2008-CA-01155SCTT

I. 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.

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6. The Honorable Percy L. Lynchard, Jr. — Trial Court Judge
   3rd Chancery Court District
   P.O. Box 340
   Hernando, MS 38632

KIRK MILAM [redacted]

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IV. STATEMENT REGARDING ORAL ARGUMENT

Appellant Houston does not feel that this case raises any novel issues of law or fact which would require oral argument. However, Appellant Houston would welcome any questions the court may have for him.

V. STATEMENT OF THE ISSUES

Whether the trial court committed error in awarding the Plaintiff specific performance and liquidated damages in light of specific contractual language allowing for the choice of only one of these options.

VI. STATEMENT OF THE CASE

On March 11, 2004, the parties entered a contract for the rental of a home owned by Willis and for the possible purchase of the home by Houston. (R.E. 4, R. 121)[1]. The contract provided that Willis would rent the property to Houston for month to month not to exceed 6 months at a rate of $2,00.00 per month with half the rent to go toward the purchase of the property. (R.E. 4, R. 122) The contract further provided that Houston would put up $10,000.00 non-refundable earnest money and to forfeit all the rents paid if for any reason Houston did not go thru with the sale. (R.E. 4, R. 122) An Addendum was entered into on September 10, 2004 adding an additional $10,000.00 in earnest money and increasing the rent. (R.E. 3, R. 79) The other terms of the contract were still in effect. (R.E. 3, R. 79) On March 11, 2005, the parties entered into a second addendum. (R.E. 3, R. 80) While it is in the form of another standard real estate contract, it states "Seller agrees to extend the original sales contract, dated March 11, 2004." (R.E. 3, R. 80) Further, Buyer agreed to pay various property taxes, the insurance premium and an increase in rent. (R.E. 3, R. 80) In March of 2006, Houston declined to purchase the property and forfeited the earnest money per the contract. (R.E. 3, R. 80) The agreement

[1] For this Brief, R will represent the Record, R.E. will represent Record Excerpt and TT will represent the Trial Transcript.

entered into by the parties provided for three remedies in the event of breach by the Purchaser, one of which was to accept the earnest money making the contract void. (R.E. 3, R. 80) The exact language states: section 11. BREACH OF CONTRACT:

> In the event of breach of contract by Purchaser, Seller may at his option (a) accept the earnest money deposit as liquidated damages and this contract shall then be null and void; or (b) enter suit in any court of competent jurisdiction for damages for the said earnest money deposit; or (c) enter suit in any court of competent jurisdiction for specific performance.

Willis elected to accept the earnest money and the agreements are void pursuant to the contract. (R.E. 3, R. 81) Willis received a check for $20,000 that was described as earnest money. (R.E. 3, R. 97).

Plaintiff/Appellee Robert Willis (hereinafter "Willis") filed suit for specific performance of a Real Estate Contract on or about February 2, 2007. (R.E. 2 , R. 37) Appellant Houston moved to dismiss this action on March 30, 2007 which this Court denied on October 25, 2007. Limited discovery was taken and Appellant Houston moved for summary judgment on January 30, 2008 which this Court denied on the day of trial, March 11, 2008. The Chancellor entered a Judgment on April 8, 2008 awarding Willis the contract price for the house, $365,000 plus $62,761.41 in back rent, attorneys fees and costs. (R.E. 5, R. 197). It is from this Judgment that Houston takes this appeal.

VII. SUMMARY OF THE ARGUMENT

Robert Willis took the $20,000.00 in earnest money in 2005. This fact is uncontroverted. The unambiguous reading of the contract is that the Seller may at his option accept the earnest money deposit as liquidated damages and this contract shall then be null and void. Coupling the

fact that Willis took the earnest money with the unambiguous language of the contracts, the only rational conclusion that can be reached is that the contract is null and void.

Willis persuaded the lower court that the contract was not void because the $20,000.00 he accepted was a down payment which he interprets differently than the term earnest money. Any testimony on this point is parol evidence and should not be considered. The language of the contract was clear in that the third contract was a continuation of the first. It is also clear that the acceptance of the earnest money was one of three remedies set forth in the contract that the non-breaching party could elect and it was in fact the one Willis chose. Mississippi law clearly does not favor specific performance and Houston followed the contract as it was written and intended and the failure of Willis to do so and then file suit in an attempt to gain a windfall is bad faith and a failure to comply with the terms in the "four corners" of the contract.

