IN THE SUPREME COURT OF THE STATE MISSISSIPPI

NO. 2008-TS-01155

GARY HOUSTON — APPELLANT

v.

ROBERT WILLIS — APPELLEE

BRIEF OF APPELLEE ROBERT WILLIS

ON APPEAL FROM THE CHANCERY COURT
OF GRENADA COUNTY, MISSISSIPPI
CAUSE NO. 07-02-026 ML

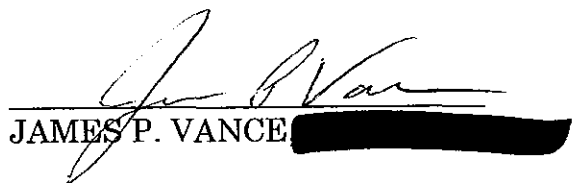
JAMES P. VANCE
Attorney at Law
123 Second Street
P.O. Box 159
Grenada, MS 38902-0159
Telephone: (662) 226-9111
Facsimile: (662) 226-9198
[redacted]

Attorney for Appellee,
Robert Willis

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.

1.	Robert Willis Post Office Box 160 Grenada, MS 38902	Plaintiff/Appellee
2.	James P. Vance Attorney at Law Post Office Box 159 Grenada, MS 38902	Attorney for Plaintiff/Appellee
3.	Gary Houston 2048 Wooded Drive Grenada, MS 38901	Defendant/Appellant
4.	S. Kirk Milam HICKMAN, GOZA & SPRAGINS P.O. Drawer 668 Oxford, MS 38655	Attorney for Defendant/Appellant
5.	Honorable Percy L. Lynchard, Jr. Chancellor P.O. Box 340 Hernando, MS 38632	Trial Court Judge



JAMES P. VANCE [redacted]

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

IV. STATEMENT REGARDING ORAL ARGUMENT

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

V. STATEMENT OF THE ISSUES

Whether the trial court committed error in ordering specific performances of the contract.

VI. STATEMENT OF THE CASE

On March 11, 2004, the parties entered into a Contract for Sale, whereby Gary Houston, Appellant agreed to purchase a home from Robert Willis, Appellee, for $385,000.00. The contract allowed Houston to move into the home and rent it for six (6) months at $2,000.00 per month with one-half the rent to go toward the purchase of the property. The contract provided that Houston put up $10,000.00 as non-refundable earnest money and would forfeit the $10,000.00 and all rents paid if he did not go through with the purchase. (R.E.42, R. 83)[1]

On September 10, 2004, six (6) months later, Houston got Willis to extend the closing for 6 months by putting up with the Real Estate Broker, Caldwell Banker, an additional $10,000.00 non-refundable earnest money and increasing the rent to $2,489.18 which was seller Willis mortgage payments. (R.E. 47, R.88)

On March 11, 2005, Houston and Willis entered into a new contract for the sale and purchase of this home. At this signing, Houston agreed to release the $20,000.00 heretofore held by the Broker as earnest money to the Seller as a down payment. There was no earnest money put up.

The contract for sale was for $385,000.00. The $20,000.00 down payment left a

---

[1] For this Brief, R will represent the Record, R.E. will represent Appellant's Record Excerpt, TT will represent the Trial Transcript and SUPP R.E. will represent Appellee's Record Excerpt.

balance due of $365,000.00 to be paid at closing.

Closing was to occur on or before March 11, 2006. (Not to exceed 12 months) (R.E. 48, R. 89)

The contract clearly stated that specific performance was the essence of the contract and gave Willis the option of specific performance if Houston breached the contract. Under the special provisions of the new contract, Houston was allowed to continue to rent the property at a new rate of $2,615.06 per month. Houston assumed all other incidents of ownership by agreeing to pay the home owners insurance premium in the amount of $2,604.00 and city and county taxes in the amount of $4,389.15. Willis agreed to credit Houston with any reduction of principal of Willis' mortgage.

On or about March 1, 2006, Houston's wife notified Willis of their intent to breach the contract and tried to elect Willis' remedy by asserting that he was forfeiting his earnest money. (R.E. 53, R. 94)

Willis filed suit for specific performance of the Real Estate Contract. Houston moved to dismiss this action on March 30, 2007 which this Court denied on October 25, 2007. Houston moved for a summary judgment on January 30, 2008 which the Court denied. After a trial on the issue, the Court entered a Judgment awarding Willis the balance due under the contract, $365,000.00 plus $62,761.41 in back rent, attorney fees and costs. Houston has appealed.

