2007-CA-01737

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that Mr. Floyd Marshall, 5122 Keele Street, Jackson, Mississippi; 39206, and Hon. Sorie S. Tarawally, counsel for appellant, have an interest in the outcome of this case. This representation is made in order that the judges of this Court may evaluate for possible disqualifications and or recusal.

Sorie S. Tarawally

Sorie S. Tarawally, Esq.; MSB [redacted]

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STATEMENT OF THE CASE

Mr. Floyd Marshall, Plaintiff below and Appellant before this Court initiated an action for specific performance of a certain option contract to purchase property leased by him from the Defendant Appellee by filing an action in the Chancery Court of the First Judicial District of Hinds County, Mississippi. The court below after taking testimony and evidence ordered specific performance of the contract of sale of the property. The Court in addition to its order for specif performance ordered that the payments made by Mr. Marshall after the exercise of the option but before a delayed closing be applied as rent under the lease. Appellant feeling aggrieved by the portions of the Chancellor's order that failed to credit him for payments made after the exercise of the option towards the purchase price agreed upon in the option, files this appeal to this Court and the case is now ripe for review.

STATEMENT OF THE ISSUES

THE TRIAL COURT IS CORRECT IN DECREEING SPECIFIC PERFORMANCE.

THE TRIAL COURT ERRED WHEN IT FAILED TO CREDIT MARSHALL FOR ALL PERIODIC PAYMENTS MADE TO LANDLORD'S AGENT AFTER THE EXERCISE OF THE OPTION ON OR BEFORE JANUARY 31, 2005.

THE TRIAL COURT ERRED IN ORDERING ANY ATTORNEYS FEES FOR THE DEFENDANT APPELLEE'S LAWYERS

THE TRIAL COURT ERRED IN FAILING TO ORDER ATTORNEY'S FEES ON BEHALF OF MARSHALL.

FACTS

This case in a nutshell can be summarized thus: In September, 2004, Floyd Marshall entered into a three year lease agreement with Carolyn Lindsly on a piece of property located at 558 West Northside Drive, Jackson, Mississippi. The lease contained an option to purchase within the lease period. The option provides that if Marshall exercises the option prior to October 1, 2005, the purchase price shall be one hundred and twenty-five thousand dollars ($125,000.00). If he elects to exercise his option on or after October 1, 2005 until the expiration of the lease, his purchase price shall be one hundred and thirty-five thousand dollars ($135,000.00). The option further provided that should Marshall exercise his option before January 31, 2005, all his rental payments since the inception of the lease will be credited towards the purchase price. Should he, however, exercise his option on or after February 1, 2005, only half of his monthly rental payments shall be credited towards the purchase price. Other conditions and terms relating to purchase price and financing were provided for and outlined in the option. See Exhibit 1, page 8.and Exhibit 2. We further note that the option did state that " the closing date and closing will be within thirty (30) days of receiving purchaser's letter to purchase "

Mr. Floyd Marshall exercised his option via letter dated January 10, 2005 which letter was received by landlord's agent before January 31, 2005. Exhibit 3. The agent presented to Marshall a Commercial Property Contract on February 16th, 2005 at which date Marshall executed same and further tendered his earnest money tender in the amount of two thousand

dollars ($2000.00). See Exhibit 5.. We are told seller executed the Commercial Sales Contract on the 18th February, 2005. Another month or so was to elapsed before agent engaged closing attorney to handle the closing. TT at 65 and 77, ln. 3 to 9.. Another four or five weeks elapsed before a closing was scheduled for April 15, 2005. TT at 66. Mr. Marshall was unavailable for that day and he promptly noticed closing attorney via e-mail of his unavailability and also of the fact he has not been provided with copies of the closing documents for his review.

When the documents were provided, the discrepancy as to the amount due at closing due to the credits was noticed and the parties never could agree and no further closing was ever scheduled. TT 77, ln 10 to 28. Meanwhile, Marshall continued his occupancy of the premises and made periodic payments. The back and forth discussions was largely recorded in e-mails exchanged between Marshall and the agent for landlord, Joe Dove. This counsel at the behest of Marshall intervened and attempted to resolve the dispute and effect the closing, when this cannot be done, suit was filed to enforce the sale. See Exhibits 28, 29 and 30. The facts are more revealing as contained in the exhibits which counsel will attempt to outline below.