The addendums were clearly extensions of the prior option to purchase contract and Gary Houston exercised his option not to purchase his home and since Willis accepted the earnest money, he has been compensated for any breach of the contract by Houston.

Finally, the lower court awarded Willis back rent for the time between Houston's withdrawl from the agreement and trial, which were damages neither contemplated in the contract nor asserted by Willis at trial.

VIII. ARGUMENT

A. Standard of Review

There is a well established standard of review when considering a chancellor's decisions. *Frierson v. Delta Outdoor, Inc.*, 794 So.2d 220, 222 (Miss.2001). Under this limited standard, the court "will not disturb the factual findings of a chancellor when supported by substantial evidence

unless the Court can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard." *Gannett River States Publ'g Corp. v. City of Jackson,* 866 So.2d 462, 465 (Miss.2004). That is, "if the chancellor's findings are unsupported by substantial credible evidence, ***we must reverse.***" *Frierson,* 794 So.2d at 222 (emphasis added) (citing *Hammett v. Woods,* 602 So.2d 825, 827 (Miss.1992)).

B. Willis Did Not Act in Good Faith and Did Not Adhere to the Terms of the Contract.

It is one of the oldest and most well known maxims that one seeking relief in equity must come with clean hands or face refusal by the court to aid in securing any right or granting any remedy. *Cole v. Hood,* 371 So.2d 861, 863-64 (Miss.1979) (those who seek equitable relief must do so with clean hands); *Thigpen v. Kennedy,* 238 So.2d 744, 746 (Miss.1970) (same); *Taliaferro v. Ferguson,* 205 Miss. 129, 143, 38 So.2d 471, 473 (1949) (same). In other words, whenever a party seeks to employ the judicial machinery in order to obtain some remedy and that party has violated good faith or some other equitable principle, "the doors of the court will be shut against him" and "the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." *Shelton v. Shelton,* 477 So.2d 1358 (Miss. 1985).

In every contract there is an implied duty of good faith and fair dealing included in a contract. *Merchants & Planters Bank v. Williamson,* 691 So. 2d 398, 404–405 (Miss. 1997). A party is not entitled to a recovery of damages if it would constitute a windfall or double recovery;*849;849. Garris v. Smith's G & G, LLC,* 941 So. 2d 228 (Miss. Ct. App. 2006). "[T]he principles of equity and righteous dealing [are] the purpose of the very jurisdiction of the [chancery] court to sustain." *Shelton,* 477 So.2d at 1358-59.

The Mississippi Supreme Court has implemented a three-tiered process for contract

interpretation. *Pursue Energy Corp. v. Perkins,* 558 So.2d 349, 351-53 (Miss.1990). First, the Court must look to the four corners of the contract and at the language the parties used in expressing their agreement. *Id.* at 352. A party who breaches a contract is only liable for the damages *caused by the breach,* and the non-defaulting party is only entitled to be put in the same position he would have been had there been no breach. *Leard, et al. v. Breland,* 514 So.2d 778 (Miss.1987); *McDaniel Bros. Construction Co., Inc. v. Jordy,* 195 So.2d 922 (Miss.1967); *Miss. Power Co. v. Harrison,* 247 Miss. 400, 152 So.2d 892 (1963). In a contract dispute such as this one, the law requires that the express words of the contract govern the behavior of the parties and the court must effect a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties. *Dunlap Acres, Ltd. v. Intervest Development Corp.*, 955 So. 2d 345 (Miss. Ct. App. 2006), cert. denied, 956 So. 2d 228 (Miss. 2007).

The initial contract, dated March 11, 2004 states in its special provisions section the following:

> Seller agrees to rent the property to the buyer month to month not to exceed 6 months at a rate of $2,00.00 per month with half the rent to go toward the purchase of the property. Buyer agrees to put up $10,000.00 non-refundable earnest money and to forfeit all the rents paid if for any reason the buyer does not go thru with the sale. Sellers (sic) agrees to complete the house and clean it up completely by 3-25-04 or as soon as possible.

