2008-CA-00244 E

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-TS-00244

TOMMY THOMPSON APPELLANT

V.

FIRST AMERICAN NATIONAL BANK APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify 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. Tommy Thompson, Appellant;
2. Sean Akins, Attorney for Tommy Thompson
3. Fortier & Akins, Attorneys for Tommy Thompson;
4. First American National Bank Appellee;
5. Wendell H. Trapp, Jr., Attorney for First American National Bank.;
6. Mitchell, McNutt & Sams, P.A., Attorneys for First American National Bank;
7. Stanley R. Parker, Attorney for First American National Bank;
8. Matt P. Patterson, Attorney for First American National Bank;
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STATEMENT OF THE CASE

Plaintiff/Appellant, Tommy Thompson borrowed money from Defendant/Appellee, First American National Bank (First American) on October 29, 1997, to buy 120 acres of real estate. Plaintiff became delinquent in payment and First American foreclosed on the property. Shortly before the foreclosure sale, Plaintiff came to one of the First American branches and paid part of the past due debt. After this partial payment, Plaintiff was still two payments behind. Plaintiff claims that he asked one of the Bank tellers, Linda Johnson, whether his partial payment would be enough to stop the foreclosure and was told that it would. The foreclosure sale occurred as scheduled and First American acquired the property for the amount due on the loan. Plaintiff made no attempt to refinance the loan, obtain a new loan, or redeem the property. First American eventually sold the property at a substantial loss. Over ten months later, Plaintiff sued First American for breach of contract.

First American moved for summary judgment on the grounds that Plaintiff's claim was barred by the Statute of Frauds and that Plaintiff's alleged oral modification of the contract was void for lack of consideration. In opposition, Plaintiff argued that the doctrine of promissory estoppel prohibited First American from asserting defenses based on the Statute of Frauds or lack of consideration. The trial court granted summary judgment in favor of First American finding that Plaintiff's claim was barred by the Statute of Frauds; that Plaintiff's alleged contract modification was void for lack of consideration; and that the doctrine of promissory estoppel did not apply because Plaintiff could not establish detrimental reliance, i.e. that he undertook some action or changed position to his detriment, in reliance on the alleged representation.

In this appeal, Plaintiff contends the trial court erred in ruling that, as a matter of law, his failure to pay the entire past due amount does not constitute detrimental reliance sufficient to

invoke the extraordinary doctrine of promissory estoppel. Plaintiff concedes that the judgment in favor of the Bank should be affirmed should the Court reject his promissory estoppel argument.

STATEMENT OF THE FACTS

On October 29, 1997, Plaintiff purchased 112 acres of land ("the gravel pit") in Hardin County, Counce, Tennessee with money he borrowed from First American. (R-21-22) The gravel pit was purchased for $86,097.00, for which Thompson and his wife signed a loan agreement and pledged a deed of trust on the gravel pit. Plaintiff sold gravel commercially and had a gravel business called Thompson Gravel Pit. (R-21-22) By September 19, 2001, Plaintiff was several months delinquent on his loan payments and Diane Ernst, collections officer for First American, sent him a letter advising that his loan was substantially past due and must be paid in full or brought current immediately. (R-27) On November 12, 2001, First American sent a letter advising that foreclosure proceedings had been commenced and the gravel pit would be sold at auction on December 7, 2001. (R-31) To avoid foreclosure, Thompson borrowed more money from First American and refinanced his loan on January 6, 2002, the gravel pit loan was renewed in the amount of $89,299.53. (R-32-33)

From August 19, 2002 through February 2003, Plaintiff only paid two of his scheduled monthly payments. (R-39-43) On February 21, 2003, Ms. Ernest sent a letter to Plaintiff advising that his loans had been transferred to the collection department and that foreclosure of the land might be the only possible resolution regarding his indebtedness. (R-44) First American collections department receives delinquent loans only after the borrower has fallen behind by at least 60 days. (R-9) Plaintiff made his scheduled monthly payments in March, April and May, 2003. He did nothing to make up the past due payments. (R-9, 39-43, 75)

On June 2, 2003, a Substitute Trustee's Notice of Foreclosure Sale of the gravel pit was issued scheduling the foreclosure sale for July 8, 2003. (R-45-48) On June 3, 2003, First

