IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2007-CA-01737

FLOYD MARSHALL
Appellant

vs.

CAROLYN LINDSLY
Appellee

APPEAL
From the Chancery Court of the First Judicial District
of Hinds County, Mississippi

BRIEF OF THE APPELLEE

ATTORNEY FOR THE APPELLEE:

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FLOYD MARSHALL **APPELLANT**

VS. **CAUSE NO. 2007-CA-01737**

CAROLYN LINDSLY **APPELLEE**

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. Carolyn L. Lindsly
   280 Crescent Lake Drive
   Madison, MS 39110

2. Floyd Marshall d/b/a Mississippi Hardware
   558 West Northside Drive
   Jackson, MS 39212

3. Sorie S. Tarawally, Esq.
   Catledge Tarawally & Associates
   201 West Capitol Street
   P.O. Box 31027
   Jackson, MS 39286-1027

4. Honorable Chancellor Denise Owens
   Hinds County Chancery Court
   Post Office Box 686
   Jackson, Mississippi 39205-0686

SO CERTIFIED, this the 7th day of July, 2008.

DEREK L. HALL (MSB[redacted]

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STATEMENT OF THE CASE

On September 7, 2004, Carolyn Lindsly and Floyd Marshall entered into a Lease Agreement for a hardware store located at 558 West Northside Drive, Jackson, Mississippi, being Tax Parcel # 427-4. (Exhibit 1). Contained in Section 27 of the "Lease Agreement" was an "Option to Purchase." (Id.) The relevant portion of the "Option to Purchase" contained a provision that "[s]hould tenant elect to purchase the property by January 31, 2005, Landlord will apply first quarterly lease payment of Five Thousand Two Hundred Fifty ($5,250.00) to purchase price of the property." (Id.). The remainder of the terms were that Seller would, with acceptable down payment, finance one hundred thousand ($100,000.00) dollars at six percent (6%) amortized over fifteen years with a balloon payment coming due at the end of five years. (Id.). The Lease Agreement also stated, among other things, that Mr. Marshall would be responsible for payment of all property taxes, of which he has paid none. (Id.).

On January 10, 2005, Floyd Marshall sent a letter to Joe Dove of Cook Commercial Properties, who was acting as the real estate agent and property manager for the Property. (Exhibit 3). In his letter, Mr. Marshall notified Mr. Dove of his intent to purchase the property. He also stated that he was sending the "lease amount" for January with a request to determine the "best way to handle any other payments until the sale completion." (Id.) He also stated in his letter that he would be out of town mid and later February and requested that the paperwork be drafted and signed during the first week of February. (Id.). The letter was not even sent until January 22, 2005 and was not even received in the office of Joe Dove until January 27, 2005. (Id.).

During the first week of February 2005, Joe Dove drafted a "Commercial Property Contract" (Exhibit 22). Mr. Dove attempted numerous times to get Mr. Marshall into his office

to sign the Contract. Finally, on February 16, 2005, Mr. Marshall executed the Contract. On February 18, 2005, Ms. Lindsly also executed the Contract. The Contract provided for a down payment in the amount of twenty five thousand ($25,000.00) dollars with the phrase "Seller to finance $100,000.00 according to the terms of Lease with Option to Purchase Agreement." (Exhibit 22). The Contract also stated inter alia, that this "Contract incorporates all other agreements between the parties and is the final agreement between the parties..." (Id.). Nothing in the contract stated that Mr. Marshall would be given any credit or set off for earlier rental payments. The Contract merely incorporated the terms of owner financing of One Hundred Thousand ($100,000.00) dollars at six (6%) percent interest amortized over Fifteen (15) years with a five year balloon, with a down payment of Twenty Five Thousand ($25,000.00) dollars.

It is undisputed that Mr. Marshall is a "contractor" who regularly buys and sells property for his business. It is undisputed that Mr. Marshall is sophisticated in Contract negotiation and has negotiated numerous contracts throughout his career. Mr. Marshall was under no duress to sign the agreement and was advised to seek counsel of his choice to review the terms of the Contract. Mr. Marshall did not avail himself of the opportunity to obtain representation.

Joe Dove contacted Don McLemore, a real estate closing attorney, to conduct a title review and close the transaction. He followed this up with a letter and copy of documentation on March 2, 2005. (Exhibit 24). Mr. McLemore set about to obtain all necessary closing materials. Mr. McLemore, during his research, found a "missed call" on the deed and set about to order a survey in order to correct the call. Mr. McLemore drafted all of the necessary documentation and prepared a "Settlement Statement" outlining all of the expenses and disbursements involved in the transaction, as required under Federal and State law. Once corrected, Mr. McLemore set a closing date and time for April 15, 2005 at 2:00 p.m.

