage and the garage flooding, as misrepresented in the Contract and the Seller's Disclosure Statement, are factored in, the claims against Lyles are multiplied. Lyles argues that "Despite the clarity of this reasoning the Fletcher Parties boldly assert that they did not have a cause of action against Lyles until the closing of the subject transaction which occurred on October 30, 2000." Lyles brief, page 7. How are the Fletchers damaged by Lyles' false representations and Dabbs' failure to adhere to MREC rules if Fletcher did not purchase the subject property? Fletcher suffered no damages until closing. *Miss. Code Ann. § 89-1-523* (1972, as amended).

Lyles states that " The ONLY alleged false representation that Lyles made to the Fletcher Parties upon which they relied to induce them to purchase the Bridge Water Drive Property was the express contractual representation (contained in paragraph 13 of the contract) that Lyles had no actual knowledge of any defects in the condition of the property." Lyles brief, page 8. Lyles overlooks and fails to mention the misrepresentations Lyles made on the Seller's Disclosure Statement. (Rec., pages 0016-0017) Paragraph 13 of the Contract (Rec., page 0015) required Lyles to provide a completed Seller's Disclosure Statement to Fletcher.

Lyles argues that Fletcher had to have knowledge of their alleged injury at the time they filed their complaint because of the requirements of *Miss. R. Civ. P. 11.* Lyles brief, page 11. Fletchers' counsel signing the Complaint constitutes a certificate that he read the Complaint and that to the best of his knowledge, information and belief there was good ground to support it. At that time the Walker report had not been secured, the identity of Rodriguez was unknown, and the identity of Advanced Engineering Resources, Inc. was unknown. After the Complaint was filed, the discovery procedures provided in the Rules allowed the Fletchers to discover that information. This is the purpose of discovery in litigation. This case is a perfect example of the effectiveness of the discovery process.

The home inspection secured by the Fletchers did not disclose "visible foundation defects" as alluded to by Lyles. Lyles Brief, page 11. The inspection report did not indicate that the floor sloped. The inspection report referred to the cracks in the garage floor as "common." A visible defect to an engineer may not necessarily be visible to a person without engineering training and experience, even some home inspectors.

IV. CONCLUSION

The trial court's rulings on each of these three motions should be reversed. Dabbs and Lyles'

motions for summary judgment should have been denied because the three year limitations period in this matter did not begin to run until the latter of either the date of closing or the date the misrepresentations were discovered. There are genuine issues of material fact to be tried in regard to each of these defendants. Fletcher's Motion to Amend should have been granted because the matters discovered in January, 2006 support the need for and the right of Fletcher to file an Amended Complaint. Therefore, the Fletchers respectfully request that this Court reverse and set aside the Judgment of the trial court granting Dabbs' and Lyles' Motions for Summary Judgment and the Order denying the Motion To Amend, allow the Fletchers to file an Amended Complaint and order that the case move forward as provided by the Rules of Civil Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, K. F. Boackle, do hereby certify that I have, this day served, by U.S. Mail, first class postage prepaid, a true and correct copy of the above and forgoing REPLY BRIEF to:

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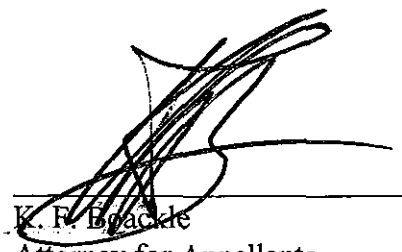
This the 7th day of May, 2008.



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