Ms. Lindsly and her husband had owned and operated a hardware store at 558 West Northside Drive, Jackson, Mississippi. She continued to operate the store after her husband's death. Sometime in 2005, she decided to sell the property and engaged the services of Cook Commercial Properties as her brokers for the sale of the property. Joe Dove is a commercial real estate agent at Cook Commercial Properties and he was the Cook agent personally handling the Lindsly matter. TT 136

Mr. Marshall is a contractor/property management consultant. During the course of his construction business, he occasionally shopped at the Lindsly Hardware store and had developed

a relationship with the Lindslys. Through Ms. Lindsly, he became aware of her desire to sell the property. Mr. Marshall expressed his interest to buy the property. She in turn gave him Mr. Dove's telephone number and Mr. Dove the Marshall phone number. This exchange of numbers brought Mr. Marshall and Joe Dove together which led to discussions and negotiations on the sale of the property.

In contemplation of a future sale, and on September 7th, 2004, Floyd Marshall and Carolyn Lindsly executed a Lease Agreement, hereinafter the Lease. Exhibit # 1. As testified to by Mr. Dove, Ms. Lindsly's agent, he drafted the lease by modifying and inserting appropriate language when necessary from a form lease in his form bank. Consistent with the contemplation of the parties and the negotiations and discussions that preceded the signing of the Lease, the Lease contained an Option Clause, Exhibit #2.

The Option Clause provides:

(a) This agreement provides an option for Tenant to purchase the property per the legal description attached as Exhibit "A" prior to October 1, 2005 for the sum of one hundred and twenty-five thousand and No/100 Dollars ($125,000.00), or for the sum of one hundred and thirty-five Thousand and No/100 Dollars ($135,000.00) on or after October 1, 2005 and prior to the expiration of the initial lease on September 30, 2007.

(b) Should Tenant elect to purchase the property by January 31, 2005, Landlord will apply first quarterly lease payment of Five Thousand Two Hundred and fifty & No/100 ($5250.00) 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 payments. Or eight Hundred and Seventy-five and No/100 ($875.00) per month, to the purchase price of the property.

©) With acceptable down Payment, Landlord agrees to finance $100,000 of sale price of property for five years at a rate not to exceed six percent (6%) amortized over fifteen (15) years. The remaining balance will be due at the end of five (5) years. There shall be no penalty for pre-payment of all or part of principle at any during this term.

(d) Landlord, as Seller, will agree to pay Attorney's fee for warranty Deed and

Certificate of Title. Tenant, as Buyer, will pay for Appraisal, Survey, Loan Costs and other closing costs as necessary.

(e) Tenant will notify Landlord in writing of his intention to exercise the option to purchase, Land lord will provide Purchaser with a clear title and a warranty deed of the property, property taxes will be prorated as of the closing date and closing will be within thirty (30) days of receiving purchaser's letter of intent to purchase.

On January 10, 2005, Mr. Marshall wrote a letter to Mr. Joe Dove, as a follow up on their conversation of January 5 and confirming his intent to purchase the property located a 558 West Northside Avenue, Jackson, Mississippi. Exhibit #3. In the language of his letter of intent dated January 10, 2005 and in pertinent parts, he writes: **This letter is to respond to you concerning my intent to purchase property at 558 west northside dr. Please accept this letter as my notice of intent to purchase the above mention property. We need to set up arrangements to do all the legal work and also a closing date. I am sending you January lease amount also need to determine the best way to handle any other payments until completion.** (Exhibit 3). Mr. Dove acknowledged receiving this letter. TT 100

In spite of the provision in the Option Clause that "... **closing will be within thirty (30) days of receiving purchaser's letter of intent to purchase.**", Joe Dove did not have ready any closing documents within the thirty (30) day window provided for closing. Instead, on or about February 16, 2005, Joe Dove prepared and presented a Commercial Sales Contract to Mr. Marshall and Ms. Lindsly for their signatures. Mr. Marshall signed it on the 16th; we are told at trial that Ms. Lindsly signed a few days later. This was six weeks (42 days) from the date of the letter of intent to purchase. Exhibit # 4. The closing of this transaction, according to testimony viewed most favorable to Ms. Lindsly, was not attempted until about three and half months later, a period of over one hundred (100) days from the date of his election to purchase and letter to Joe

Dove exercising his option.

Throughout this period, and even without a response to his inquiry in his letter exercising his option, viz "...**I am sending you January lease amount also need to determine the best way to handle any other payments until completion**," Mr. Marshall continued to make payments, believing that he was paying towards the purchase price. Consistent with this belief is the testimony of Mr. McClemore, the real estate attorney hired by Buyer to handle the transaction. He stated under oath and as a matter of law, Real Estate law that is, and he opined that the Sales Contract voided the Lease Agreement. TT 70, ln. 3 to 9; TT 79, ln. 21 and 22. Also consistent is the language of the Sales Contract; Paragraph numbered 16, **AGREEMENT OF PARTIES: This contract incorporates all prior agreements between the parties, contains the entire and final agreement of the parties, and cannot be changed except by their written consent.** The Lease, according to the testimony of McClemore, was as from February 16th or 18th, voided and of no effect after the signing of the Contract for Sale except the option clause which is specifically referred to and saved in number 2 of the Sales Contract: **PRICE: The purchase price of the property is $125,000 payable as follows: Seller to finance $100.000 according to terms of Lease with Option to Purchase Agreement.** Exhibit 4, section 2. The Commercial Sales Contract did not contemplate a landlord tenant relationship and as such did not provide for rent between the contracting parties.