Mr. Marshall informed Joe Dove and Mr. McLemore that he would take title to the Property in the name of "Phoenix II Enterprises, LLC." However, Mr. Marshall never created that company, nor did he register the company with the Mississippi Secretary of State's Office, as required under Mississippi law. Therefore, Mr. McLemore prepared all of the closing instruments, as well as the deed in Mr. Marshall's name individually. On Thursday, April 14, 2005 at 9:23 a.m., Mr. Marshall was sent a notice of a closing date and closing time, as indicated earlier. Mr. Marshall failed to contact anyone regarding objections to closing or his inability to attend closing. Ms. Lindsly attended the closing and executed all necessary documentation in order to close the transaction. Finally, Mr. Marshall, at 3:33 p.m. on Friday, April 15, 2005, sent an e-mail to Mr. McLemore informing him that he would not attend the closing. (Exhibit 8). In his communication he requested a copy of the closing statement and a new closing date. Mr. Marshall never agreed to a new closing date. To the present, Mr. Marshall has not agreed on a new closing date.

On April 19, 2005 at 9:44 a.m., Mr. McLemore sent Mr. Marshall another e-mail stating that Mr. Marshall had failed to provide purchase money funds, necessary to close the transaction, nor did Mr. Marshall indicate when he would close. (Exhibit 9). On April 19, 2005 at 8:08 p.m., Mr. Marshall sent to Mr. McClemore an e-mail indicating that the amount from borrower should be $9,875.00. (Exhibit 23). The communication also referenced the Lease Agreement, but contained no additional explanation as to how or why his figure was different. Mr. Marshall never called Mr. McLemore to obtain an explanation and never followed through and diligently pursued the closing.

However, Mr. Marshall did e-mail Joe Dove a note requesting a meeting on April 28, 2005, two weeks after the scheduled closing. (Exhibit 11). Mr. Dove responded with two dates

to meet. At some point, Mr. Marshall and Mr. Dove met and Mr. Marshall continued to disagree with the amount due at closing. Mr. Marshall then sent a correspondence to Joe Dove sometime between May 10, 2005 and May 19, 2005. At all times, Mr. Marshall maintained that he would not pay the amount due at closing, as outlined in the Closing Statement (Exhibit 19). Mr. Marshall refused to accept the reliability of the Closing Statement and refused to close the transaction, except under his terms, which were not accurate. In his May correspondence, Mr. Marshall maintained that he would close the transaction on June 15, 2005, but that he would only pay $8,125.00 at closing, which was substantially less than the amounts that would have been due under the closing which was to have taken place in April, 2005. Mr. Marshall currently maintains that he should be given credit for all monies he has paid to Ms. Marshall, despite the fact that no document produced and no writing produced indicates he is entitled to full credit for all payments he made.

It is undisputed that Mr. Marshall has continually occupied the building from October 2005 to present. It is undisputed that he has failed to pay the full amount of Five Thousand Two Hundred Fifty ($5,250.00) at the beginning of each quarter, as outlined in the Lease Agreement. Mr. Dove and Ms. Lindsly have repeatedly been forced to take legal measures to force Mr. Marshall to come current on his payments. Mr. Marshall has not paid any lease payment to Ms. Lindsly since August 2006. Mr. Marshall has never paid any of the taxes due, despite the duty to do so. Ms. Lindsly has maintained the taxes on the building. Mr. Marshall has never provided Ms. Lindsly with proof of insurance, which forced Ms. Marshall to expend additional money to protect her interest in the property. Ms. Lindsly began eviction proceedings against Mr. Marshall in January 2007. After the Notice to Vacate letter went out in January 22, 2007, Mr. Marshall instituted this suit.

