IN THE SUPREME COURT OF MISSISSIPPI

2008-TS-01463

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

VS.

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

APPEAL FROM THE CHANCERY COURT
OF RANKIN COUNTY

BRIEF OF APPELLEES
(Oral Argument Requested)

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ATTORNEYS FOR APPELLEES

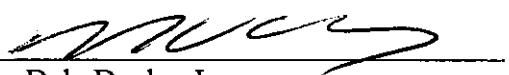
CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluate possible disqualifications or recusal:

1. The Heritage Building Property, LLC; Jenkins Heritage, LLC; Elverton Building, LLC (Appellants);
2. Mandie B. Robinson, Steven M. Hendrix, and Forman, Perry, Watkins, Krutz & Tardy, LLP (Counsel for The Heritage Building Property, LLC; Jenkins Heritage, LLC; Elverton Investments, LLC);
3. Prime Income Asset Management, Inc.; and TCI Heritage Building, Inc. (Appellees);
4. Dale Danks, Jr., Michael V. Cory, Jr., and Danks, Miller, Hamer & Cory (Counsel for the Prime Income Asset Management, Inc., and TCI Heritage Building, Inc.);
5. William L. Colbert, Jr. and Rhoden, Lacy & Colbert (Counsel for Chicago Title Insurance Company); and
6. Honorable John Grant (the "Chancery Court") (Rankin County Chancery Court Judge).

RESPECTFULLY SUBMITTED, this the 9th day of March, 2009.

DANKS, MILLER, HAMER & CORY

By: 

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2. WHETHER THE TRIAL COURT CORRECTLY FOUND THAT THE AGREEMENT WAS PROPERLY TERMINATED PRIOR TO THE EXPIRATION OF THE INSPECTION PERIOD.

3. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE SECOND AMENDMENT WAS NEVER BINDING ON THE PARTIES.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case involves an earnest money dispute arising from the termination of an Agreement to purchase certain real property and improvements known as the Heritage Building. When the Buyers (Prime Income Asset Management, Inc., and TCI Heritage Building, Inc.) and the Sellers (The Heritage Building Properties, LLC, Jenkins Heritage, LLC, and Elverton Investments, LLC) both claimed to be entitled to the earnest money, the title company holding the earnest money filed an interpleader action on November 21, 2007.

Both the Buyers and Sellers subsequently filed motions for summary judgment. Following a hearing on the competing motions, the trial court issued its Opinion granting the summary judgment motion filed by the Buyers, denying the summary judgment motion filed by the Sellers, and awarding the disputed earnest money to the Buyers.

The Sellers timely filed their notice of appeal, and the Buyers now submit this their Brief of the Appellees requesting that this Court affirm the decision of the trial court.

II. PERTINENT FACTS

The basic facts on which this case is based are not in dispute. The facts pertinent to this

appeal are set forth below.

1. On September 12, 2007, Prime Income Asset Management entered into a Purchase and Sale Agreement (hereafter the "Agreement") to purchase certain real property and improvements known as "The Heritage Building." [R pp. 200-234; RE pp. 003-038]. At the time, the Heritage Building was owned by three separate and distinct legal entities: (1) The Heritage Building Property, LLC; (2) Jenkins Heritage, LLC; and, (3) Elverton Investments, LLC. (hereafter the "Sellers"). The Agreement became effective when it was signed by each of the Sellers and Prime Income Asset Management.

2. Section 12.8 of the Agreement specifically allowed Prime Income Management to assign its rights under the Agreement to a subsidiary. Prime Income Asset Management subsequently assigned TCI Heritage Building, Inc., its rights under the Agreement.

3. Pursuant to the Agreement, the Buyers were required to forward $100,000 into an Escrow Deposit with Chicago Title. Initially, the Buyers did not forward the deposit in the time required under the Agreement, resulting in the lapse of the Agreement. However, they subsequently informed the Sellers they were still interested in purchasing the property. All of the parties then signed a Reinstatement and First Amendment to Purchase Agreement (the "First Amendment") on September 21, 2007. [R pp. 356-358; RE pp. 053-055]. On that same date, the Buyers wire-transferred the required $100,000 Escrow Deposit to Chicago Title.

4. Under Sections 6.1 and 6.2 of the Agreement (and not changed under the First Amendment), the Buyers had the right to terminate the Agreement on or before the expiration of the Inspection Period. The Inspection Period was set to expire at 5:00 p.m. Central Standard Time on October 10, 2007. The Agreement specifically stated:

> Buyer shall have the right, for any reason in Buyer's sole and absolute discretion, to terminate this Agreement by written notice to the 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 cancelled this Agreement . . . . [R p. 21; RE p. 001](emphasis added).