VI. SUMMARY OF THE ARGUMENT

Houston argues that Willis elected to accept earnest money so the contract is

void and he has no further remedy.

Willis argues that the earnest money previously put up with the broker for the first contract and the addendum was paid to him as a down payment at the inception of the final contract. Nor further earnest money was put up. Once Houston defaulted, Willis has the right to elect his remedy, one of which is specific performance. (Emphasis Mine)

Houston has argued two (2) different theories trying to defend his actions at trial. First, he has argued that he was only renting the house. He says that he had the option to purchase but was not legally bound to do so. (TT 89-91, SUPP R.E 8-10). NO PLACE in the final contract wherein Houston paid the $20,000.00 previously put up as earnest money as a down payment does the contract give Houston the option to purchase. Janet Kinard, the real estate agent who represented Houston, testified that Houston knew he was contracting to purchase and not renting with the option to purchase. (TT 12-13, SUPP R.E. 11-12)

After Houston breached the contract and was notified of the breach by Caldwell Banker, Houston never responded to assert his lack of obligation to purchase. (TT 88, SUPP R.E. 13)

Again, after Willis' attorney wrote him advising him of his default, (SUPP R.E. 16-18) Houston never responded asserting his lack of legal obligation. (TT 89,SUPP R.E. 8)

Houston's imaginative legal justification only arose after suit was filed.

Secondly, Houston argues that Willis accepted the $20,000.00 earnest money, therefore, Willis elected his remedy and the contract is null and void. The parties

agree that the language of the contract provides for three remedies under 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.

If the Court were to accept Houston's argument, the contract was null and void from its inception because Willis accepted the $20,000.00 previously put up as earnest money as consideration or down payment for the final contract. Willis had the $20,000.00 a year before Houston defaulted on the contract. Once Houston breached his contract to purchase, Willis elected the remedy of specific performance which was really the only remedy Willis had available.

Houston had put up no further earnest money at the inception of the final contract. The Contract specifically says no earnest money was put up ("0"). (R.E. 48, R. 89)

Houston assumed all incidents of ownership by agreeing to pay taxes, insurance, and house payment.

The contract further states that specific performance is the essence of this contract. Houston seeks to walk away from his legal obligation, by saying, in effect, "I gave you $20,000.00. You ought to be happy."

The contract is clear. It is a contract to purchase and sale. $20,000.00 was paid at the inception of the March 11, 2005 contract as a down payment with the balance of

$365,000.00 due at closing within one (1) year. The Buyer defaulted.

Houston attempts to force the election of remedies on Wills by saying that since Willis chose to accept the earnest money, the contract is void. Willis was given the $20,000.00 earnest money at the inception of this contract as down payment in consideration for the contract. Willis had no other viable legal remedy at Houston's breach other than sue for specific performance. Houston was given credit for the $20,000.00 down payment leaving a balance owed of $365,000.00.

VII. ARGUMENT

A. Standard of Review

Appellee agrees with Appellant that it is well established that 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 erroneous legal standard." *Gannett River States Publ'g Corp. v. City of Jackson*, 866 So.2d 462, 465 (Miss 2004). The Court heard the testimony and found the Contract to be unambiguous. The Chancellor rejected Houston's claims as not supported by the evidence. The Chancellor's decision should not be overturned.

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

It is ironic that Houston, who contracted to purchase Willis' home, lived in it for two (2) years causing extensive damage, abandons it, defaults on the contract, now argues Willis did not act in good faith.

Willis agrees with Houston's recitation of the "clean hands" doctrine. He who

seeks equity must do equity. *Thigpen v. Kennedy*, 238 So.2d 744, 746 (Miss 1970); *Cole v. Hood*, 371 So.2d 861, 863-64 (Miss 1979); *Taliaferro v. Ferguson*, 205 Miss. 129, 143, 38 So.2d 471,473 (1949). Willis is the innocent aggrieved party in this transaction.