On March 11, 2005, the parties entered into another addendum. While it is in the form of another standard real estate contract, it states "Seller agrees to extend the original sales contract, dated March 11, 2004." Additionally, both contracts contain the following standard language: section 11. BREACH OF CONTRACT:

> In the event of breach of contract by Purchaser, Seller may at his option (a) accept the earnest money deposit as liquidated damages and this contract shall then be null and

void; or (b) enter suit in any court of competent jurisdiction for damages for the said earnest money deposit; or (c) enter suit in any court of competent jurisdiction for specific performance.

The language of the contract stating "seller agrees to extend the original sales contract, dated March 11, 2004." is clear in stating that the third contract was a continuation of the first. It is also clear that the acceptance of the earnest money was one of the electable remedies and it was in fact the one Willis chose. Houston followed the contract as it was written and intended and the failure of Willis to also conform to the terms of the contract and then file suit in an attempt to gain a windfall is bad faith and a failure to comply with the terms in the "four corners" of the contract.

C. Absent Parol Evidence, the Contracts show that Plaintiff is not entitled to Specific Performance or the Contract is Ambiguous.

When an instrument's substance is determined to be clear or unambiguous, the parties' intent must be effectuated. *Id.* Where the instrument is not so clear, the court will, if possible, harmonize the provisions in accord with the parties' apparent intent. *Id.* If the court is unable to determine the parties' intent from examining the four corners of the instrument, then the canons of contract construction may be applied. *Id.* If the intent is still unclear, the court may then consider parol or extrinsic evidence. *Id.* The parol evidence rule is one of substantive law rather than evidence. *Turner v. Terry,* 799 So.2d 25, 32 (Miss.2001) (citing *Estate of Parker v. Dorchak,* 673 So.2d 1379, 1383 (Miss.1996)). Whether parol evidence will be admitted depends on whether the terms of the contract in question are ambiguous. *Heritage Cablevision v. New Albany Elec. Power Sys.,* 646 So.2d 1305, 1313 (Miss.1994). The initial question of whether the contract is ambiguous is a matter of law. *Lamb Constr. Co. v. Renova,* 573 So.2d 1378, 1383 (Miss.1990).

The parol evidence rule provides that where a document is incomplete parol evidence is admissible to explain the terms but, in no event, to contradict them. *Bushing v. Griffin,* 540 So. 2d 860, 865 (Miss. 1989). Parol or extrinsic evidence is not admissible to affect, contradict, vary, modify, add to or subtract from a written instrument *Clow Corp. v. J. D. Mullican, Inc.*, 356 So. 2d 579, 583 (Miss. 1979 The parol evidence rule is one of substantive law rather than evidence. *Turner v. Terry,* 799 So.2d 25, 32(16) (Miss.2001) (citing *Estate of Parker v. Dorchak,* 673 So.2d 1379, 1383 (Miss.1996)).

[W]here the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party. *Johnston v. Palmer*, 963 So.2d 586, 593 (Miss. Ct. App. 2007) *citing Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.,* 908 So.2d 107, 111(Miss.2005). This falls under the doctrine of *Contra Proferentem,* where any ambiguity in an agreement must be construed against the drafter. *AmSouth Bank v. Quimby*, 963 So.2d 1145, 1152(¶19) (Miss.2007).

The Court must decide whether the contracts between the plaintiff and defendant are ambiguous before any testimony as to the parties understanding of the terms may be heard. Then, the parties cannot provide testimony that contradicts, modifies, varies, adds to or subtracts from the contracts.

The Contracts are not ambiguous. The initial contract, dated March 11, 2004 states in its special provisions section the following:

> Seller agrees to rent the property to the buyer month to month not to exceed 6 months at a rate of $2,00.00 per month with half the rent to go toward the purchase of the property. Buyer agrees to put up $10,000.00 non-refundable earnest money and to forfeit all the rents paid if for any reason the buyer does not go thru with the sale.

> Sellers (sic) agrees to complete the house and clean it up completely by 3-25-04 or as soon as possible.

