

IN THE SUPREME COURT OF MISSISSIPPI

APPEAL NO. 2008-CA-01853 SCTT

NORMA SLATER-MOORE

APPELLANT

VS.

ROBERT M. BAILEY

DESOTO LAND CORPORATION

ANNICE KYLE

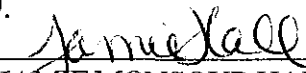
APPELLEES

I. CERTIFICATE OF INTERESTED PERSONS.

The undersigned counsel of record certifies that the following listed persons/entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Circuit Court Judge Robert P. Chamberlin, Desoto County Circuit Court, Hernando, Mississippi
2. Robert M. Bailey, Appellee and Officer of Desoto Land Corporation
3. Desoto Land Corporation, Appellee
4. Annice Kyle, Appellee
5. Norma Slater Moore, Appellant
6. Myers Law Group, PLLC, Attorneys for Appellees Robert M. Bailey and Desoto Land Corporation
7. Glassman, Edwards, Wade & Wyatt, Attorneys for Annice Kyle
8. Goeldner, Porter, & McDowell, Attorneys for Norma Slater Moore
9. All persons/entities identified in Appellant's Certificate of Interested Persons.

DATED this the 14th day of August, 2009.


JAMIE MONSOUR HALL, MSB NO [REDACTED]
Attorney For Appellees, Robert M. Bailey and
Desoto Land Corporation

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IV. STATEMENT OF ISSUES

- I. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF BAILEY AND DESOTO LAND CORPORATION ON MOORE'S CLAIMS**
- II. WHETHER THE TRIAL COURT PROPERLY HELD THAT BAILEY IS NOT PERSONALLY LIABLE FOR HIS ACTIONS ON BEHALF OF DESOTO LAND CORPORATION**
- III. WHETHER THE TRIAL COURT PROPERLY DETERMINED THAT RESCISSION IS NOT AN APPROPRIATE REMEDY FOR MOORE'S FRAUD CLAIMS**

V. STATEMENT OF THE CASE

A. THE NATURE OF THE CASE.

On June 27, 2006, Desoto Land Corporation sold a home to Norma Slater- Moore. On June 26, 2007, Moore filed a Complaint against Desoto Land Corporation and Bailey, both individually and as officer for Desoto Land Corporation, alleging that Bailey and Desoto Land Corporation breached the real estate contract, breached the implied warranty of habitability and covenant of good faith, and committed negligent misrepresentation and fraud, all of which is based on Moore's claim that Bailey and Desoto Land Corporation made representations regarding the home which were false. R. 12.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

On June 26, 2007, Moore filed a Complaint against Desoto Land Corporation, Robert. M. Bailey and Annice Kyle for damages arising out of breach of contract, breach of implied warranty of habitability and covenant of good faith, and misrepresentation. R. 12, 103-104. On August 22, 2008, Annice Kyle filed a Motion for Summary Judgment. Appellant's R.E. 102-107. On August 29, 2008, Bailey and Desoto Land Corporation filed a Motion for Partial Summary Judgment,

requesting judgment as a matter of law in favor of Bailey and Desoto Land Corporation based on the following: (1) Bailey is not personally or individually liable; (2) Desoto Land Corporation and Bailey did not misrepresent any fact to Moore; and (3) rescission is an improper remedy in this case. R. 406-411. Following a hearing on said motions, the Circuit Court of Desoto County granted Bailey and Desoto Land Corporation's motion. Appellant's R.E.109-122, R. 577-590. All of Moore's remaining claims against Desoto Land Corporation, which were not disposed of by the trial court's grant of partial summary judgment, were dismissed with prejudice by virtue of the Stipulation of Dismissal dated October 9, 2008. R. 655. Moore's dismissal of her remaining claims made the summary judgment order in favor of Desoto Land Corporation and Bailey a final order. Moore subsequently filed her Notice of Appeal. Appellant's R.E. 107.

C. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.

On June 27, 2006, Desoto Land Corporation sold a home located at 2312 Legends Drive Nesbit, Mississippi to Moore. R. 412- 418. Moore was represented by real estate agent, Joel "Duck" Hawkins, and Desoto Land Corporation was represented by its real estate agent, Annice Kyle. R. 419. Prior to closing, Desoto Land Corporation provided a Property Condition Disclosure Statement to Moore. R. 422-423. After receipt of the Property Condition Disclosure Statement, Moore signed a Purchase and Sale Agreement ("the Contract") solely with Desoto Land Corporation, not Bailey. R. 412- 418.

