IN THE SUPREME COURT OF MISSISSIPPI

THE HERITAGE BUILDING PROPERTY, LLC;
JENKINS HERITAGE LLC; ELVERTON INVESTMENTS, LLC **APPELLANTS**

VS. **CASE NO. 2008-CA-01463-COA**

PRIME INCOME ASSET MANAGEMENT, INC.; and
TCI HERITAGE BUILDING, INC. **APPELLEES**

APPEAL FROM RANKIN COUNTY CHANCERY COURT, FIRST DISTRICT

REPLY BRIEF OF APPELLANTS, THE HERITAGE BUILDING PROPERTY, LLC; JENKINS HERITAGE LLC; and ELVERTON INVESTMENTS, LLC

ORAL ARGUMENT NOT REQUESTED

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INTRODUCTION

This case involves a dispute over the contractual obligations of the parties following the failure to consummate the sale of a building in downtown Jackson known as "The Heritage Building." The Appellants in this action, The Heritage Building Property, LLC, Jenkins Heritage LLC, and Elverton Investments, LLC, were collectively the "Sellers" in the proposed sale of the building. The Appellees, Prime Income Asset Management, Inc. and TCI Heritage Building, Inc., were the proposed "Buyers" in that transaction.

The facts of this case are undisputed and were stipulated to by the parties in the Chancery Court. They are set forth in full in the Seller's (Appellant's) Brief before this Court. In essence, the parties had entered into a Purchase and Sale Agreement for the sale of the Heritage Building. (R. 200; R.E. at D). The Buyers had the right to cancel the agreement during the "Inspection Period," which would expire on October 10, 2007, at 5:00 p.m. (R. 209; R.E. at D). On that date, the Buyers instead asked the Sellers if an amendment to the contract could be made that would give them an extension of time to review the title and survey and to complete the necessary assumption of financing. (R. 301-02; R.E. at D). Counsel for the Sellers drafted the requested Second Amendment and forwarded it to counsel for the Buyers via email, who presumably reviewed it before sending it to his client for signature. (R. 379; R.E. at E). This Second Amendment provided that "the Inspection Period has expired" and the Buyer has "no further right to terminate the Agreement . . . ." (R. 307; R.E. at D).

A representative of the Buyers signed the Second Amendment accepting all the terms in the offer. (R. 275, 281-84; R.E. at D). Breck Hines, agent of the Sellers,[1] then obtained the

[1] Curiously, the Buyers claim in the Appellee's Brief that "there is no evidence in the record that Breck Hines was an agent of the Sellers in the legal sense that he had the actual authority to sign for and bind the Sellers." Appellee's Brief at p. 10. However, the Buyers agreed to the facts as stipulated to the Chancery Court, including the fact that Breck Hines was an agent of the Sellers. (R. 379; R.E. at E). The Buyers cannot backtrack now, and claim that Breck Hines was, as loosely stated on page 3 of the

signature of Ted Duckworth on behalf of one Seller. (R. 302, 289; R.E. at D). Hines then forwarded the Second Amendment to all parties, noting in his written email correspondence that the other two Sellers had agreed to the extension, but could not print the amendment to sign it at that time. (R. 302, 285; R.E. at D). Counsel for the Buyers then called asking to "trash" the Second Amendment, stating he wanted to further "modify" it. (R. 275; R.E. at D). At 5:14 p.m., after termination of the Inspection Period, counsel for the Buyers forwarded a "Revised" Second Amendment to the Sellers' counsel via email. (R. 275-76, 291; R.E. at D).

Following the Buyers' failure to consummate the transaction, the Sellers demanded payment of the Escrow Deposit as liquidated damages under the terms of the Purchase Agreement. In response, the Buyers claimed the Escrow Deposit should be returned to them. Chicago Title Insurance Company thereafter filed an interpleader action in the Chancery Court of Rankin County for the resolution of the dispute over the Escrow Deposit. (R. 4; R.E. at C). After briefing by the parties and oral arguments in the case, the Chancery Court held that the Escrow Deposit should be returned to the Buyers. (R. 389-97; R.E. at B). The Sellers now appeal the Chancery Court's ruling.