A party who breaches a contract is liable for the damages caused by the breach, and the 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). The only way Willis would be put in the same position is for the Court to order Specific Performance. Because of Houston's breach, Willis now has to pay the mortgage, insurance and taxes on two (2) houses.

Houston continues to argue that Willis elected to accept the earnest money as a remedy for Houston's default.

Houston had paid the $20,000.00 (formerly earnest money in previous contracts) as a down payment in consideration for the new contract of March 11, 2005. Willis did not elect to keep the money as his remedy. He put Houston on notice through their dual agent that he was enforcing the contract. (TT 88). The $20,000.00 was already paid to Willis at the inception of the Contract. He has given Houston credit towards the purchase price. Willis has no wind fall. He has two (2) houses and mortgages in an unfavorable housing market recession.

C. Absent Parol Evidence, the Contracts show that Plaintiff is entitled to Specific Performance.

The initial question of whether the contract is ambiguous is a matter of law.

Lamb Contr. Co. v. Renova, 573 So.2d 1378, 1383 (Miss. 1990).

The Court found that the contract was unambiguous.

The Court found that Houston had breached the Contract to Purchase of March 11, 2005. It is a Standard Real Estate Sales Contract that says specific performance is the essence of the contract.

Willis agrees that the contract is not ambiguous. Houston argues that "the unambiguous reading of the contract leads to on(sic) obvious conclusion – that if the seller accepts the earnest money deposit as liquidated damages, this contract shall be null and void." Houston fails to recognize throughout this entire process that Willis did not and does not accept the earnest money as liquidated damages. Willis, pursuant to the contract, has the right to elect his remedies, one of which is specific performance. Houston does not get to decide which remedy Willis chooses.

Houston argues that any testimony on acceptance of the $20,000.00 is parole evidence and should not be considered. The contract itself indicates that Willis was paid $20,000.00 at the inception of the contract in consideration for it as down payment with $365,000.00 due at closing. The contract itself states "0" earnest money was deposited with Broker. At the trial on this issue, Janet Kinard, the Real Estate Broker, who was Houston's agent (dual agency) testified that she made it clear to Houston that he was entering a contract to purchase and not an option to purchase. No where in the contract conveys to Houston the option to purchase, however, he attempts to introduce parol evidence to assert that he was granted the option and not the obligation.

D. The Court was correct in ordering Specific Performance.

Specific Performance is an appropriate remedy in matters relating to tracts of real property because of the unique nature of real estate. *Van Etten v. Johnson* (In re *Estate of Pickett),* 879 So.2d 467,471 (Miss. Ct. App. 2004)

Where a contracting party can feasibly be given what he bargained for, specific performance is the preferred remedy. *Frierson v. Delta Outdoor, Inc* 794 So.2d 220, 224 (Miss. 2001) (Citing *Osborne v. Bullins),* 549 So.2d 1337, 1339 (Miss. 1989).

Willis was at all times ready willing and able to convey the home to Houston. Because of Houston's breach, Willis now has two (2) houses for which he is having to maintain insurance, taxes, upkeep, and mortgage payments. Specific performance is the only viable option available to Willis to put him in the same position he occupied prior to the breach of contract by Houston.

Houston argues the damages in this case are liquidated damages defined in contract. That is simply not true. While Houston could argue that the initial $10,000.00 deposit plus the $10,000.00 put up for the first addendum might be considered as earnest money subject to being accepted as damages, the Final Contract of March 14, 2005, Special Provisions did not provide for the earnest money forfeiture, since there was none.

Houston argues election of remedies. There are not two (2) or more remedies available to Willis. The contract provides for three (3) remedies all of which are at Willis' Option. Willis did not elect to accept the "down payment" as set out in the new contract as his remedy. Willis had this money at the inception of the contract in

consideration for the contract. Houston argues that Willis previously made a choice of one (1) of his remedies by accepting a down payment. Willis had this payment prior to the breach. Subsequent to notification of the breach, Willis informed Houston of his election to seek specific performance if he refused to complete the sale.

The doctrine of election of remedies is disfavored in equity and should not be unduly extended. It is a limited defense dependant upon the facts and circumstances of the case. *O'Briant v. Hull* 208 So.2d 784 (Miss. 1968).

It is not even applicable here since specific performance was the only remedy sought after the breach of contract by Houston.