The Contract signed by Moore gave Moore the option to inspect the property prior to closing and that after such inspection, Moore could either accept the property with limited repairs made and paid for by the Seller or terminate the Contract with all Earnest Money refunded to Moore. R. 412-418. Specifically, the Contract provides in part as follows:

____. **Initial Inspection.** Buyer, its inspectors, appraisals and/or representatives shall have the right and responsibility to enter the property during normal business hours, for the purpose of making inspections and/or tests. Buyer shall, within 5 calendar days from Binding Agreement Date, make such inspections described in this paragraph AND either: (a) accept Property in its present condition by written notice to Seller, OR (2) furnish to Seller a copy of the inspection report with a written list of items set forth in the inspection report which Buyer requires to be repaired and/or replaced. Buyer shall within 2 calendar days from receipt of a written notice from the Seller either (1) accept the property with limited repairs made and paid for by the Seller per the counter notice OR (2) terminate this agreement with all Earnest Money refunded to buyer.

Sellers Initials _____ Buyer's Initials: _____

Applies to Either A or B: Final Inspection: The above notwithstanding Buyers shall have the right to conduct a final inspection of the property no later than 2 calendar days prior to the closing or 9:00 AM the day of possession only to confirm the Property is in the same or better condition as it was on the Binding Agreement Date normal wear and tear excepted and to determine that all repairs/replacement have been completed.

R. 414

Moore and her family members personally inspected the house, the yard and the entire property prior to purchasing the property from Desoto Land Corporation, and were given full opportunity to inspect every portion of the property. R. 476-478. After initially inspecting the property, Moore retained the services of Michael Mabry's Tree Service to clear a path to view the entire property before signing the Contract to purchase the property. R. 479-481.

Prior to closing, Moore engaged the services of Randy Brassfield of Brassfield Appraisal and Inspection Services to perform an inspection of the home, and Randy Brassfield issued an inspection report. R. 424-438, R. 481-485. Bailey and Desoto Land Corporation had nothing to do with the selection of the home inspector. R. 485. The Inspection report revealed: (1) insects were found in the home and recommended treatment for same (2) fireplace mantel and crown molding in family room and kitchen needed to be caulked (3) touch up paint needed throughout the home (4)

needed 10 splash blocks under downspouts (5) double switch plate needed to be adjusted (6) weather stripping on front door and door in garage needed replacement (7) crack in the mortar on brick exterior of home needed repair (8) property needed to be cleared of debris and cut logs (9) small a/c until vibrates (10) professional cleaning due to pets and insects at buyer's request. R. 424-438.

Moore also hired Randy Brassfield to appraise the home. The appraisal revealed "the subject property is in excellent condition due to the property being new" and "no needed repairs were noted during the inspection." R. 439. Moore admits that she had no conversations with Bailey, and never asked any questions of Bailey regarding any issues of the property or the home. R. 490.

VI. SUMMARY OF THE ARGUMENT.

There are no genuine issues of material fact of any misrepresentations on the part of Bailey or Desoto Land Corporation under controlling Mississippi law. Desoto Land Corporation sold a home to Moore. Both parties engaged real estate agents. Prior to the execution of the contract, Desoto Land Corporation provided a Seller's Property Condition Disclosure Statement. As was her right, Norma Moore, along with her family members, personally inspected the property prior to the closing. Moore employed a professional inspector and appraiser of her choice prior to the closing, and the conditions complained of in Moore's Complaint were open and obvious and readily determinable upon a reasonable inspection. Neither Bailey nor Desoto Land Corporation had anything to do with the selection of Moore's home inspector and appraiser. The record reveals that Moore did, or had every opportunity to, inspect the property personally and by a professional inspector and an appraiser, prior to closing on the property. Moore's fraud and misrepresentation claims are based solely on the terms of the Contract and the Seller's Property Disclosure Statement. Desoto Land Corporation fully disclosed all aspects of the home in the Seller's Property Disclosure Statement. There were no undisclosed defects to the

subject property.

A review of the record reveals that there are no genuine issues of material fact demonstrating any individual liability on the part of Bailey. The Contract was entered into between Desoto Land Corporation and Moore. Bailey signed on behalf of Desoto Land Corporation. Moore never asked any questions of Bailey regarding any issues of the property or the home prior to the closing. Moore failed to present any evidence of individual wrongdoing by Bailey.

There are no genuine issues of material fact that support rescission of the Contract. Rescission is inappropriate as an award of monetary damages would be sufficient to allow Moore to make any necessary repairs to her home. Further, as there are no issues of material fact to support Moore's claim of misrepresentation and fraud, and Moore dismissed all of her remaining causes of action against Desoto Land Corporation, there are no claims upon which rescission could be granted.

The trial court carefully examined Moore's affidavit and other evidence produced by Moore in opposition to Bailey and Desoto Land Corporation's Motion for Partial Summary Judgment as fully appears in the trial court's Order granting summary judgment. R. 577-590. As Moore failed to put any material fact in dispute by her affidavit or other evidence submitted to the trial court, the court's Order granting summary judgment against Moore should be upheld.