5. On October 10, 2007, Garry Gibbons, on behalf of the Buyers, informed Breck Hines, a broker for the Sellers, that the Buyers wanted to proceed but needed an additional amendment regarding extending the deadline for the Buyers to perform a title and survey review, and for assumption of financing. [R pp. 301-303; RE pp. 043-045]. The Sellers subsequently agreed to the requested terms, and their counsel drafted and circulated the proposed Second Amendment via email at 3:30 p.m. the same day. [R pp. 274-275; RE pp. 038-039].

6. Counsel for the Sellers forwarded the Proposed Second Amendment to the Buyers for signature. Steven Shelley, the representative for the Buyers, signed the Second Amendment and returned the signed Second Amendment to the Sellers via email at 4:25 p.m. [R p. 306; RE p. 046].

7. Breck Hines was only able to obtain the signature of one of the Sellers on the Second Amendment. [R p. 302; RE p. 044]. At 4:41 p.m., Breck Hines sent a copy of the Second Amendment which had been signed by one of the Sellers back to the Buyers, via email. In this email, Breck Hines advised the Buyers that the other two Sellers had verbally agreed to the extension, but that they were out of state, and were unable to sign it that day.

8. Prior to 5:00 p.m., Jeff Agrest, counsel for the Buyers, had a telephone conversation with Dru Luckett, a paralegal in the offices of counsel for the Sellers, and requested that she "trash" the Second Amendment. This conversation and request was confirmed by an email at 4:55 p.m. from Dru Luckett. [R pp. 274-276, 290, RE pp. 038-039, 042].

9. The proposed Second Amendment was not signed by the remaining two Sellers prior to the Buyers making their request to "trash."

10. No notice of intent to proceed was provided by the Buyers to the Sellers or the Title Company prior to the expiration of the Inspection Period. [R p. 395; RE p. 050].

11. At 5:14 p.m., counsel for the Buyers forwarded a "Revised" Second Amendment to Dru Luckett via email. In this email, that the Buyers were requesting that the Inspection Period be extended, or in the alternative – if the Inspection Period could not be extended, that this email should "serve as a termination notice." [R pp. 274-275, RE pp. 038-039]. Negotiations for the purchase of the Heritage Building continued between the Parties until the Buyers informed the Sellers on November 1, 2007, that the Buyers were no longer interested in the property. However, as set forth in the argument contained herein, all communication after 5:00 p.m. are irrelevant because the Agreement had already lapsed by the operation of its express terms.

12. The Agreement that was in force at the time it lapsed specifically provided, among other things, that:

a. the Closing would occur within 30 days of the expiration of the expiration of the Inspection Period;

b. the Inspection Period would expire on October 10, 2007, at 5:00 p.m.;

c. Buyers had the "absolute" right to terminate the Contract on or before the expiration of the Inspection period;

d. in the event that the Buyer did "not deliver any notice during the Inspection Period (notice to proceed or notice of cancellation), Buyer shall be deemed to have timely cancelled" the Agreement; and,

e. all notices under the Contract were to be in writing.

13. Both the Buyers and Sellers claim to be entitled to the $100,000.00 in earnest money, which was deposited by the Buyers with the Title Company.

SUMMARY OF THE ARGUMENT

On September 12, 2007, the Buyers and Sellers entered into an Agreement concerning certain real property and improvements located in Jackson, Mississippi. This Agreement expressly provided, that the Buyers could terminate the Agreement, and have their earnest money returned, any time prior to the expiration of the Inspection Period by simply not giving a written notice of intent to proceed.

On the day the Inspection Period was scheduled to end, there were multiple communications between the parties concerning extending certain deadlines. As a result of these communications, a proposed Second Amendment was drafted by Sellers and sent to the Buyers by email. Shortly after receipt, the Proposed Second Amendment was signed on behalf of the Buyers and sent back to the Sellers. However, prior to the expiration of the Inspection Period, and prior to Sellers executing the Proposed Second Amendment, the Buyers' withdrew their acceptance of the proposed Second Amendment, and allowed the original Agreement to terminate or lapse. Because the Second Amendment was never a binding obligation on all parties prior to the expiration of the Inspection Period, and because the Buyers did not send a written notice of intent to proceed prior to the expiration of the Inspection Period, the Agreement was terminated or lapsed and the Buyers are entitled to the return of their earnest money.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT THE BUYERS RETAINED THE RIGHT TO TERMINATE THE AGREEMENT PRIOR TO THE EXPIRATION OF THE INSPECTION PERIOD AT 5:00 P.M. ON OCTOBER 10, 2007