Specific Performance, we are told in the Contract of Sales, is the essence of the contract. Exhibit # 4, 11. Mr. Marshall even with the delays not caused by him or his agents but by the Seller and her agents, still wanted the property. On April 5, 2005, he wrote a letter to Mr. Dove inquiring about "progress of us finishing our agreement." Exhibit # 6. Joe Dove at this time was

out of the country and Bill Cook responded for him to Floyd Marshall. Exhibit # 7.

On April 14th, and via e-mail from mclemore@bellsouth.net, Don McClemore informed Floyd Marshall that " *** *The closing is set for 2:00 Pm Friday the 15th. You will need to bring a certified check in the amount of $15,450.33. IT WOULD BE ADVISABLE TO BRING ANOTHER PERSONAL CHECK IN CASE THE FIGURE CHANGES... I have attached a copy of the closing statement. If you cannot open it, call me, and I will fax you a copy.*

Mr. Marshall responded via e-mail dated 2005/04/15 Fri AM 03:30:18 EDT as follows: *Thank you for your mail message concerning the Lindsly closing. However a 2:00 Friday closing is a negative. If you would please fax me a copy of the closing statement to 601-366-1151 whereby I can view the statement and together we can set a closing good for all parties. Thanks.* This response we note here was sent at 3:00 a.m. on Friday, April 15th. TT 83

At 9:20 a.m. on Friday, April 15th, 2005, Don McClemore sent via e-mail the following: *Mr. Marshall, I am faxing the revised closing statement. Note that the amount of money you need to bring to closing has been changed to $16, 452.23, due to the addition of taxes for the period of the lease [line 100]. Please coordinate with Bill Cook and me a new time for closing ASAP.* Exhibit # 8. TT 84. The court below erred grievously in its calculation of the time sequence. In it opinion, it seem to ignore the fact that Marshall not appearing for closing at 2:00 p.m. on the 15th April was already agreed upon by McClemore and Marshall through earlier e-mails exchanged by the two.

In spite of this apparent knowledge and agreement among Marshall, McClemore, and Bill Cook for Joe Dove who was out of the country, that the closing was not going to take place on the 15th, Don McClemore had Ms. Lindsly execute documents that afternoon. Much is made

during the trial that Mr. Marshall was a no show for the purported closing of the 15th. We note, emphasize and point out here that at 9:20 that morning McClemore acknowledged that the closing will not proceed and informed Marshall to coordinate a new date with him and Bill Cook. TT 84, ln. 2 to 13. We must further note here that on the 14th, when Marshall was informed of the closing, the problem was not even the figures because he had not seen any closing documents. The problem was timing and that was why he said outrightly that it was a negative. (Marshall's in his e-mail.) TT 83, ln 13 to end. The issue of the credits first arose in his e-mail of April 19th; in that e-mail, he first raised the issue of the amount because of disagreements on the credits. Exhibits 8 and 23 and TT 85, ln. 25 to end and TT 86, 1 to 22.

Joe Dove returned to the country and his office on or around April 26, 2005. He e-mailed Mr. Marshall: *I understand there were some problems that came up with closing on the property at 558 W. Northside Drive while I was out of the country. I am back in the office now, and ready to work with you to resolve any questions or differences. Please give me a call as soon as possible.* Exhibit # 10. Mr. Marshall promptly replied : *Thank you for your reply, Please take a look at the information complied by the attorney and fax me a revised copy or give me a good time to meet with you to go over the differences.* Exhibit #11, page 1 of 2. Other e-mail messages discussed and agreed upon a time both will meet and they met but were not able to resolve the differences. The contentions between the parties is in Mr Marshall's letter of intent to Joe Dove, "**need to determine the best way to handle any other payments until completion.**" Marshall contends that when he timely exercised his option to purchase, the lease ceases and his payments hence should be credited towards the purchase of the property, payments that would have been negligible to none had the closing been effected within thirty days of his election. It was three

months later and he was required to pay for delays not caused by him or his agent.