VII. ARGUMENT.

A. STANDARD OF REVIEW.

This matter came before the trial court upon Robert M. Bailey and Desoto Land

Corporation's Motion For Partial Summary Judgment pursuant to Miss. Rule Civil Procedure 56 (c).¹

Attached to and made a part of the Motion were Exhibits "A"- "H".²

Mississippi Rule of Civil Procedure 56(c) expressly provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* Where this evidence shows that there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See, e.g., Lattimore v. City of Laurel, 735 So.2d 400, 402 (Miss. 1999). See also Brown v. Credit Center, Inc., 444 So.2d 358, 362 (Miss. 1984); Cothorn v. Vickers, Inc., 759 So.2d 1241, 1245 (Miss. 2000); Hill v. Consumer Nat'l Bank, 482 So.2d 1124, 1128 (Miss. 1986). "A fact is material if it tends to resolve any of the issues, properly raised by the parties." Powell v. Cohen Realty, 803 So. 2d 1186, 1189 (Miss. Ct. App. 1999).

The standard of review of the grant of summary judgment is familiar and oft-repeated under Mississippi law:

The standard for reviewing the granting or the denying of summary judgment is the same standard as is employed by the trial court under M.R.C.P. 56(c). This Court conducts de novo review of orders granting or denying summary judgment and examines all the

¹

Moore's remaining claims not addressed in Bailey and Desoto Land Corporation's Motion for Partial Summary Judgment were dismissed after the trial court granted summary judgment to Bailey and Desoto Land Corporation.

²Real Estate Contract, Exhibit "A", R. 412-418.

Disclosure Regarding Real Estate Agency Relationships, Exhibit "B", R. 419.

Records of Mississippi Secretary of State, Exhibit "C", R. 420.

Property Condition Disclosure Statement, Exhibit "D", R. 422-423

Inspection Report, Bates No. 470, Exhibit "E", R. 424-438.

Appraisal Report, Bates No. 462, Exhibit "F", R. 439.

Report of Moore's expert Robert Aymett, Exhibit "G", R. 440-456.

Report of Tom Hudgens, Exhibit "H", R.457-469.

evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant would be given the benefit of the doubt.

See Titus v. Williams, 844 So.2d 459, 464 (Miss. 2003)(citing McCullough v. Cook, 679 So.2d 627, 630 (Miss.1996)).

Knowing her burden under this standard of review, Moore failed to present to the trial court a single fact that would create an issue for trial. As such, the judgment in favor of Bailey and Desoto Land Corporation by the Circuit Court of Desoto County was proper and should be affirmed.

B. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF BAILEY AND DESOTO LAND CORPORATION ON MOORE'S CLAIMS

Relying on Quay v. Archie L. Crawford and Shippers Exp., Inc., 788 So.2d 76, 81 (Miss. Ct. App. 2001), Moore argues that the trial court should not have considered any affidavit other than her own affidavit to support a finding of summary judgment. Id. In Quay, the Court stated, "It appears to us that a fair assessment of the proof offered for and against the motion for summary judgment left a glaring question of fact as to whether the lights on the rear trailer of the [Defendant's] rig were functioning properly so as to adequately illuminate the rear of the trailer." Id. at 81 (¶ 18) (emphasis added). The difference between Quay and the present case is that Moore offered no proof to demonstrate any triable issue of material fact regarding the alleged misrepresentations by Desoto Land Corporation and Bailey. It is abundantly clear that the trial court carefully considered Moore's affidavit and all other evidence presented to the trial court by Moore

in determining that there is no genuine issue of any material fact in the present case. R. 583-590. A careful reading of the trial court's Order granting summary judgment shows that the trial court addressed each and every misrepresentation alleged by Moore and searched for evidence to support Moore's claims in reaching the obvious conclusion that no issue of material fact exists. R. 583-590. Miss. Rule Civ. P 56(e) provides that "[W]hen a motion for summary judgment is made and supported as provided in this rule, **an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is genuine issue for trial.**" Id. (Emphasis added). For the reasons set out herein below, summary judgment against Moore's misrepresentation claims was proper as Moore failed to place any material fact in dispute through her affidavit or other evidence.

1. NEGLIGENCE MISREPRESENTATION

To prove negligent misrepresentation, a Plaintiff must show by a preponderance of the evidence (1) a misrepresentation or omission of a fact; (2) that the representation is material or significant; (3) failure to exercise reasonable care on the part of the ; (4) reasonable reliance on the misrepresentation or omission; and (5) damages as a direct result of such reasonable reliance. Little v. Miller, 909 So. 2d 1256, 1260 (Miss. Ct. App. 2005) (citing Spragins v. Sunburst Bank, 605 So. 2d 777, 780 (Miss. 1992)). The following analysis of fraudulent misrepresentation also applies to Moore's claims for negligent and gross negligent misrepresentation as negligent misrepresentation has the lesser evidentiary burden of the two forms of misrepresentation.