American's attorney, Bradley Tennison, sent Plaintiff a copy of that notice with a letter advising that if the debt to First American was not paid within 30 days the gravel pit would be sold through foreclosure. (R-49-51) On June 4, 2003, Plaintiff received Mr. Tennison's letter. He telephoned Mr. Tennison, who told Plaintiff he needed to speak to First American. (R-9)

On June 5, 2003, Plaintiff went to First American's Tishomingo branch and approached teller Linda Johnson to make a loan payment. (R-9) That day was the first time that Plaintiff had ever made a payment to Ms. Johnson. (R-9) Thompson made two of the four past due payments on the gravel pit loan on June 5, 2003. (R-10, 41-43) Those payments did not bring the loan current. (R-10) Plaintiff claims that Ms. Johnson told him, on that day, that the foreclosure sale would be stopped if he made two of the past due payments, even though Plaintiff would still be two full payments behind. (R-10)

On July 8, 2003, the foreclosure sale occurred as scheduled. First American bought the property for the balance owed on the note and received a Trustee's Deed to the gravel pit. (R-56-60)

On July 10, 2003, Plaintiff again went to the Tishomingo branch and was told that the foreclosure sale had occurred as scheduled. (R-10) Plaintiff never contacted First American or otherwise attempted to redeem, refinance, or repurchase the gravel pit. (R-10) First American eventually sold the gravel pit in December, 2003 at a loss of over $50,000. (R-10)

SUMMARY OF THE ARGUMENT

The order granting summary judgment in favor of Bank is correct and should be affirmed for the following reasons. First, Plaintiff sued for breach of a contract relating to the sale of land. Mississippi Code Annotated § 15-3-1(c) requires any such contract, and any modification thereof, to be in writing to be enforceable. Because it is uncontroverted that Plaintiff's claim is

based on an alleged oral modification of a contract relating to the sale of land, he is prohibited from pursuing such claim as a matter of law.

Second, because it is uncontroverted that Plaintiff gave no consideration for the alleged oral contract or oral modification of a written contract, the alleged contract is void for lack of consideration.

Finally, Plaintiff cannot invoke the doctrine of promissory estoppel to prohibit First American from asserting the Statute of Frauds and lack of consideration defenses because Plaintiff cannot establish an essential element thereof: detrimental reliance on the alleged agreement. It is uncontroverted that there was no "action or forbearance of a definite or substantial character on the part of" Plaintiff which resulted solely from Plaintiff's reliance on the alleged agreement.

Therefore, the trial court properly granted summary judgment in favor of First American. It is respectfully submitted that the trial court's ruling should be affirmed.

ARGUMENTS AND AUTHORITIES

I. STANDARD OF REVIEW

An appeal from summary judgment is reviewed *de novo. Cossitt v. Alfa Ins. Corp.* 726 So.2d 132, 136 (¶ 19) (Miss. 1998). The question is whether the appellant is entitled to relief as a matter of law. The focal point of that review is on material facts. In defining a "material" fact in the context of summary judgment, this Court has stated that "[t]he presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense." *Dailey v. Methodist Medical Center*, 790 So.2d 903, 907 (Miss.App. 2001) (citing *Roebuck v. McDade,* 760 So.2d 12 (¶ 9) (Miss.Ct.App. 1999)) (citations omitted).

II. LEGAL ARGUMENT

A. Plaintiff's Claim is Barred by the Statute of Frauds.

It is well settled that any contract for the sale of land falls under the Statute of Frauds, and must be in writing. Miss. Code Ann. § 15-3-1(c). "Any agreement involving an *interest* in the land would not be binding unless in writing under the Statute of Frauds." *WRH Properties, Inc. v. Estate of Johnson*, 759 So. 2d 394, 396 (Miss. 2000) (quoting *Hennessey v. Wilson*, 83 So. 2d 176, 177 (Miss. 1955)) (emphasis added). Further, **any modification of an underlying contract that was within the Statute of Frauds must be in writing**. *Canizaro v. Mobile Communications Corp. of America*, 655 So. 2d 25, 29 (Miss. 1995) (emphasis added).