Joe Dove in his e-mail to Mr. Marshall states: *** *Re: the question on applying rental payments to the purchase price, Don (McClemore) says your letter prior to Jan. 31 was an "intention" to buy, the contract is when you "agree" to buy. According to real estate law, he says, there is no deal or agreement without a signed contract with specific terms spelled out. That means that the amount of rent Carolyn should apply to the sale price is one-half of the monthly payments since you started, or Oct, 2004 to now.* Exhibit # 11 at 4th page 2 of 4.

The foregoing interpretation by McClemore through Joe Dove is contrary to the parties clear intent and contract. Exhibit # 2, Option Clause states in pertinent parts:

(a) This agreement provides an option for Tenant to purchase the property per the legal description attached as Exhibit "A" prior to October 1, 2005 for the sum of one hundred and twenty-five thousand and No/100 Dollars ($125,000.00), or for the sum of one hundred and thirty-five Thousand and No/100 Dollars ($135,000.00) on or after October 1, 2005 and prior to the expiration the initial lease on September 30, 2007.

(b) Should Tenant elect to purchase the property by January 31, 2005, Landlord will apply first quarterly lease payment of Five Thousand Two Hundred and fifty & No/100 ($5250.00) 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 payments. Or eight Hundred and Seventy-five and No/100 ($875.00) per month, to the purchase price of the property

(e) Tenant will notify Landlord in writing of his intention to exercise the option to purchase, Land lord will provide Purchaser with a clear title and a warranty deed of the property, property taxes will be prorated as of the closing date and closing will be within thirty (30) days of receiving purchaser's letter of intent to purchase.

The flurry of e-mails continued between Mr. Marshall and Joe Dove. Exhibit # 12 up until September of 2005. Mr. Marshall made an offer on or before May 17, 2005 to close by June 15th, 2005. Exhibit # 15. According to his testimony, he offered to make a down payment at that time of two thousand dollars ($2000.00) above what he believes he should pay for a total

of ten grand instead of eight if they can close by June 15. According to the testimony of all witnesses, no closing was ever scheduled. Floyd Marshall continued to make periodic payments on the building he wants to purchase and he believes he is purchasing if only all the parties can get together and resolve the differences. According to Ms. Lindsly, Floyd will occasionally stopped by her job and assure her that he is still interested and will not abandon the transaction. Since September 2004, Mr. Marshall has made total payments of fifty thousand, one hundred and twenty-five dollars ($50,125.00) to Cook Commercial Properties for Ms. Carolyn Lindsly. Exhibit # 13. Counsel for Mr. Marshall, at the time of the trial, are holding in escrow the amount of five thousand two hundred and fifty dollars ($5250.00). Exhibit # 30. Letter to Joe Dove from counsel for Marshall.

Exhibit # 14, for identification is disputed by Marshall as not reflecting his correct credits. Exhibit # 15 is the *mea culpa* by Joe Dove. Here, he is attempting to advise Mr. Marshall on the terms of the contract and what it says. Exhibits #s 16, 17, 18, 25 and 26, were generated after the onset of this litigation to create a record or evidence by counsel for Ms. Lindsly. These are all letters written by Ms. Lindsly trial attorney after notice by counsel for Mr. Marshall that he will initiate suit for specific performance.

2005 was the year of the e-mails between Joe Dove and Mr. Marshall. In May 2006, Marshall contacted this attorney concerning the stalled purchase transaction. The undersigned counsel called and wrote a letter to Joe Dove dated June 8, 2006. This is the only letter acknowledged by Ms. Lindsly as she having received or is aware of. Exhibit # 28. Joe Dove and this counsel did discuss the matter but was not resolved. On August 25, 2006, counsel again wrote a follow up letter to Joe Dove. Exhibit # 29. Joe Dove responded and advised counsel that

because of Ms. Lindsly's mother's health, it has not been easy getting her as she travels frequently to Memphis. He will however get back with counsel immediately after he would have discussed the matter with Ms. Lindsly. Meanwhile, Mr. Marshall continues to make periodic payments. On January 10, 2007, counsel for Marshall wrote his final letter to Joe Dove and informed him of the pendency of the suit. See Exhibit # 30. Joe Dove responded by leaving a message on counsel's answering machine and upon him being called back, he expressed his displeasure with counsel's letter or the threat to sue contained in said letter. I told him it is not a threat as I will file suit as Mr. Marshall wants finality to this odyssey of a transaction. On February 13, 2007, we filed the present action and served the defendant on or before February 16th, 2007.

Ms. Lindsly initiated an action for eviction, unpaid rents and other relief in County Court after this suit but that action was dismissed by county judge based on the principle of priority of action.