2. FRAUDULENT MISREPRESENTATION

To establish a claim on fraudulent misrepresentation, a Plaintiff must prove **by clear and convincing evidence**: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the

person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. Id. (citing Levens v. Campbell, 733 So. 2d 753 (Miss. 1999)) (emphasis added). Fraud is "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." Mitchell v. Nelson, 830 So. 2d 635 (Miss. 2002).

In Little v. Miller, 909 So. 2d 1256, 1259 (Miss. Ct. App. 2005), the Plaintiffs brought claims against their builder for negligent and fraudulent misrepresentation, seeking damages or, in the alternative, rescission of the contract. First, the Plaintiffs alleged that the builder had negligently misrepresented the sub-soil conditions of the lot by failing to disclose his knowledge of said defect when selling the property. Id. Second, the Plaintiffs alleged that the builder, by signing the seller's property condition disclosure statement, fraudulently represented that the lot they purchased was free from sub-soil defects and standing water. Id.

The Mississippi Court of Appeals found that the Plaintiffs inspected the property before purchasing it and discovered some erosion and drainage problems, causing them to hire a professional to inspect the property and give them a price to remedy the problems. Id. at 1260. Although the Plaintiffs discovered additional problems after purchasing the house, the Court held that it was apparent from the evidence that the Plaintiffs were well aware of the problems associated with the property and only completed the purchase after making their own observations and hiring a professional to inspect the lot. Id. **"We, therefore, cannot impose liability on [the builder] because the evidence presented by [the Plaintiffs] is insufficient to prove by a preponderance of the evidence that they acted in reliance of a misrepresentation by [the builder]."** Id. (¶ 17)(emphasis added). Because the Court found that the Plaintiffs had failed to meet the lower evidentiary burden of a negligent misrepresentation claim, the Court dismissed the higher clear and

convincing evidentiary burden associated with fraudulent misrepresentation. Id. See also Culbreath Revocable Trust v. Sanders, 979 So. 2d 704 (Miss. Ct. App. 2007) (affirming trial court's finding that a purchaser of land did not reasonably rely on any statement by the seller concerning flooding of the property, and, thus, there was no fraudulent or negligent misrepresentation, as the purchaser was given a topography map of the property prior to signing the contract with knowledge that he could have included a contingency provision in the contract about any concerns related to flooding).

In Powell v. Cohen Realty, Inc., 803 So. 2d 1186 (Miss. Ct. App. 1999), the purchaser brought an action against the sellers, listing agent and broker, alleging that they failed to disclose certain major defects of the house which sellers knew or should have known existed, claiming misrepresentation, fraud, and violations of Miss. Code Ann. §89-1-523. Powell, 803 So. 2d at 1189-90. The Mississippi Court of Appeals upheld the trial court's granting of summary judgment to the Defendants, finding that the sellers had complied with their duty to disclose under Mississippi law and that the purchaser inspected the house with her own real estate agent. Id. at 1190-91. As to the purchaser's misrepresentation and fraud claims, the Court found that the purchaser had made only general allegations of misrepresentations or fraud, but did not state with particularity the circumstances surrounding the fraud:

[The purchaser] makes a general allegation of fraudulent misrepresentation, but she does not state with particularity the circumstances surrounding the fraud. She also cites no authority as a basis for her argument, nor does she give any reason to support her propositions. **The Mississippi Supreme Court has frequently held that propositions unsupported by reasons and authority are considered to have been waived.**

Id. at 1190 (¶ 5)(citations omitted)(emphasis added). The Court further found that there was no evidence that, through the disclosure statement, Defendants had made any misrepresentations. Id. at 1191. As previously stated herein, Moore bases her misrepresentation claims on representations made in the Seller's Property Disclosure Statement. However, Moore offers no evidence that any

statement contained in the Seller's Disclosure Statement is false.

In Mitchell v. Nelson, 830 So. 2d 635 (Miss. 2002), purchasers brought an action against sellers of real property alleging that the sellers failed to disclose material information in the disclosure portion of the sales contract and knowingly failed to disclose damage to the property and extent of that damage. The Mississippi Supreme Court upheld the trial court's granting of summary judgment to the sellers, finding that the purchasers failed to plead fraud against the sellers with particularity. Id. at 640. The Court held that, while the purchasers claim that there were no conditions disclosed to them in the sales contract, they freely admitted that the sales contract disclosed and identified several areas of the home that needed to be repaired as a condition of the sale. Id. The Court agreed with the trial court that there was no evidence in the record of "willful or intentional" misconduct by the sellers. Id.