After a trial on the merits, the Chancery Court of the First Judicial District of Hinds County, Mississippi rendered its Final Judgment and Opinion of the Court which ordered as follows:

> The Court hereby orders that the closing of the subject should be done **no later than September 20, 2007.** The purchase price of the property is $125,000.00. Marshall is responsible for paying the attorney's fees in the amount of $611.00, pro rated taxes in the amount of $1,002.00, county taxes in the amount of $532.35 and interest in the amount of $246.58; therefore, the gross amount due from Marshall would be **$127,391.93.** Marshall has previously been given a credit of $8,125.00 (which includes the $5,250.00, credit earnest money credit of $2,000.00, and an additional credit of $875.00). Lindsly has agreed to finance $100,000.00 of the purchase transaction. The gross amount due from Marshall is **$127,391.93**, the amount to be paid by Marshall is **$119,266.93** and the total amount to be paid by Marshall at closing is **$19,266.93**. Marshall is also required to submit proof of insurance on the property at closing. Marshall and Lindsly are hereby ordered to exercise all due diligence in closing on the subject property **on or before September 20, 2007.**
>
> The Court further orders that if Marshall fails to bring **$19,266.93** to the closing, the Commercial Property Contract will be void. Marshall will be required to pay the amount of **$5,250.00** (quarterly lease payment) for failure to pay rent from August 2006 through January 2007 and **$1,750.00** for the remaining two months, for a total of **$8,750.00**. If Marshall fails to close on the property, Marshall shall vacate the premises by **September 30, 2007.** If Marshall does not vacate the premises, this Court will enter an Order to Vacate the Premises. The Court further finds that Marshall's failure to comply with this Court's orders shall be considered as being in default of his contractual duties under the Lease Agreement and the Commercial Property Contract, and Marshall will be responsible for paying Lindsly's attorney's fees, court costs and other expenses in the amount of **$7,988.89.** (R. 236-237)

SUMMARY OF THE ARGUMENT

The contract entered into between the parties is clear and unambiguous. Pursuant to the terms of this contract, the Contract price was for One Hundred Twenty Five Thousand ($125,000.00) dollars. Mr. Marshall was to pay Twenty Five Thousand ($25,000.00) dollars as a down payment. Ms. Lindsly would owner finance One Hundred Thousand ($100,000.00) dollars at six percent (6%) interest amortized over fifteen years with a five year balloon payment. The Chancellor correctly determined that Mr. Marshall was entitled to a credit of $8,125.00 "(which includes the $5,250.00, credit earnest money credit of $2,000.00, and an additional credit of $875.00)." (R. 236). The Chancellor also correctly ordered that "the gross amount due from Marshall is **$127,391.39**, the amount to be paid by Marshall is **$119,266.93** and the total amount to be paid by Marshall at closing is **$19,266.93**.

Pursuant to the very terms of this contract, Ms. Lindsly was, and is, entitled to attorney's fees, as ordered by the Chancellor.

ARGUMENT:

I. The Contract Entered into Between the Parties Is Clear and Unambiguous.

When examining a contract, a court should first examine the four corners of the contract to determine how to interpret it. *McKee v. McKee,* 568 So.2d 262, 266 (Miss.1990). If the language in the contract is clear and unambiguous the intent of the contract must be effectuated. *Pfisterer v. Noble,* 320 So.2d 383, 384 (Miss.1975) *See also Pursue Energy Corp. v. Perkins,* 558 So.2d 349, 352 (Miss.1990). Only when the intent of the parties is not clear the Court should then resort to extrinsic evidence. *Perkins,* 558 So.2d. at 353. " In construing a written instrument, the task of the courts is to ascertain the intent of the parties from the four corners of the instrument. Courts look at the instrument under consideration as a whole and determine what the parties intended by giving a fair consideration to the entire instrument and all words used in it. When a written instrument is clear, definite, explicit, harmonious in all its provisions, and is free from ambiguity, a court in construing it will look solely to the language used in the instrument itself. In such a case a court will give effect to all parts of the instrument as written." *Pfisterer v. Noble*, 320 So.2d 383, 384 (Miss.1975) (citations omitted). It is well settled that extrinsic evidence is not admissible to create an ambiguity in a written agreement which is complete and clear on its face. See *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416, 419 (Miss. 1987).

Mr. Marshall and Ms. Lindsly entered into the Commercial Property Contract on February 18, 2005. The contract was clear and unambiguous. The Contract price was for One Hundred Twenty Five Thousand ($125,000.00) dollars. Mr. Marshall was to pay Twenty Five Thousand ($25,000.00) dollars as a down payment. Ms. Lindsly would owner finance One Hundred Thousand ($100,000.00) dollars at six percent (6%) interest amortized over fifteen

years with a five year balloon payment. Ms. Lindsly appeared at closing and performed her obligations under the contract. She provided clear and marketable title, signed the deed, signed the closing statement and performed her obligations. The Closing statement allocated costs and expenses correctly. Mr. Marshall disagreed and refused to close the transaction. Mrs. Lindsly had performed all of her executory obligations under the contract and availed herself of the remedy of placing Mr. Marshall under default. If a non-performing party fails to perform after removal of an impossibility, a ready and able party may seek such legal remedy as may appear appropriate in the particular case. *See In Re: Estate of Picket*, 879 So. 2nd 467, 471 (Miss. App. 2004).