SUMMARY OF ARGUMENT

A lessee who has be given a purchase option can normally seek specific performance of the option. Since specific performance is an equitable remedy, the lessee must show that there is no adequate remedy at law. Damages, the normal legal remedy for breach of contract, are generally considered an inadequate remedy where the lessee actually desires conveyance of the property subject to the option as is the case in the case under review. Furthermore, the parties by specific provision in their contract elected specific performance as the remedy.

Once an option to purchase leased property is exercised, title of party exercising option, i.e. the lessee, relates back to the time option was originally given and upon the exercise of the option, the parties legal relationship changes from lessor and lessee to vendor and vendee.

The option to purchase contained in lease, when accepted and exercised according to its terms, becomes present contract for sale of property and the lease agreement is extinguished, thereby transforming parties relationship from lessor-lessee to vendor-vendee. These are elemental truths and principles of law applicable in this instance.

We therefore urge this Court to hold that Marshall exercised his option to purchase timely; that the option is clearly enforceable by a decree of specific performance; that the delay in closing is not occasioned by any fault of Marshall; that upon the execution of the Commercial Sales Contract, the Lease Agreement is abrogated; that the Commercial Sales Contract provides for the payment of the prevailing party's attorney's fees and that Mr. Marshall is the prevailing party in this suit.

ARGUMENTS

THE TRIAL COURT IS CORRECT IN DECREEING SPECIFIC PERFORMANCE.

This Court in its hearing and review of this contract dispute does not write on a clean slate as our jurisprudence contains decisions and precedents to guide us. The standard of review for question concerning the construction of contracts are questions of law that are reviewed *de novo* by this Court. Warwick vs Gautier Utility District, 738 So 2d 212, 215 (Miss 1999); Mississippi State Highway Commission vs. Patterson Enters, Ltd., 627 So 2d 261, 263 (Miss 1993). Deeds, leases and other conveyances are construed in a manner similar to contracts. People Bank and Trust Company vs. Nettleton Fox Hunting and Fishing Association. 672 So 2d 1235 (Miss 1996). Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties. Anderton Vs Business Aircraft, Inc., 650 So. 2d 473, 475 (Miss 1995); Kelso vs McGowan, 604 So. 2d 726, 731 (Miss 1992). In order for such a subsequent document to effect a modification, it must meet the requirements for a valid contract. Singing River Mall vs Mark Fields, Inc., 599 So. 2d 938, 047 (Miss 1992). The contract we are asked to enforce and in the process interpret and construe is a commercial sales contract, albeit of real estate, the Commercial Property Contract. This contract, we contend, supercedes the Lease Agreement and therefore abrogates or cancels it.

The parties entered into a series of contracts in September, 2004 and February 2005 concerning a certain piece of property located and situated at 558 West Northside Drive, Jackson, Mississippi. The lease agreement provided among other provision a lease option to be exercised within a certain time frame. The evidence is clear, abundant and uncontradicted that Mr Marshall timely exercised the option.

The Commercial Property Contract was executed by Mr. Marshall on February 16, 2005 upon presentment by Mr. Dove, the broker agent for Ms. Lindsly. The initial question at this juncture is what effect does the execution of the Commercial Property Contract had on the Lease Agreement signed on September 7th, 2004 concerning the same property. We ask this Court to find and hold that the Commercial Property Contract is a binding contract entered into by Ms. Lindsly, Seller, and Mr. Marshall, Buyer. We further urge the Court to enforce the contract as written and particularly section 16, AGREEMENT OF PARTIES. If this is the case, then the only contract between the parties after February 16 or 18 when both signatures were affixed on the same document was the Commercial Sales Contract.

The Commercial Property Contract is silent on rent payments because it is obvious none were contemplated. This contract further incorporated the option to purchase clause in the Lease agreement. Section 27. Option to Purchase, Lease Agreement provides in 27. (a), (b) and (e):

(a) This agreement provides an option for Tenant to purchase the property per the legal description attached as Exhibit "A" prior to October 1, 2005 for the sum of one hundred and twenty-five thousand and No/100 Dollars ($124,000.00), or for the sum of one hundred and thirty-five Thousand and No/100 Dollars ($135,000.00) on or after October 1, 2005 and prior to the expiration the initial lease on September 30, 2007.

(b) Should Tenant elect to purchase the property by January 31, 2005, Landlord will apply first quarterly lease payment of Five Thousand Two Hundred and fifty & No/100 ($5250.00) 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 payments. Or eight Hundred and Seventy-five and No/100 ($875.00) per month, to the purchase price of the property

(e) Tenant will notify Landlord in writing of his intention to exercise the option to purchase, Land lord will provide Purchaser with a clear title and a warranty deed of the property, property taxes will be prorated as of the closing date and closing will be within thirty (30) days of receiving purchaser's letter of intent to purchase.