In the present case, it is uncontroverted that the real estate loan agreement between Plaintiff and First American for the purchase of the gravel pit is governed by the Statute of Frauds. Therefore, any modification of that agreement must be in writing to be enforceable. It is uncontroverted that no such writing exists. Therefore, the alleged oral modification of the loan agreement is unenforceable as a matter of law.

B. Plaintiff's Claim fails for Lack of Consideration

"[A]ny attempt to modify a written contract must be supported by new or additional consideration." *Lafayette Steel Erectors, Inc. v. Roy Anderson Corp.*, 71 F. Supp. 2d 582, 586 (S.D. Miss. 1997) (internal citations omitted). The consideration must consist of either a benefit to the promisor or some loss, detriment, or inconvenience to the promisee. *Id.*

> For the contract for forbearance cannot be valid as such, unless it be founded on a new consideration, independent of that of the original contract, upon some benefit received or secured to the creditor which the principal was not bound to render under the original contract, such as the payment of interest, or a part of the debt before it was due, the giving of additional security or the like, as a consideration for further indulgence.

C.I.T. Corp. v. Turner, 157 So. 2d 648, 655 (Miss. 1963) (quoting *Roberts v. Stewart*, 31 Miss. 664 (Miss. Err. & App. 1856). Payment of a debt which is due and undisputed does not constitute consideration for a promise. 17A Am.Jur.2d *Contracts* § 135 (1991). Likewise, a mere promise to pay a debt for which the promisor is already legally bound does not constitute a consideration sufficient to support a new contract. *Id.*

Under Mississippi law, "Partial payment of the amount named in a contract after such payment is due is not sufficient consideration for an agreement of the creditor to extend the time for payment of the balance owing under the contract, because such payment is merely a partial performance of a duty already existing." *Hattiesburg Prod. Credit Ass'n v. Smith*, 1 So. 2d 768, 769 (Miss. 1941). (emphasis added). Such an agreement would be "a mere indefinite indulgence." *Id.* at 770.

In the present case, it is uncontroverted that Plaintiff gave no additional consideration for the alleged promise of further forbearance that he claims to have received from Ms. Johnson. Plaintiff's payment of two of the four past due payments is not sufficient consideration as a matter of law. Therefore, even if the alleged oral modification or forbearance agreement was not barred by the Statute of Frauds, it is void for lack of consideration.

C. Promissory Estoppel Does Not Apply.

Plaintiff concedes that First American's Statute of Frauds and lack of consideration defenses should prevail, but attempts to side step their preclusive effect by asserting the doctrine of promissory estoppel. Application of the doctrine in Mississippi requires: (1) a representation that later proves to be untrue; **(2) an action by the person seeking to invoke the doctrine, such action being undertaken in justifiable reliance on the representation; and (3) a resulting detriment to that person arising from his action.** *Miss. Dep't of Pub. Safety v. Carver,* 809 So. 2d 713, 718 (¶ 18) (Miss.Ct.App. 2001) (citing *Town of Florence v. Sea Lands, Ltd.,* 759 So. 2d

1221, 1229 (¶ 29) (Miss. 2000)) (emphasis added). Estoppel should only be used in exceptional circumstances. *Powell v. Campbell,* 912 So. 2d 978, 982 (¶ 12) (Miss. 2005) (citing *PMZ Oil Co. v. Lucroy,* 449 So. 2d 201, 206 (Miss. 1984)). The burden of proof is on the party pleading estoppel. *See Chapman v. Chapman,* 473 So. 2d 467, 470 (Miss. 1985); *Hathorn v. Illinois Cent. Gulf R. Co.,* 374 So. 2d 813, 817 (Miss. 1979). The law does not regard estoppels with favor, nor extend them beyond the requirements of the transactions in which they originate. *PMZ Oil Co.,* 449 So. 2d at 206 (quoting *McLearn v. Hill*, 276 Mass. 519, 177 N.E. 617, 619 (Mass. 1931)).