On March 11, 2005, the parties entered into an addendum. While it is in the form of another standard real estate contract, it states "Seller agrees to extend the original sales contract, dated March 11, 2004." Additionally, both contracts contain the following standard language: section 11. BREACH OF CONTRACT:

> In the event of breach of contract by Purchaser, Seller may at his option (a) accept the earnest money deposit as liquidated damages and this contract shall then be null and void; or (b) enter suit in any court of competent jurisdiction for damages for the said earnest money deposit; or (c) enter suit in any court of competent jurisdiction for specific performance.

The unambiguous reading of the contract leads to on obvious conclusion – that if the Seller accepts the earnest money deposit as liquidated damages, this contract shall then be null and void. Coupling the fact that Willis took the earnest money with the unambiguous language of the contracts, the only conclusion that can be reached is that the contract is null and void.

Willis argues that the contract is not void because the $20,000.00 he accepted was a down payment which he interprets differently than the term earnest money. Any testimony on this point would be considered parol evidence and should not be considered. However, the Mississippi Supreme Court has addressed this point and does not distinguish between the terms earnest money, down payment, forfeit, penalty, "or whatever name it may be called." *Maxey v. Glindmeyer*, 379 So. 2d 297, 300 (Miss. 1980) *emphasis added; see also, Thomas v. Scarborough*, 2007 WL 4171123 (Miss. Ct. App. 2007). Ernest money is not distinguishable from a down payment. Willis accepted the money thereby making the contract null and void. In

any event, Willis's attempt to rename the earnest money as "down payment" finds no support in the language of the contract at issue, nor did he submit any admissible evidence that would support that interpretation. The contract is unambiguous on this point nonetheless, should the court find the contract to be ambiguous, the law requires the interpretation most favorable to Houston govern as he had no part in drafting the contract.

D. Specific Performance is not a Favored Remedy under Mississippi Law and the Proof Will Show That it Should Not Be the Remedy Applied in this Case.

While specific performance may be awarded where the sale of real estate is involved in a contract, it will not be awarded where damages may be recovered and where a remedy in a court of law is adequate. *Roberts v. Spence,* 209 So. 2d. 623 (Miss. 1968). If parties agree by contract what the damages for the breach of their contract shall be, the damages are said to be liquidated, and, unless the amount is unreasonable or unless the agreement violates some principle of law, the parties are bound by such agreements. *See Miss. Code Ann. § 75-2-718*; *Maxey v. Glindmeyer*, 379 So. 2d 297 (Miss. 1980). Since 1847, Mississippi law has been that earnest money is held to be liquidated damages. *See Sims v. Hutchins*, 16 Miss. 328 (1847); *see also Culbreath Revocable Trust v. Sanders*, 2007 WL 2472548 (Miss. Ct. App. 2007). *Sims* was a case similar to the case *sub judice* in that Hutchins and Sims entered into an agreement for the purchase of land and Hutchins, the buyer, payed fifty dollars in earnest money and then did not close the deal. *Sims*, 16 Miss. 328 (1847). In *Sanders*, the contract had the same identical language as the case *sub judice*, "in the event of breach of this contract by Purchaser, Seller may at his option (a) accept the earnest money deposit as liquidated damages and this contract shall be null and void..." *Culbreath Revocable Trust v. Sanders,* 2007 WL 2472548 at ¶ 25. The

chancellor found that the parties were bound to the liquidated damages provision in the contract which was upheld by the appellate court. *Id.*

The damages in this case are liquidated damages defined in the contract, i.e. the $20,000.00 earnest money. Both the March 11, 2004 and March 11, 2005 contracts state that "In the event of breach of this contract by Purchaser, Seller may at his option (a) accept the earnest money deposit as liquidated damages and **this contract shall be null and void...** (R 83-85, 89). Specific performance is not favored by the Mississippi Supreme Court in this situation and is against the plain reading of the contract. Furthermore, under the doctrine of election of remedies, a plaintiff's subsequent action is barred if (a) there exist two or more remedies; (b) the remedies are inconsistent; (c) and the plaintiff has previously made a choice for one of them. *O'Briant v. Hull*, 208 So. 2d 784 (Miss. 1968); and *Beyer v. Easterling*, 738 So. 2d 221 (1999).