The evidence is clear that Mr. Marshall timely elected to purchase the property well before January 31, 2005 and complied in all respect as required under the option. In an option contract, time is of the essence. Robinson vs Martel Enterprises, Inc. 337 So 2d 698, (Miss 1996); Poole vs McCarty, 229 Miss 170, 90 So 2d 190 (1956); *72 ALR 2d* 1127 (1960); 71 *Am. Jur. 2d*, ***Specific Performance***. We are further instructed to read the contract as a whole, so as to give effect to all of its clauses. Facilities, Inc., vs Rogers-Usry Chevrolet, 908 So. 2d 107 (Miss 2005); Brown vs Hartford Ins. Co. 606 So 2d 122, 126 (Miss 1992). The contract sub judice further provides that closing shall be within 30 days of acceptance of contract. It is clear by the foregoing provisions that the transaction should have been completed promptly and as such there would have been no future rents to haggle over. This was not done and the delay we urge this Court to hold to be the fault of the Seller, Ms. Lindsly through her agent, Joe Dove. In that regard, we cannot allow Ms. Lindsly to benefit from rent payment and collect the full sale price that they agreed upon on September 7, 2004, and reaffirmed on February 16, 2005. Time is of the essence of a contract when parties, by fixing upon a time for performance have indicated that time was regarded by them as important; or else it must result from the nature and circumstances of the contract. Tyler vs McCardle et al, 9 Smedes & Marshall, 17 Miss 230, 243 (1846). In the contract at bar, the option clause is time specific; the date of closing is time specific; these deadlines have they all been adhered to would have avoided the problem of crediting future payments. And Mr. Marshall by his letter made inquiry about the handling of future payments. By the time the issue came on the table, two quarterly payment would have been made separate from the initial payment in September, 2004. This Court should not allow Ms. Lindsly to violate her contract and reap a profit as a result of those violations. Robinson vs Martel Enterprises, Inc.

337 So 2d 698, 703 (Miss 1976). In the final analysis, we ask, is the contract between the parties susceptible to a decree for specific performance?

We respond with a resounding yes. A valid option constitutes a continuing offer to sell which is irrevocable during the period specified therein...When the lessee accepts the offer in the manner prescribed, the contract for sale is complete and binding upon both parties and may be enforced by specific performance. *Martel Enterprise, Inc.* citing *Reynolds V Maples*, 214 F. 2d 395 (5th Cir. 1954), at 702. Further, in *Duke v Whately*, 580 So. 2d 1267, 1274 (Miss 1991), it is stated:

Before a court can order specific performance, the court must be able to look at the instrument and determine what performance is required. *Crocker v Farmers & Merchants Bank*, 293 So 2d 438, 438 (Miss 1974)... The agreement must be definite and certain in order to be enforceable.*** A contract is sufficiently definite if it contains matter which will enable the court under proper rules of construction to ascertain its terms, including consideration of the general circumstances of the parties and if necessary relevant extrinsic evidence. [other citations omitted]. We state without hesitation that this contract is enforceable. *In accord*: *Polk v Sexton*, 613 So 2d 841 (Miss 1993); *Hicks v Bridges*, 580 So 2d 743 (Miss 1991). *Van Eaten v Johnson (In re Estate of Pickett)*, 879 So 2d 467, 471 (Miss Ct. App. 2004).

B. CONSTRUCTION OF CONTRACT:

In the analysis and review of this case, we state in the beginning that we do not write on a clean slate. In Citizens' Bank vs Frazier, 157 Miss 298, 302, 127 So 716 (1930); Rubel vs Rubel, 221 Miss 848, 75 So. 2d 59 (1954), and reaffirmed in Frazier vs Northwest Mississippi Shopping Center, Inc. 458 So 2d 1051, 1054 (Miss 1984), this Court instructed thus:

> A construction leading to an absurd, harsh or unreasonable result in a contract should be avoided, unless the terms are express and free of doubt. It is the duty of courts to give a contract that construction or interpretation, if possible, which will square its terms with fairness and reasonableness, each party towards the order... It is also well settled that the words of a contract should be given a reasonable construction, where that is possible, rather than an unreasonable one; and the should likewise endeavor to give a construction most equitable to the parties, and one which will not give of them an unfair or unreasonable advantage over the other. ...Constructions of contracts which would make them unfair or unjust are to be avoided, unless the terms are unambiguous and express. 458 So 2d at 1054 .