Appellee's Brief, a "broker" of the Sellers. Instead, it is undisputed in the record before this Court that Breck Hines was an agent of the Sellers for all intents and purposes. As such an agent, there is no question that all parties recognized that when Breck Hines said in writing that the other two Sellers had agreed to the terms of the agreement, that those Sellers would be bound by the admission of their agent as a matter of law. *See* Restatement (Second) of Agency, § 320 Principal Disclosed.

ARGUMENT

I. THE SECOND AMENDMENT IS ENFORCEABLE.

The Sellers have shown that the Second Amendment was signed by the Buyer, signed by one Seller, and that written confirmation of the agreement of the other two Sellers was given by the Sellers' undisputed agent, ***all before*** the Buyers attempted to revoke their acceptance of the amendment.

The Buyers assert the Second Amendment is not enforceable because it was revoked prior to the signing by ***all*** Sellers. In doing so, they quote the basic law of this State that an offer may be revoked anytime prior to acceptance. However, the Buyers must concede that one Seller did sign the Second Amendment prior to the attempted revocation, and that the agent of the Sellers stated in writing that the other two Sellers agreed to its terms. Despite this fact, the Buyers cite to no law that supports their position that the signature of one Seller, and agent's written acceptance by the others, would not end their right to revoke. On the other hand, the Sellers ***have*** cited such law that shows that the Buyers' right to revoke the Second Amendment they signed had ended when the ***first*** Seller signed that document.

Specifically, the Sellers have cited *Holzberger v. Holzberger*, 2005 WL 1399258 (Wis.App. June 14, 2005) (attached in the Appendix of Authorities), in which the plaintiff claimed a settlement agreement was not enforceable because it had not been signed by ***all the parties*** prior to his attempted revocation the morning after he had signed. He argued - as the Buyers do in this case - that any signatory to a contract had the right to revoke his acceptance until all parties had signed. The court disagreed, noting that this principle only applies if the contract itself ***specifically states*** that it will not be valid until all parties have signed. *Id.* at **3 (citing *Consolidated Water Power Co. v. Nash,* 85 N.W. 485 (Wis. 1901)). Instead, the court found the agreement was unambiguous, and "'by its very terms,' did not require that all parties

listed ***or provided a signature line*** would sign the Memorandum of Understanding." *Id.* at **4 (emphasis added). The court concluded that the contract would be enforceable against any party who signed prior to the plaintiff's attempted revocation, including the plaintiff. *Id.* at **5.

Similar to the plaintiff in *Holzberger*, the Buyers claim that the Second Amendment is not effective because it did not contain ***all*** of the Sellers signatures before the Buyers revoked their agreement. In doing so, the Buyers cite *Robinson v. Martel Ent., Inc.*, 337 So. 2d 698 (Miss. 1976) for the proposition that failure to accept an offer in the manner prescribed by the contract will not result in the formation of a binding contract. *See* Appellee's Brief at 8. They claim that since each Seller was provided a signature line, that acceptance would only be binding by the signature.

The Sellers agree that if the amendment specifically stated it would not be binding on any party until signed by all, then the Buyers would have been safe in revoking their acceptance prior to the signing by the last two Sellers. However, this is not the case. As noted in *Holzberger*, the fact that a document has a signature line – as asserted by the Buyers in this case - is not sufficient. Instead, the contract must specifically state that it will not be effective until each party has signed.

As further explained in *International Creative Management, Inc. v. D. & R. Entertainment Co., Inc.,, et al.*, 670 N.E.2d 1305 (Ind. App. 1996),

> Generally, the validity of a contract is not dependent upon the signature of the parties, ***unless such is made a condition of the agreement.*** *State v. Daily Exp., Inc.*, 465 N.E.2d 764, 767 (Ind.Ct.App.1984). However, some form of assent to the terms of the contract is necessary. *Id.* Assent may be expressed by acts which manifest acceptance. *Id.*

Id. at 1312 (attached in the Appendix of Authorities)(emphasis added). The court further noted the general law that:

> In situations where fewer than all the proposed parties execute the document we look to the intent of the parties as determined by the language of the contract to