Moore contends that Bailey and Desoto Land Corporation made false representations of fact that she relied upon and suffered loss as a result thereof. Moore lists these representations in her Complaint and Affidavit in opposition of summary judgment, as follows: (1) Desoto Land Corporation and Bailey were not the builder of the home, (2) the home was built in conformity with an approved building code, (3) no foundation repairs are currently needed, (4) there is no infestation of vermin, mildew, etc, (5) there was no disclosure made about any "repaired damage", (6) there were no soil problems, (7) there was no standing water, (8) there was no landfill on the property, (9) the property has never flooded, (10) there are no matters that may affect the ownership interest in the property, (11) there have been no structural changes or alterations to the property, (12) there have been no problems with interior walls, (13) defendants were not aware of any problems which may exist by virtue of prior uses, (14) defendants were not aware of any problems or conditions that affect the value, desirability or functionality of the

heating, electrical, plumbing and other system, (15) defendants are not aware of any back-ups related to the plumbing, (16) defendants are not aware of any violation of local, state or federal laws or regulations relating to the property, (17) defendants are not aware of any defects or needed repairs about which a buyer should be informed, and (18) there were no repairs performed in the last two years. R. 45-49, Appellant's R.E. 130-133. Moore claims that Bailey and Desoto Land Corporation knowingly made false and material representations with the intent to induce her to enter into the contract, that she did not know the falsity of the representations, that she reasonably relied upon their truth, and that she suffered loss as a result. Appellant's Brief p. 31-45. However, the undisputed facts and evidence in the record do not support Moore's claims of misrepresentation.

First, Moore's deposition testimony clearly shows that Moore was represented by her own real estate agent and she, her family, and her real estate agent inspected the house several times prior to her purchase of the house. R. 476-478, 501. Moore hired a professional inspector to inspect the house. R. 495-497, 501. Notably, such inspection revealed certain conditions that Moore required to be addressed prior to the closing. R. 412-418, 501. Only after full inspection and with full knowledge that certain defects existed in the house, Moore chose to go forward and close on the Contract. R. 495-497, 501. Thus, all representations by Desoto Land Corporation and Bailey were entirely consistent with Moore's own inspection and that of her professional inspector. Although Moore attempts to make out a laundry list of "misrepresentations", all of the alleged representations of the conditions of the property were either made known to her prior to closing, were not material, and/or were open and obvious and not hidden from her during any inspection. R. 486-489. Further, Moore's own expert engineer has given his opinion that there is nothing structurally wrong with the property. R. 454. **Importantly, Moore was made aware of**

certain problems with the house prior to closing and only completed the purchase after making her own observations and hiring a professional to inspect it. Just as in Little, 909 So. 2d at 1260, *supra*, the Court properly dismissed Moore's misrepresentation claims as Moore has failed to show that she acted in reasonable reliance of any representation by Desoto Land Corporation or Bailey.

Miss. Code Ann. §89-1-505(1) provides that a transferor of real property **shall not be liable for any error, inaccuracy or omission of any information delivered in the Disclosure Statement if the error, inaccuracy, or omission was not within the personal knowledge of the transferor at the time the information was provided.** *Id.* (emphasis added). In addition to failing to prove materiality and reasonable reliance, Moore failed to show that any alleged "misrepresentation" of fact by Desoto Land Corporation or Bailey was in the personal knowledge of Desoto Land Corporation or Bailey at the time of the representation to Moore. If Moore and her inspectors did not detect any problems, it is difficult to perceive how Desoto Land Corporation or Bailey would have known about them without some clear factual explanation. **The fact that Moore claims that certain defects of the house now exist does not prove that Desoto Land Corporation or Bailey misrepresented any known condition of the house prior to closing.** Rosson, 962 So. 2d at 1288, *infra*. Moore failed to demonstrate any evidence of any fact that would suggest any willful or intentional fraudulent conduct by Desoto Land Corporation or Bailey.

The trial court properly granted summary judgment against Moore as there are no genuine issues of material fact to support Moore's claims for misrepresentation or fraud against Bailey and Desoto Land Corporation.

C. **WHETHER THE TRIAL COURT PROPERLY HELD THAT BAILEY IS NOT PERSONALLY LIABLE FOR HIS ACTIONS ON BEHALF OF DESOTO LAND CORPORATION**