In Facilities Inc, vs Rogers-Usry Chevrolet, 908 So 2n 107, we are further instructed that the primary purpose of all contract construction principles and methods is to determine and record the intent of the contracting parties. In this instance the parties anticipated a sale and transfer of the property. Furthermore, the mere fact that the parties disagree about the meaning of a contract does not make the contract ambiguous as a matter of law. Only if a contract is unclear or ambiguous can a court go beyond the text to determine the parties true intent. If there are ambiguities in a contract, such ambiguities would be construed against the drafting party.

In the case sub judice, the property description is definite, the purchase price is agreed upon and the method of financing is stated. The transaction was to close in thirty (30) days hence no provision was made for future rent. The contract, we urge is clear and unambiguous in all essential terms therefore is enforceable. The general rule in interpreting contracts is that the court will look only to the 'four corners' of the instrument to ascertain and give effect to the limitation of the parties. In Rubel v. Rubel, 221 Miss. 848, 75 So.2d 59 (1954), the Court said: 'The intention of the parties must be collected from the whole agreement, and every word therein must be given effect, if possible, and be made to operate according to the intention of the parties.' It is also well settled that the words of a contract should be given a reasonable

construction, where that is possible, rather than an unreasonable one; and the court should likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other. 75 So.2d at 65.

There is also a three-tiered approach that courts use in interpreting a contract: the "four corners" of the document, the " 'canons' of contract construction," and extrinsic or parol evidence. *Tupelo Redevelopment Agency v. Abernathy*, 913 So.2d 278, 284(¶ 13) (Miss.2005) (citations omitted). The four corners approach looks only at the language used in the contract. *Id.* The canons are to be used only if the four corners of the document are insufficient to interpret the contract, and extrinsic or parol evidence is to be used only if the contract remains ambiguous after application of the four corners and the canons. *Id.*

A written contract should be construed according to the obvious intention of the parties, notwithstanding clerical errors or inadvertent omissions therein, which can be corrected by perusing the whole instrument. ***Robinson v. Martel Enterprises***, 337 So.2d 698 (1976).

In *Hicks v. Bridges*, 580 So.2d 743 (Miss.1991), the Mississippi Supreme Court stated as follows: It is a well settled principle that this Court favors a determination that an agreement is sufficiently definite, so as to carry out the reasonable intention of the parties. ***844** *Busching v. Griffin*, 542 So.2d 860 (Miss.1989); *Jones v. McGahey*, 187 So.2d 579 (Miss.1966). In ***Busching***, the Court said: A contract is sufficiently definite if it contains matter which would enable the court under proper rules of construction to ascertain its terms, including consideration of the general circumstances of the parties and if necessary relevant extrinsic evidence. Having found a contract to have been made, an agreement should not be frustrated where it is possible to reach a reasonable and fair result. *Id.* 542 So.2d at 863 (***quoting*** *Jones* 187 So.2d at 584). *Hicks*, 580 So.2d

at 246.

An option, when supported by a valid consideration, constitutes a continuing offer to sell which is irrevocable during the period specified therein. Until it is exercised, it contains no elements of a sale. When the optionee accepts the offer in the prescribed manner and before expiration thereof, the contract for sale is complete and binding upon both parties. It is incumbent upon the optionee to exercise the option in the manner provided in the contract and, unless such requirements are waived, his failure to do so, or his attempt to exercise it in another manner, is inoperative to form a binding contract for sale. 214 F.2d at 398. Reynolds v. Maples, 214 F.2d 395 (5th Cir. 1954) As a general rule, time is of the very essence of an option contract. Poole v. McCarty, 229 Miss. 170, 90 So.2d 190 (1956); 17 Am.Jur.2d, Contracts s 335 (1964)

Marshall exercised his option within the time and in the manner prescribed, we therefore urge specific performance.

THE TRIAL COURT ERRED WHEN IT FAILED TO CREDIT MARSHALL FOR ALL PERIODIC PAYMENTS MADE TO LANDLORD'S AGENT AFTER THE EXERCISE OF THE OPTION ON OR BEFORE JANUARY 31, 2005.

The Court had various testimony from all the witnesses. Marshall contends that his letter of intent to purchase the property as provided for under the option clause effectively terminates the landlord tenant relationship under the lease and is now translated to Buyer and Seller. Even if you disagree with this position, the argument gains compelling force when the contract to purchase was actually signed. If this Court were to agree with this position, then all Mr. Marshall's payment, not just the first quarter payment before the option was exercised but all subsequent payments after the exercise and the signing of the Commercial Sales Contract, should be credited towards the purchase price. Further buttressing this conclusion is the testimony of the closing attorney hired by the Seller and her agents. Don McClemore, a Mississippi licensed attorney, in practice for thirty (30) years and limiting his practice to real estate law opined that upon execution of the Commercial Property Sales Contract, the Lease Agreement is henceforth of no effect except the option clause adopted and incorporated into the Commercial Property Sales Contract and not inconsistent with the terms of that contract. A rent provision would have been inconsistent and contradictory to the terms, purposes, and intent of the parties. Contracts are reasonably construed in order to determine intentions of contracting parties. Hicks vs Bridges, 580 So. 2d 743, 746 (Miss 1991).