> determine who may be liable under the agreement. It should be assumed that all the parties who sign the agreement are bound by it unless it affirmatively appears that they did not intend to be bound unless others also signed. *Kruse Classic Auction Co., Inc. v. Aetna Cas. & Sur. Co.,* 511 N.E.2d 326, 328 (Ind.Ct.App.1987), *reh'g denied, trans. denied.*

Id. at 1311. In that case, the parties affirmatively agreed the contract would not be binding absent the signature of all parties by specifically stating in the contract "THIS CONTRACT NOT BINDING UNLESS SIGNED BY ALL PARTIES HERETO." *Id.*

Yet, there is no such provision in the original Purchase Agreement or the Second Amendment. Instead, the exact opposite is true in this case. Contrary to the Buyers assertions that all the Sellers must sign, the original Purchase Agreement provides that no modifications shall be valid "unless the same is in writing and signed by the party against whom the enforcement thereof is sought." (R. 226; R.E. at D). It does not require all parties to sign for the modification to be valid – only the party against whom enforcement is sought. In this case, the Sellers seek enforcement of the agreement against the Buyers, who were actually the first to sign the modification contained in the Second Amendment.

As a last effort to avoid the binding nature of the Second Amendment, the Buyers claim it could be revoked at any time prior to the signature of all three Sellers because it lacked consideration. This claim is unfounded. In this case, the Buyers asked for an extension of time in which to fulfill certain obligations. The extension of time was the benefit to the Buyers. In consideration of granting that extension, the Sellers were guaranteed that the Buyers were no longer allowed to terminate the agreement without losing the escrow deposit. The termination of the "Inspection Period" was the benefit to the Sellers. Clearly, there was consideration for both sides in the drafting and acceptance of the Second Amendment.

In conclusion, the Buyers accepted the Second Amendment by signing it, and their right to revoke that acceptance ended when the signature of the first Seller was placed on the

document. The Second Amendment is valid and effectively ended the Inspection Period during which the Buyers could have terminated the contract for sale. Because the Buyers thereafter failed to consummate the sale, they forfeited the Escrow Deposit as liquidated damages under the terms of the original Purchase Agreement. (R. 221; R.E. at D).

II. THE BUYERS GAVE THE NOTICE TO PROCEED REQUIRED UNDER THE ORIGINAL PURCHASE AGREEMENT

In the event the Court finds the Second Amendment was not enforceable, the Escrow Deposit still belongs to the Sellers under the terms of the original Purchase Agreement. As noted above, the Purchase Agreement provides that it will lapse at the end of the Inspection Period unless the Buyer simply gives "notice to proceed." (R. 212; R.E. at D). In this case there is no dispute that the Buyers gave the necessary notice to proceed numerous times throughout the day on the last day of the Inspection Period.[2]

Contrary to the Buyers' assertions, the Sellers have never argued that "the Inspection Period was somehow waived or shortened." Appellee's Brief at p. 11. Rather, in the event the

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[2] The Buyers seem to claim that in order to be effective, their notice to proceed must have been sent to the Title Company as well. *See* Appellee's Brief at p. 6. However, a reading of the termination provision shows this is not the case. The agreement states:

> **6.2 Right of Termination.** Notwithstanding anything in this Agreement to the contrary, Buyer shall have the right, for any reason in Buyer's sole and absolute discretion, to terminate this Agreement by written notice to Seller and Title Company on or before the expiration of the Inspection Period, and Title Company shall promptly deliver to Buyer the Escrow Deposit less the Non-Refundable Deposit. In the event that Buyer does not deliver any notice during the Inspection Period (notice to proceed or notice of cancellation), Buyer shall be deemed to have timely canceled this Agreement and the Title Company shall promptly deliver to Buyer the Escrow Deposit less the Non-Refundable Deposit. . . .