Moore argues that the trial court erroneously relied on the standard for “piercing the corporation veil” as articulated in Rosson v. McFarland, 962 So. 2d 1279 (Miss. 2007) and Gray v. Edgewater Landing, Inc., 541 So. 2d 1044 (Miss. 1989) in holding that Bailey is not individually liable for his actions on behalf of Desoto Land Corporation. Appellant’s Brief p. 14. Moore cites the case of Hardy v. Brock, 826 So. 2d 71 (Miss. 2002) to support her argument that an officer of a corporation may be personally liable for his direct participation in, or authorization of, a tort, even on behalf of the corporation. Id. Desoto Land Corporation and Bailey submit that the trial court properly relied upon the Rosson decision, which held that, “[i]ndividual liability of corporate officers or directors **may not be predicated merely on their connection to the corporation but must have as their foundation individual wrongdoing.**” Rosson, 962 So. 2d at 1288 (¶ 43) (emphasis added). This is the same standard stated in the Hardy case as the applicable standard for determining individual liability.³ Appellant’s Brief p. 14. A review of the Hardy case reveals that the Hardy Court applied the three-prong test established in Gray v. Edgewater Landing, Inc., in determining whether individual liability existed. Hardy, 826 So.2d at 75 (¶ 20). Moore argues that the “piercing the corporate veil” analysis is only relevant or appropriate when there is no evidence that an officer directly participated in, or authorized, the wrongdoing. Appellants Brief p. 16. While the Hardy Court did find that the Plaintiffs presented no proof evidencing that the Defendant directly

³ “[I]ndividual liability of corporate officers or directors may not be predicated merely on their connection to the corporation but must have as their foundation individual wrongdoing.” Hardy v. Brock, 826 So.2d 71, 75 (¶ 18) (Miss. 2002) (quoting Turner v. Wilson, 620 So.2d 545, 548 (Miss. 1993))

participated in the alleged misfeasance in the subject development in that case, the Court did **not** hold that the “corporate veil” analysis is inappropriate or inapplicable in determining individual liability in such a case. However, just as in Hardy, Moore failed to present any evidence of fraud or misfeasance on the part of Bailey. See Section VII. B., *supra*. The Hardy Court held, “To disregard the corporate entity in determining whether [the Defendant] should be held potentially liable for the corporation's possible negligence, the appellate court would have to consider a three-prong test to justify placing shareholder liability on the [Defendant].”⁴ Id.

Applying the Gray, Rosson and Hardy cases, the trial court properly held that Bailey was not individually liable in this case as Moore failed to establish any individual wrongdoing on the part of Bailey.

“A corporation is an entity separate and distinct from its stockholders.” Rosson, 962 So. 2d at 1284 (¶ 22)(citations omitted). “Generally, a stockholder is not liable for the acts of the corporation.” Id. at 1287 (¶ 36). “Since contract liability arises from an essentially consensual relationship, courts generally decline to disregard the corporate entity, choosing instead to enforce the contract as written.” Id. at 1284-85 (¶ 22)(citations omitted). Under Mississippi law, to pierce the corporate veil, one must demonstrate:

- a) Some frustration of contractual expectations regarding the party to whom he looked for performance; b) the flagrant disregard of corporate formalities by the corporation and its principals; and c) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder.

Id. at 1285 (citations omitted).

“To present a jury issue on a demand that the corporate veil be pierced, **a party must present**

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The three-prong test was established in Gray and relied upon in Rosson in order to “pierce the corporate veil.” Id. at 75 (¶20).

some credible evidence on each of these points.” Id. (emphasis added). In Gray v. Edgewater Landing, Inc., 541 So. 2d 1044, 1047 (Miss. 1989), the Mississippi Supreme Court held that one who contracts with a selected party may not look to another party for liability merely because he is disappointed in the selected party’s performance “without additional compelling facts.” See also Nash Plumbing, Inc. v. Shasco Wholesale Supply, Inc., 875 So. 2d 1077, 1082 (¶17) (Miss. 2004) (holding that “[c]ourts do not take piercing of the corporate veil lightly because of the chilling effect it has on corporate risk-taking”).

In Rosson, the Mississippi Supreme Court found that the 3-prong test for piercing the corporate veil for individual liability against a builder was not satisfied. Id. at 1288-89. First, the Court held that it was clear that the Plaintiff did not contract with the builder individually for performance or require the builder to personally guarantee the performance of the corporation and, thus, the Plaintiff failed to satisfy the first prong to pierce the corporate veil. Id. See also Richardson v. Jenkins Builders, Inc., 737 So. 2d 1030, 1032 (Miss. Ct. App. 1999) (noting that the contract *on its face* places the burden of performance on a corporation and not an individual, holding that there was no individual liability for the builder).

Second, the Rosson Court found insufficient evidence that the corporation was no more than the alter ego of the builder with a disregard for corporate formalities. Finally, regarding the third prong, the Court found no evidence that the builder used the Plaintiff’s money for the builder’s own personal benefit, or that the builder was using a shell corporation as a shield from personal liability. Rosson, 962 So. 2d at 1288; see also Richardson, 737 So. 2d at 1032 (¶ 10)(finding no evidence that the builder, “from the beginning, was intent on obtaining the Plaintiff’s money for his own personal use with no intention of performing on the contract”). “As an agent for a disclosed principal . . . they incur no individual liability, absent fraud or other equivalent conduct.” Rosson, 962 So. 2d at 1288

(¶ 42) (citations omitted). Specifically, the Court stated, “**Although [the Plaintiff’s] home did not comply with the [Standard Building] Code, this does not mean [the builder] fraudulently represented herself.**” *Id.* (¶ 39) (emphasis added).