Ms. Lindsly and her broker agent, Mr. Joe Dove, on the other hand contend that Mr. Marshall's payment should be characterized and treated as rent. Ms. Lindsly is doing Mr. Marshall a favor by crediting him half of these rent payments.

We proceed firstly on the following proposition: Upon the exercise of an option to purchase which exercise is as prescribed in the option, and timely, the lease and all its incidents ceases to exist, and the relationship of the parties is now one of vendor- vendee. Our Mississippi courts have not squarely ruled on this issue but our sister states of Florida, Georgia, Nevada, Illinois and the majority of other jurisdiction have adopted this view. See: *Keys Lobster, Inc. V Ocean Divers, Inc.* 468 So 2d 360 (Fla. App. 1985) *reh. den.* 480 So 2d 1295 (Fla 1985); *Wolfram Partnership, Ltd. V LaSalle National Bank*, 765 N. E. 2d 1012, 1020 (Ill App 2001); *Shupe v Ham*, 639 P. 2d 540, 543, and cases and jurisdictions cited therein (Nev. 1982); *American Law Property*, Section 3.84 at 363 (1952)

We therefore urge this court to hold and rule in conformity with the majority jurisdiction that the lease is superceded by the contract for sale signed by the parties in February 2005 and as such no rent is due erstwhile landlord now seller from erstwhile tenant now buyer. We do not dispute that seller maybe due interest on the purchase price as provided for in the contract.

Secondly, we argue, when a person has been injured by breach of contract, the injured party is entitled to be justly compensated and is to be made whole. However, he/she is never intended to be placed in a position better than he/she would have been if the contract had been performed. We assume here for the sake argument but in no way so admitting that seller is the injured party, the chancellor's order unjustly enriched the seller because it grants her the full purchase price and rents. This we contend is error. In *Polk infra*, the optionee was denied recovery of rents paid to avoid a double recovery–free occupancy plus damages for breach. In

Head v Scanlin, 367 S. E. 2d 546 (Ga. 1988) a case similar to the case at bar and where the tenant's right of first refusal was denied, the tenant was given credit for the rents paid.

THE TRIAL COURT ERRED IN ORDERING ANY ATTORNEYS FEES FOR THE DEFENDANT APPELLEE'S LAWYERS

THE TRIAL COURT ERRED IN FAILING TO ORDER ATTORNEY'S FEES ON BEHALF OF MARSHALL.

These two proposition are governed by the terms of the contract which provides for the payment of the prevailing parties attorneys' fees. The record below did not have any proof on the matter as its submission was postponed. We urge a remand to the lower court for a finding consistent with the Court's disposition of the matter.

CONCLUSION

We have consistently argued in the court below and before this Court that the remedy of specific performance is available in this instance. And we argue further that each party in the court's order should be in the same position as if the contract had been performed thirty (30) days from the exercise of the option. Mr. Marshall is still willing and able to perform provided he is given the proper credits for his payments. When he exercised his option, the building cost him one hundred and twenty-five thousand dollars ($125,000.00). He was to be given credits of about five thousand dollars ($5000.00). If closing had occurred without any more payments by him, he would have to bring about eight thousand dollars ($8000.00). Under the Chancellor's order, after paying a little over fifty-one thousand dollars ($51,000.00), he was still required to pay one hundred and nineteen thousand dollars + ($119,269.93) for a total cost to of about one hundred and seventy thousand dollars ($170,000.00).

We therefore urge the Court to order specific performance and Mr. Marshall being given credits for all payments made and of course the seller should be awarded interest as contained in the contract.

CERTIFICATE OF SERVICE

This is to certify that I, Sorie S. Tarawally, attorney for the Appellant, do hereby state that on April 2, 2008, did mail a true and correct copy of the forgoing document to the attorneys for the Appellee at their regular business address: Hon. Derek L. Hall, Derek L. Hall, P.A., 1764 Leila Drive, Jackson, MS 39216, to the trial judge, Hon. Judge Denise Owens, Post Office Box 686, Jackson, MS 39205-0686..

Dated this the 2nd day of April, 2008.

Sorie S. Tarawally

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MBN [redacted]

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