Promissory estoppel requires Plaintiff to show that he undertook some action or changed his position, to his detriment, in reliance upon the conduct of another. *PMZ Oil Co.,* 449 So. 2d at 206 (citing *Birmingham v. Conger,* 222 So. 2d 388, 392-393 (Miss. 1969)); *Ivy v. Grenada Bank,* 401 So. 2d 1302, 1303 (Miss. 1981); *Thomas v. Bailey,* 375 So. 2d 1049, 1052 (Miss. 1979). Promissory estoppel requires actual action, forbearance or some change of position on the part of the promisee in reliance on the promise. *See Overlock v. Central Vermont Public Service Corp.*, 126 Vt. 549, 554, 237 A.2d 356, 359 (Vt. 1967) (the unexecuted offer by third parties to collect funds was unenforceable in absence of any reliance or change of position on part of Plaintiff); *Patriot Scientific Corp. v. Korodi*, 504 F. Supp. 2d 952, 967-968 (S.D. Cal. 2007) (an essential element of promissory estoppel is detrimental reliance on the promise). Black's Law Dictionary defines detrimental reliance as reliance by one party on the actual representation of the other, causing a worsening the first party's position. (Black Law Dictionary 8th ed. 2004)

In the present case, it is uncontroverted that Plaintiff did not undertake any particular action or change any position in reliance upon the alleged representation (*i.e.* incurred additional debt or new obligation, etc.). The gravel pit was in foreclosure when Plaintiff walked into First

American on June 5th and was still in foreclosure when he walked out of First American on June 5th. He was behind in his payments when he walked into First American on June 5th and was still behind in his payments when he left.

Thompson claims that his detrimental reliance consists of his "withholding payment" of the past due amount, (Appellant Brief, p. 10): "Bank induced Thompson to change his position by withholding the payment until July." Nothwithstanding this characterization, the fact remains that he was in the same position when he went in First American as when he came out. He had "withheld" payments that were due before he went to First American on June 5th and continued to do so after he left.

The only substantive case cited by Thompson in attempt to support his promissory estoppel argument is *Brewer v. Universal Credit Co.*, 192 So. 902 (Miss. 1940). However, *Brewer* has no application to the present case. The pertinent facts of *Brewer* can be summarized as follows:

1. On July 21, 1938, appellant purchased an automobile, paying cash $165, and for the balance of the purchase money, amounting to $396, he executed an installment purchase money conditional sales contract by which he agreed to pay the balance in monthly installments of $33 each, title retained until all payments made.

2. This contract was assigned to appellee, Credit Company. After paying the August and September installments, appellant, being temporarily out of employment, became in arrears in the October and November installments.

3. The Credit Company thereupon demanded possession of the vehicle, and there was an agreement made on November 24, 1938, between the Credit Company and appellant, to which agreement appellee Ellis was a party, that the automobile should be stored with the latter in Winona, in this state, for thirty days, appellant to pay the storage thereon, and that appellant should have that time within which to pay the two delinquent installments and thereupon receive his car. The car was at once stored under that agreement.

4. Within the thirty days, to wit, on December 13, 1938, appellant appeared with the $66 for the two installments then due and tendered same, but was informed, and the fact was, that Ellis had sold at private sale and delivered the automobile to a Miss Jacks, Ellis claiming that he had bought it outright from the Credit

> Company; and Ellis, as well as the Credit Company, declined to do anything whatever about a redelivery of the car to appellant or to recognize that appellant had any rights in the premises whatever.

Id. at 902-903

As shown above, the Plaintiff in *Brewer* relied on the defendants promise to allow him an additional 30 days to bring his loan current by: 1) voluntarily surrendering possession of the car to a third party for storage; 2) agreeing to pay the storage costs; and 3) tendering the agreed payment within 30 days.

In the present case, there was no agreement between Plaintiff and First American similar to that in *Brewer*, and Plaintiff took no action that he was not already legally obligated to take. Plaintiff simply paid a portion of a debt he already owed. Paying less than the full amount due and owing was not harmful or detrimental to Plaintiff as a matter of law and cannot constitute detrimental reliance sufficient to invoke the doctrine of promissory estoppel.

ADDITIONAL GROUNDS TO AFFIRM

Even if this court concludes that the trial court erred in determining the doctrine of promissory estoppel is applicable, and therefore also erred in finding Plaintiff's claim barred by the Statute of Frauds and void for lack of consideration; the order granting judgment in favor of First American is correct and should be affirmed.