As stated above, “Individual liability of corporate officers or directors **may not be predicated merely on their connection to the corporation but must have as their foundation individual wrongdoing.**” *Id.* at 1288 (¶ 43)(emphasis added). The Rosson Court found, “In this case, there is no proof that [the builder] acted in any capacity other than as that of officer, agent, or employee of the corporation, nor that [the builder] was using a shell corporation as a shield from personal liability.” *Id.* at 1289.

As for the 3-prong test for piercing the corporate veil, Moore clearly admits to contracting with Desoto Land Corporation, and not Bailey individually, and Moore does not even allege that Bailey personally guaranteed the construction of Moore’s house, nor does any such guarantee exist. R. 492-494, 500. Moore entered into the Contract with Desoto Land Corporation. Bailey merely signed the Contract on behalf of Desoto Land Corporation. The Contract *on its face* clearly placed the burden of performance on Desoto Land Corporation and not Bailey individually. R. 412; see also Richardson, supra. Thus, Moore knew that she was contracting with Desoto Land Corporation, and she has failed to satisfy the first prong requiring evidence of some frustration of contractual expectations regarding the party to whom Moore looked for performance.

Second, Moore did not even allege, and presented no evidence to support, that Desoto Land Corporation is no more than the alter ego of Bailey. A review of the records of the Mississippi Secretary of State reveals that Desoto Land Corporation timely submits its reports, follows corporate formalities, and is in good standing. R. 420. Thus, there is insufficient evidence of any flagrant disregard of corporate formalities by Desoto Land Corporation and its principals.

Finally, as to the third prong, there is absolutely no suggestion or evidence that Bailey uses Desoto Land Corporation as a shell or shield from personal liability. In fact, Bailey is not the sole shareholder but one of four (4) shareholders of Desoto Land Corporation. R. 421. The record reveals that Moore failed to demonstrate fraud or other equivalent misfeasance on the part of Bailey as the corporate shareholder, as she admits in her deposition that she never met or spoke with Bailey personally prior to the closing. R. 475, 498-499. The Contract also clearly states Desoto Land Corporation did not build the home but bought the near-finished home as an investment. R. 412-416. Moore did not allege and there is absolutely no proof that Bailey used her money for his own personal use or benefit, with no intention from the beginning of ever performing on the contract. See Richardson, supra. Just as in Rosson, Moore's suit is solely based on allegations that her home does not comply with the Standard Building Code, which does not mean that Bailey fraudulently represented himself.

Moore merely alleges that Bailey should be liable because he is an agent of Desoto Land Corporation, which is precisely what the Mississippi Supreme Court has deemed insufficient for piercing the corporate veil. See Rosson, supra. As in Rosson, there is no proof that Bailey acted in any capacity other than as that of officer, agent, or employee of Desoto Land Corporation. Moore has failed to demonstrate any "additional compelling facts" to attribute liability to Bailey personally. See Gray, supra. Moore did not put any material fact in dispute to support her claim of misrepresentation or other wrongdoing by Bailey. As such, Moore's claims against Bailey individually were properly dismissed by the trial court.

D. WHETHER THE TRIAL COURT PROPERLY DETERMINED THAT RESCISSION IS NOT AN APPROPRIATE REMEDY FOR MOORE'S FRAUD CLAIMS

Moore's Complaint fails to plead a cause of action for rescission and fails to request the relief of rescission against Bailey and Desoto Land Corporation. R. 12, 103-104. However, Moore claimed

in her deposition that Bailey and Desoto Land Corporation fraudulently misrepresented the condition of the property and breached the contract in such a way as to justify rescission of the contract. R. 502. Bailey and Desoto Land Corporation assumed that a cause of action for rescission was stated for purposes of their Motion for Partial Summary Judgment only. The trial court held that rescission was not an appropriate remedy in the instant case as the appropriate remedy would be damages. R. 590. The Court has held in Browder v. Williams, 765 So. 2d 1281, 1284 (¶ 16)(Miss. 2000), that “[r]escission is an appropriate remedy for fraud.” However, rescission is **not required**, even upon a finding of fraud, where monetary damages will suffice. Id. at 1286-87 (upholding trial court’s award of repair damages to homebuyers rather than awarding rescission of contract, even though the trial court found that sellers had committed fraud when selling home to buyers, as monetary damages would suffice).