E. The March 11, 2005 Contract was a New Contract.

Although already addressed hereinabove, Houston continues to argue that the March 11, 2005 contract was not a new contract but an extension of the original contract.

When the original March 11, 2004 contract was extended, an addendum was executed wherein Houston put up an additional $10,000.00 as earnest money. On March 11, 2005 a new contract was prepared. While some terms of the original contract were extended, under Paragraph #25, there was no mention of the forfeiture of earnest money because no earnest money was paid. The $20,000.00 previously put up under the original contract and addendum was released and paid to Willis as a "down payment" with a balance due of $365,000.00.

Mr. Houston contends, after his default, that it was his understanding that should he "elect" not to purchase the house, his damages would be the loss of earnest

money and rent. Further, Mr. Houston's understanding of the contract was that he was renting the property with the option to purchase the property at the end of the term.

Janet Kinard, Houston's Real Estate Broker and Agent testified on this issue as follows:

> Q. Did you discuss the terms of this contract with Mr. Houston before he signed it?
> A. Yes.
> Q. Did you make it clear to Mr. Houston that he was entering a contract to purchase before he signed it?
> A. Yes.
> Q. Is there anywhere in that contract that you're aware of that Mr. Houston is given the, quote, option to purchase?
> A. No, sir. (TT 12-13, SUPP R.E. 11-12)

Mrs. Kinard has previously testified in narrative form that originally Houston was looking for something to lease but nothing was available. Mrs. Kinard testified that Mr. Willis was not agreeable to lease his property with an option to buy. (TT 6, SUPP R.E. 14)

Mr. Houston is the plant manager at a large manufacturer in Grenada and is aware that he was entering into a legally binding contract to purchase as evidenced by the contract itself and the testimony of his agent and Real Estate Broker.

F. Houston contends Willis has been compensated for his breach of the contract.

Houston argues that his payment of rent for the two (2) years he occupied the house together with the $20,000.00 down payment fully compensates Willis for Houston's Breach.

Houston had use and occupancy of the house. As far as Willis taking in the

monthly payment, the evidence showed that Mr. Willis' mortgage payment was $2,489.00. (TT 45, SUPP R.E. 15) Willis was losing money allowing Houston to delay closing.

Willis still has the house and is required to make the mortgage payment, insurance and taxes every month since Houston's default in March 2006. There has been no windfall and Willis never elected to accept any liquidated damages. Damages continue to accrue.

G. The Lower Court is correct in Awarding Damages.

The Court, in ordering specific performance, found that from the March 11, 2005 closing date up until the date of trial, Houston should be required to pay $2615.06 per month for a total additional judgment of $62,761.44, which was the monthly mortgage payment Willis was paying and would not have had to pay had Defendant, Houston, not breached his contract. The Chancellor has wide latitude to see an equitable remedy is reached and his decision should not be disturbed *Gannett River States Publ'g Corp. v. City of Jackson*, 866 So.2d 462,465 (Miss. 2004).

IX. CONCLUSION

The Court was correct in ordering specific performance and awarding damages and costs.

Willis' only viable remedy after the breach was to seek specific performance.

The Court found there was no reasonable relief Willis could be accorded except specific performance. Defendant's arguments concerning "options to purchase" and "election of accepting earnest money" are an effort to excuse his breach of contract and

were rejected by the Chancellor. The Chancellor's decision should not be disturbed.

Respectfully submitted,

ROBERT WILLIS

By: _____

JAMES P. VANCE, [redacted]
Attorney for Robert Willis
P.O. Box 159
Grenada, MS 38902-0159
(662) 226-9111

CERTIFICATE OF SERVICE

I, James P. Vance, Attorney for Robert Willis, do hereby certify that I have this day mailed, via first class United States mail, postage pre-paid, a true and correct copy of the above and foregoing *Brief of Appellee* to the following:

S. Kirk Milam
Hickman, Goza & Spragins, PLLC
P.O Drawer 668
Oxford, MS 38655-0668

Honorable Percy L. Lynchard, Jr.
Chancellor
P.O. Box 340
Hernando, MS 38632

This the 26th day of February, 2009.

JAMES P. VANCE

JAMES P. VANCE
Attorney at Law
P.O. Box 159
Grenada, MS 38902-0159
(662) 226-9111
Fax: (662) 226-9198