Mr. Marshall's only real disagreement was with the "figures" in the settlement statement. Mr. Marshall refused to accept that his "numbers" were wrong. A closer look at the Settlement Statement (Exhibit 19) demonstrates clearly that Mr. Marshall was wrong. The Contracted sales price of $125,000.00 dollars correctly reflects the amount in the contract. Under the Contract, Mr. Marshall should have brought $25,000.00 to closing. Line 103 correctly states the amount of settlement charges to the borrower at $611.00 (This amount is detailed on the second page of the Settlement Statement). Line 109 prorates the taxes under the contract and actually gives Mr. Marshall credit for taxes, even though he had not paid them, so this favored Mr. Marshall. In line 201 Mr. Marshall was given credit for his $2,000.00 earnest money deposit. Line 202 correctly reflects the Principal amount of the dollars financed by Ms. Lindsly. In line 206, Mr. Marshall was given credit for his security deposit of $875.00. Line 207 reflects a credit for six thousand one hundred and twenty five ($6,125.00) dollars. The line states credit for one half rent. This amount was acceptable to Ms. Lindsly, but not required under the contract dated February 18, 2005. In line 208, he was credited back "unearned rent" for the remainder of April,

even though he had not paid rent for February, March or April. In line 211, county taxes were prorated to each party according to the terms of the Commercial Property Contract.

Line 220 takes into account all monies paid for by borrower, included in that amount is the $100,000.00 loan amount, which properly reflects that amount of the transaction. The additional taxes are added back to Mr. Marshall's total and the closing costs. The total amount paid by borrow is $110,000.00 dollars. Line 301 reflects the gross amount due from borrower at $126,859.58. Line 302 allocates the credits due from borrower's funds, leaving the amount of $16,452.23 due from borrower at closing. These figures were accurate as of April 15, 2005. Assuming that Mr. Marshall legitimately could not attend the closing on April 15, 2005, there was no reason to believe that Mr. Marshall should not have attended a closing of the transaction on April 18 or 19 at the latest. Mr. Marshall refused to do so. Accordingly, Ms. Lindsly asserted her rights under the contract and accepted the earnest money as liquidated damages for Mr. Marshall's default. Mr. Marshall never objected, but continued to insist on "closing the transaction" but only under his terms. Mr. Marshall cannot utilize the delay caused by himself to gain an advantage over Ms. Lindsly. "In Mississippi, equity will prevent an intolerable injustice such as where a party has gained an unconscionable advantage by mistake and the mistaken party is not grossly negligent...." *Rotenberry v. Hooker*, 864 So. 2d 266, 271 (Miss. 2003). Accordingly, Mr. Marshall's delay entitled Ms. Lindsly to declare him in breach of contract, accept the $2,000.00 earnest money as liquidated damages for Mr. Marshall's breach of contract and maintain her rights under the Lease Agreement.

Mr. Marshall was required to pay all property taxes and utilities, including telephone and security system service and maintenance. Mr. Marshall has failed and/or refused to pay any portion of the property taxes since the beginning of the lease. As of the date of the trial, Mr.

Marshall had failed and/or refused to pay Four Thousand One Hundred Seventy-Seven Dollars and Fifty-Eight Cents ($4,177.58) for the property taxes on the property since the beginning of the lease and Ms. Lindsly had to pay these costs herself.

Pursuant to the Lease Agreement, Mr. Marshall was required to provide proof of a comprehensive policy of insurance naming Carolyn Lindsly as an additional insured. Mr. Marshall has NEVER provided this proof to Ms. Lindsly.

Pursuant to the Lease Agreement, Mr. Marshall was required to pay at the beginning of each quarter the sum of five thousand two hundred and fifty ($5,250.00) dollars.

The 4th calendar quarter installment for 2006 of Five Thousand Two Hundred Fifty Dollars ($5,250.00) was due any payable on October 1, 2006. Mr. Marshall did not submit any rent for the 4th calendar quarter until December 26, 2006, at which time the Defendant only paid the sum of $3,250.00. Mr. Marshall has NEVER submitted any further payments to Ms. Lindsly since that time and has been occupying Ms. Lindsly's building rent-free since before December of 2006.