Citing Garris v Smith’s C&G, LLC, 941 So. 2d 228 (¶8) (Miss. Ct. App. 2006), Moore argues that the trial court’s decision that rescission was not appropriate without a trial was premature as “the law is clearly established that the jury’s finding of fraudulent misrepresentation allows [plaintiff] to make a choice to either rescind the contract and be restored to its’ former position before the store was purchased or to elect to keep the business and bring an action for damages.” Id. In the instant case, there was no finding of fraudulent misrepresentation by the court. R. 590. Moore failed to offer evidence to prove the elements of fraudulent misrepresentation. See Section VII. B. *supra*. Moore failed to prove the falsity and materiality of any statements that were within the knowledge of Desoto Land Corporation or Bailey at the time of making any such statements, and has further failed to prove her reasonable reliance on any such statements. See Section VII. B; Little v. Miller, 909 So. 2d 1256,1260 (Miss. Ct. App. 2005). As such, the trial court properly granted summary judgment against Moore on her fraud claim, leaving no triable issue regarding the

remedy of rescission in this case. Even if the Court had denied summary judgment and allowed Moore to proceed to the jury on her claim of fraudulent misrepresentation, the Court is not required to allow the jury to consider the remedy of rescission so long as monetary damages will suffice. See Browder, supra.

Bailey and Desoto Land Corporation presented their argument against rescission as relief for Moore's breach of contract claims in their Memorandum in support of their Motion for Partial Summary Judgment. However, Moore subsequently dismissed with prejudice her breach of contract claims and other remaining causes of action against Desoto Land Corporation.⁵ R. 655. As such, the foregoing discussion of rescission as applies to Moore's contract claims is abbreviated.

In Cenac v. Murry, 609 So. 2d 1257, 1273 (Miss. 1992), the Court held that "Rescission may be an appropriate remedy for breach of contract where damages are inadequate for a breach 'going to the very substance of the contract.'" Id. The Cenac Court explained:

As to the character or kind of breach or default warranting rescission, there may be a rescission if there is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially defeats its purpose.

Id. (quoting Gulf South Capital Corporation v. Brown, 183 So. 2d 802, 805 Miss. 1966)).

When considering rescission as a remedy, the Supreme Court has stated that "the focus is upon the materiality of the breach with the understanding that **such a drastic remedy is reserved for 'extreme cases' and should be 'sparsely granted.'**" Id. (citations omitted)(emphasis added).

In Bevis Construction Company, Inc. v. Kittrell, 139 So. 2d 375 (Miss. 1962), homebuyers sued their

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The Stipulation of Dismissal dated October 9, 2008 dismissed with prejudice Moore's claims against Desoto Land Corporation for breach of contract, tortious breach of contract, breach of implied warranty of workmanship and habitability, and implied covenant of good faith and fair dealing. R. 655

builder claiming that the building was not properly constructed and was inadequate and unacceptable, seeking rescission of the contract. The Supreme Court determined that the only issue was whether or not the contract was substantially complied with to the extent that the builder may pay the costs of bringing the building up to the contemplated specifications, or whether the contract was breached in such a manner as to justify a rescission and cancellation of the contract. *Id.* at 378. The *Bevis* Court held that, although the builder had breached the contract, the home was built in substantial compliance with the written contract and, therefore, the trial court erred by canceling the contract, and should have awarded damages instead. *Id.* at 379-80.

Assuming *arguendo* that Moore's claimed breaches existed and were not dismissed, rescission is inappropriate as an award of monetary damages would be sufficient to allow Moore to make any necessary repairs to her home. R. 457-469. See *Bevis supra*. The trial court properly held that rescission is inappropriate as the "drastic" remedy of rescission is not warranted under the facts of this case.

VIII. CONCLUSION



As found by the previous decision of the Desoto County Circuit Court, there is no genuine issue of material fact to support Moore's claims of negligent or fraudulent misrepresentation. Moore presented no proof, as often stated by the trial court in its order, of the falsity or materiality of any representation by Bailey and Desoto Land Corporation and Moore failed to demonstrate her reasonable reliance on any such representations. Moore did not put any material fact in dispute with her affidavit and other documents presented to the trial court in opposition to Desoto Land Corporation and Bailey's Motion for Partial Summary Judgment. There is no genuine issue of material fact to support Moore's claim that Bailey is personally or individually liable in this case. The record reveals that, at all times relevant hereto, Bailey acted solely as a representative of Desoto

Land Corporation, and Moore failed to present any proof of wrongdoing on the part of Bailey. Lastly, rescission is not an appropriate remedy in this case, as monetary damages, if proven, would have sufficed. The Circuit Court's grant of summary judgment against Moore should be affirmed.

RESPECTFULLY SUBMITTED this the 14th day of August, 2009.

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CERTIFICATE OF SERVICE

I, Jamie Monsour Hall, one of the attorneys for Appellees Robert M. Bailey and Desoto Land Corporation, do hereby certify that I have this day provided a true and correct copy of the above Brief of Appellees Robert M. Bailey and Desoto Land Corporation via First Class Mail, postage prepaid, to the following:

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