E. The March 11, 2005 Contract was Not a New Contract, but an Extension of the Original Contract

Plaintiff claims that the Real Estate Contract entered on March 11, 2005 was a new contract to the exclusion of the March 11, 2004 contract and September 10, 2004 addendum. The plain reading of the March 11, 2005 contract states in paragraph 25 "Seller agrees to extend the original sales contract dated March 11, 2004." (R. 89). Further, the Realtor, who drafted the documents understood that the March 11, 2005 contract was an extension of the March 11, 2004 contract:

Q. So this one relates back to the first one?

A. Uh-hum.

Q. So the terms in the first one apply to the terms in the last one?

A. Except it changed. Mr. Houston agreed to more written terms here.

Q. Okay. But other than that, all the terms are the same?

A. All the terms are the same.

Q. Okay.

A. Except the dates, they are extended.

Q. Okay. And under your understanding as a realtor, they - - the terms in the first apply to the terms in the one that is dated March 11th, 2005, Correct?

A. Uh-hum.

(R. 160-161). The plain reading of the contracts and the understanding of the drafter of those contracts is that the March 11th 2005 contract is an extension of the original contract. Therefore, Plaintiff's assertion that the March 11th 2005 contract is a new contract excluding the language and understandings put forth in the original contract and addendum is false.

Paragraph 25 of the March 11, 2004 Contract provides the following agreement:

> Seller agrees to rent the property to the buyer month to month not to exceed 6 months at a rate of $2,000.00 per month with half of the rent to go toward the purchase of the property. Buyer agrees to put up $10,000.00 non-refundable earnest money and to forfeit all rents paid if for any reason the buyer does not go thru with the sale...

It is clear from the plain reading of the Contract that there was an understanding between the parties that should Mr. Houston elect not to purchase the house, his damages would be the loss of the earnest money and rent.

Further, Mr. Houston's understanding of the contract was that he was renting the property with the option to purchase said property at the end of the term. (TT 67). Mr. Houston expressed his desire to rent a house with the option to purchase to the realtor who he believed

was making that desire a reality with the language above in paragraph 25 of the March 11, 2004 contract. (TT 63). It was also Mr. Houston's understanding that the March 11, 2005 contract was an extension of the original contract. (TT 72). Therefore, based on the plain reading of the contracts, the realtor's understanding when she drafted the special provisions of the contracts and Gary Houston's understanding, the March 11, 2005 contract was intended to be an extension of the March 11, 2004 contract. Mr. Houston's understanding and intent are further evidenced by his handwritten note, in which he explains that he had paid approximately $85,000, understood that he was forfeiting the earnest money, and was declining his option to buy. (R 186).

F. **Willis has been compensated for any breach of the Contract.**

Under the terms of the March 11, 2004 agreement, Willis was paid $2,000.00 a month rent for six months, or $12,000.00. In September of 2004, they amended the rent payment to $2489.18 for six more months totaling $14,935.08. The March 11, 2005 agreement provided for Willis to be paid $2,615.06 per month for twelve months or $31,380.72. Therefore Willis earned a total of $58,315.80 in rent over two years. Additionally, he accepted the $20,000.00 Earnest money. Willis has taken in $78,315.80 and he still has the house. Willis has received sufficient compensation for Houston's use of the property and Houston's decision not to purchase the property in question. To compensate him further would amount to a windfall for Willis in light of his election to accept the liquidated damages.

G. The Lower Court Awarded Damages not Sought in Plaintiffs Case in Chief.

The lower court found that Appellant Houston was bound to pay $62,761.44 for rent from March 11, 2005 up until the date of the trial. The contract does not provide for payment of rent in the event Mr. Houston withdrew from the contract. Further, Willis did not offer any testimony

of documentary proof that he infact incurred this loss at trial. While the Chancellor has wide latitude to see that an equitable remedy is reached, he is not empowered to provide a remedy in a breach of contract case where there is no provision in said contract and the plaintiff does not provide proof of such a loss.

IX. CONCLUSION

The agreement entered into by Houston and Willis provided for three remedies, one of which was to accept the earnest money making the contract void. Willis elected to accept the earnest money and the agreements are void. Therefore, there is no contract to be specifically performed. Accordingly, for all of the reasons stated above, the Court should find based on the facts and the law that Robert Willis elected to take the $20,000.00 in earnest money thereby rendering the contracts null and void and making the remedy of specific performance impossible.

Respectfully submitted,

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