II. Mr. Marshall is Not Entitled to Credit Toward the Purchase Price for All Rent Payments Made.

Mr. Marshall has asserted throughout that he should be credited for "all payments" he made. This assertion is wholly without merit. Nowhere in the Commercial Property Contract or the Lease Agreement can such language be found. The most basic principle of contract law is that contracts must be interpreted by objective, not subjective standard. A court must effect a determination of the language used, not the ascertainment of some possible but unexpressed intent of the parties. *Simmons v. Bank*, 593 So.2d 40, 42-43 (Miss.1992) (quoting *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416, 419 (Miss.1987)). The Simmons Court also restated that "mere disagreement about the meaning of a contract clause does not make it ambiguous as a

matter of law." Id. at 43. Mr. Marshall pointed out in his testimony and in his writings that Section 27 of the Lease Agreement gave him the right to expect that "all of his payments would be credited." This assertion is clearly wrong. Section 27 (b) of the Lease Agreement reads, as follows:

> "(b) Should Tenant elect to purchase the property by January 31, 2005, Landlord will apply first quarterly lease payment of Five Thousand Two Hundred Fifty & No/100 ($5,250.00) to purchase price of the property. Should Tenant elect to purchase the property on or after February 1, 2005 and during the term of the initial lease, Landlord will apply **one half** of all monthly **rent** payments, or Eight Hundred and Seventy Five and No/100 ($875.00) per month, to the purchase price of the property." (Emphasis added.)

The Commercial Property Contract is silent as to credit for rent payments. Mr. Marshall clearly has misinterpreted the Lease Provision. Mr. Marshall testified that he "elected to purchase the property prior to January 31, 2005." Mr. Dove stated that the language meant that he must close prior to January 31, 2005. However, giving Mr. Marshall the benefit of all contract construction, if his "election to purchase" prior to January 31, 2005 is valid, then he would be entitled to five thousand two hundred fifty ($5,250.00) dollars credit. Clearly, he was given credit for six thousand one hundred twenty five dollars ($6,125.00) in the closing documents. Additionally, he was given credit for rent that he paid in February, as well. He was not entitled to any more credit than the amounts contained in the closing statement. He refused to accept that and set about a course of a three and one half year battle.

The Chancellor correctly determined that Mr. Marshall was entitled to a credit of $8,125.00 "(which includes the $5,250.00, credit earnest money credit of $2,000.00, and an additional credit of $875.00)." (R. 236). The Chancellor also correctly ordered that "the gross amount due from Marshall is **$127,391.39**, the amount to be paid by Marshall is **$119,266.93** and the total amount to be paid by Marshall at closing is **$19,266.93**.

III. Ms. Lindsly is entitled to Attorney's Fees.

Paragraph 15 of the Lease states that if "Tenant is in default hereunder, and the Landlord employs and/or consults with an attorney to give advice or to enforce or defend the Landlord's rights or remedies hereunder, Tenant shall pay all attorney's fees, court costs and other expenses occasioned by such Default. The Court has held that "enforcing a contract 'without enforcing the clause addressing attorney fees would be contrary to the law.'" *Industrial and Mechanical Contractors of Memphis, Inc. v. Tim Mote,* 962 So.2d 632, 638 (Miss.App.,2007)(quoting *Theobald v. Nosser,* 752 So.2d 1036, 1042(¶ 24) (Miss.1999)). As such, the Chancery Court properly ordered that if Mr. Marshall failed to comply with the Court's order by failing to close the sale on the subject property no later than September 20, 2007 he would be in default of his contractual duties and would owe unto Ms. Lindsly the sum of $7,988.89 in attorney's fees. (R. 236-237). Since he failed to comply with the Court Order, these sums are due and owing.

CONCLUSION

For all of the above and foregoing reasons, Appellee requests that this Honorable Court affirm the decision of the Chancery Court of the First Judicial District of Hinds County, Mississippi.

Respectfully submitted, this the 7th day of July, 2008.

CARLOYN LINDSLY

BY: _____
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CERTIFICATE OF SERVICE

I, Derek L. Hall, do hereby certify that I have this day caused one (1) true and correct copy of the Brief for the Appellee to be forwarded, via United States Mail, postage prepaid, and addressed as indicated below to the following:

1. Sorie S. Tarawally, Esq.
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2. Honorable Chancellor Denise Owens
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   Post Office Box 686
   Jackson, Mississippi 39205-0686

This service effective this, the 7th day of July, 2008.

Derek L. Hall (MSB [redacted])