[R. 21; R.E. at D]. Therefore, the Buyers had the right to terminate the agreement by sending written notice to the Seller and Title Company, for the sole purpose of allowing the Title Company to refund the escrow deposit. However, as the next sentence clearly reveals, neither the notice of termination, nor the notice to proceed, was required to go to the Title Company. The Title Company was not a party to the contract, and had no interest in the sale of the building, other than as holder of the escrowed funds. Indeed, Buyers' own email giving "notice of cancellation" at 5:14 p.m. following termination of the Inspection Period – which was not copied to the Title Company - belies the Buyers' assertions that any notice must be sent to the Title Company to be effective.

Court finds the Second Amendment was not enforceable, then the Buyers had until 5:00 p.m. on October 10, 2007, in which to give notice of their intention to proceed or intention to terminate. If the Buyers failed to give any notice during that time, then the contract terminated of its own accord.

However, the Buyers are attempting to add language to the contract that is not there. The Buyers seem to argue that the contract called for their notice of their intention to proceed to be in some specific unidentified form. Indeed, the Buyers recognize "there were numerous conversations ***and communications*** between the parties concerning the terms of a proposed Second Amendment." *Id.* However, they claim these numerous writings, ***setting forth their intentions to proceed*** with the sale under certain modified circumstances, were truly not writings that qualify as notice of their intention to proceed. The Sellers are at a loss as to what the Buyers would argue would qualify as notice of their intention to proceed. The truth of the matter is that the contract language did not require the notice to be in any specific form, on any certain color paper, with any certain type-set, with any certain heading of "notice," or any other requirement. Rather, it simply stated that if the Buyers did not "deliver any notice during the Inspection Period (notice to proceed or notice of cancellation), Buyer shall be deemed to have timely canceled this Agreement. . . ." (R. 212; R.E. at D).

In this case, the Buyers gave written notice of their intention to proceed with the purchase of the Heritage Building through their email correspondences throughout the day and the signing of the Second Amendment. They were not silent as to their intentions, which silence under the contract would have resulted in the termination of the agreement by its terms. Rather, they **gave repeated written verifications** of their intentions to proceed. These writings certainly placed the Sellers on notice that the Buyers intended to go forward with the purchase

of the building, and the Buyers cannot now argue that this notice had to be in some unspecified form or manner in order to be effective.[3]

Clearly, all parties to this transaction were fully aware that the Buyers had given continual "notice to proceed" - in writing - up to and ***through*** the 5:00 p.m. deadline on the last date of the Inspection Period. Therefore, their failure to go through with the purchase of the property is a breach of contract resulting in the Escrow Deposit being paid to the Sellers as liquidated damages and the Chancery Court erred when it ruled otherwise.

CONCLUSION

The Buyers could not revoke their acceptance of the Second Amendment after one of the Sellers had signed it. Therefore, the Second Amendment is valid and effectively ended the Inspection Period. Because the Buyers did not go through with the purchase of building, the Escrow Deposit should be paid to the Sellers as liquidated damages as required under the terms of the Purchase Agreement.

Likewise, the same result is reached even if the Second Amendment is found ineffective, as the Buyers gave continual written notices of their intentions to proceed with the purchase throughout the last day of the Inspection Period as necessary under the terms of the original Purchase Agreement.

Based on the foregoing, the Chancery Court erred in holding the Buyers were entitled to the return of their forfeited Escrow Deposit, and this Court should reverse and hold that the Escrow Deposit should be paid to the Sellers.

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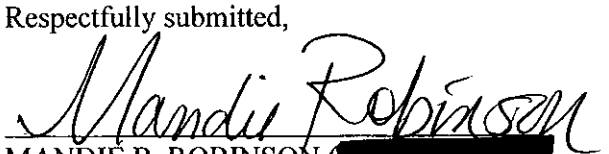
[3] In fact, the Sellers find it incredulous that the Buyers would argue their repeated emails could not qualify as their notice of intention to proceed, while at the same time they belatedly tried to give notice of termination of the agreement through an email. *See* email from Buyers' counsel at 5:14 p.m. stating he was giving "notice of the intention to terminate.")(R.275-76; R.E. at D). The Buyers simply cannot have it both ways.

This the 23rd day of March, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Appellant's Reply Brief via hand-delivery on the following:

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Dated this 23rd day of March, 2009.

Mandie B. Robinson

APPENDIX OF AUTHORITIES

Cases

Other