> Appellate courts are not in the business of reversing a trial court when it has made a correct ruling or decision. We are first interested in the result of the decision, and if it is correct we are not concerned with the route-straight path or detour-which the trial court took to get there.... An appellee is entitled to argue and rely upon any ground sufficient to sustain the judgment below.

Kirksey v. Dye, 564 So. 2d 1333, 1336-1337 (Miss. 1990) (quoting *Hickox By and Through Hickox v. Holleman*, 502 So. 2d 626, 635 (Miss. 1987)).

Plaintiff's appeal, and underlying lawsuit, are based on an incorrect assumption, i.e.: that Plaintiff could have required First American to abandon the foreclosure and cancel the scheduled sale by simply paying the total amount of scheduled payments that were past due. As is true

with virtually every installment loan, the terms of the loan agreement provide that the failure to make any scheduled payment when due is a default and, upon default, the entire amount of the loan becomes due and payable. Therefore, after Plaintiff defaulted by not making scheduled payments when due, the entire amount of the loan became due and payable and First American was entitled to foreclose and sell the collateral regardless of whether Plaintiff subsequently paid the past due installments. The only way Plaintiff could have required First American to abandon the foreclosure was by paying the entire loan, something he has not even alleged he was able to do. Therefore, the fact that Plaintiff paid two of the four past due installments, rather than paying all past due installments, is irrelevant because it would not have prevented the foreclosure sale. Therefore, Plaintiff's claimed detrimental reliance on Ms. Johnson's alleged representation did not cause the damage he claims. Absent causation, Plaintiff's claim fails as a matter of law even if it was not barred by the Statute of Frauds or lack of consideration.

Furthermore, the record indicates the Plaintiff was aware of the fact that payment of the entire note was required to avoid foreclosure. The first time Plaintiff was in default and foreclosure commenced, he received a letter from First American's attorney specifically stating: "Absent payment in full prior to the sale date, the property will be sold...." To prevent that foreclosure sale, Plaintiff refinanced the loan thereby effectively paying the entire loan with the proceeds of a new one. Likewise, when he defaulted on the new loan Plaintiff again received a notice of foreclosure sale and a letter from First American's attorney which indicated the payoff amount, as of June 2, 2003, was $87,207.09.

Plaintiff claims that on June 5, 2003, one month before the scheduled foreclosure sale, he came to the Tishomingo branch to pay the past due installments. He contends he was able to pay all past due installments but was induced by First American to withhold half of that amount until after the foreclosure sale. He contends the only reason he did not pay all past due installments

was "because of the Bank's representations and [he] lost his property as a result." (Appellant's Brief p. 9)

The fact that First American's teller allegedly induced Plaintiff to pay two of the four past due installments, rather than all four of them, did not cause him to "lose" the gravel pit. If he had paid all past due installments the result would have been the same. He could have prevented the foreclosure sale only by paying the entire loan, which he has not even claimed he could have done. He "lost" the gravel pit because he did not pay the loan, not because he paid two of his past due installments rather than all four of them. Absent causation, which cannot be established, First American is entitled to judgment in its favor as a matter of law; the decision of the trial court is correct; and the judgment should be affirmed. "[T]his Court may affirm the lower court's grant of summary judgment on grounds other than that which the trial court used." (Citations omitted) *Kirksey* 564 So. 2d at 1336.

CONCLUSION

The Circuit Judge correctly applied Mississippi law and the judgment in favor of First American should be affirmed. Since Plaintiff failed to show any action, or change of position, to his detriment, in reliance on the alleged agreement, promissory estoppel does not apply as a matter of law. The Circuit Court properly granted summary judgment to First American on grounds that the Statute of Frauds bars Plaintiff's claim and Plaintiff's claim fails for lack of consideration. In addition, the judgment is correct because the record shows that Plaintiff cannot establish that the conduct complained of caused the claimed damages. It is respectfully submitted that the ruling of the Circuit Judge should be affirmed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, MATT P. PATTERSON., one of the attorneys of record for Appellees, do hereby certify that I have this day mailed in the United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to B. Sean Akins, Esquire, and Honorable James L. Roberts, at their usual mailing addresses, addressed as follows:

Honorable James L. Roberts
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This the 9TH day of July, 2008.

_____
MATT P. PATTERSON