The trial court correctly concluded, based on the terms of the Agreement, that the Buyers had the "absolute right" to cancel the Agreement at any time prior to the expiration of the Inspection Period by not proving written notice to proceed to both the Sellers and the Title Company. [R p. 395; RE p. 050]. The trial court also correctly concluded that the right to terminate the Agreement prior to the expiration of the Inspection Period remained with the Buyers until the Inspection Period expired. These findings were based on the plain and unambiguous terms of the Agreement itself. Under the Agreement, the Buyers had until 5:00 p.m. on October 10, 2007, to terminate the Agreement, and receive the return of the Buyer's earnest money. This was an absolute contractual right that only could be waived or changed under Section 12.5 of the Agreement by a written agreement signed by the Buyers. [R p. 35; RE p. 002]. Therefore, according to the Agreement itself, if the Buyer did not give the Sellers the required written notice of intent to proceed prior 5:00 p.m. on October 10, 2007, the Agreement by its own terms would automatically terminate and the Buyers' earnest money would be promptly returned.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE AGREEMENT WAS TERMINATED PROPERLY PRIOR TO THE EXPIRATION OF THE INSPECTION PERIOD

The trial court correctly found that the Buyers did not provide written notice to the Sellers and Title Company prior to the expiration of the Inspection Period. [R pp. 395-396; RE pp. 050-051]. The trial court correctly found that because the requested notice was not given, the Agreement

terminated and the Buyers were entitled to the return of their earnest money. [R pp. 393-397; RE pp. 048-052]. The trial court's findings were based on the Agreement's clear and unambiguous language that in the absence of the delivery of a written notice to proceed, to both the Title Company and Sellers, the "Buyer shall be deemed to have timely cancelled this Agreement." While unusual, this termination provision was plain and unambiguous. Mississippi law is well settled that a contract is to be interpreted where possible based on the plain language of the contract itself. *Brown v. Hartford Ins., Co.*, 606 So.2d 122, 126 (Miss. 1992)(explaining that when construing the terms of a contract, the parties' intent is to be determined from "the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties"). In this case there is no dispute that the Buyers did not deliver the required written notice of intent to proceed to the Title Company or the Sellers prior to the expiration of the Inspection Period. Therefore, since the Buyers did not take the action necessary to extend the Agreement beyond the Inspection Period, the Agreement between the parties terminated or lapsed at 5:00 p.m. on October 10th. Moreover, regardless of whether the Buyers intended to go forward until the last moments of the Inspection Period, the Agreement itself gave the Buyers an irrevocable right under the Agreement to let the Agreement lapse by not giving the required written notice of intent to proceed.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE SECOND AMENDMENT WAS NEVER BINDING ON THE PARTIES

The trial court correctly recognized that the "real issue" before the court was whether the proposed Second Amendment became binding on the Buyers and Sellers prior to the expiration of the Inspection Period. [R p. 393; RE p. 048]. The trial court concluded that the Second Amendment did not become binding because it was not signed by all parties prior to being rescinded by the

Buyers. [R p 395; RE p. 050]. Under Mississippi law, when a person creates a power of acceptance in another party by signing the contract, that person retains the power to revoke simply by giving notice to the other party. *Vice v. Hinton,* 811 So.2d 335, 388 (Miss. Ct. App. 2001)(explaining that "no formal notice of revocation is necessary if before the party accepts the offer, they have knowledge of an act by the offeror that would be inconsistent with the offer of the sale of land and constitutes a revocation"). In this particular case, prior to 5:00 p.m. (i.e., the expiration of the Inspection Period), and prior to each of the Sellers executing the Proposed Second Amendment, the Buyers revoked/rescinded their assent to the Proposed Second Amendment. [R p. 290; RE p. 042]. The Proposed Second Amendment as drafted by the Sellers specifically provided for the signature of each of the Sellers in order for it to become a legal, valid and binding obligation. The Second Amendment also provided in paragraph 8 that in order "to expedite the execution of this Amendment, telecopied or PDF signatures may be used in place of original signatures." [R p. 308; RE p. 047]. However, there is no dispute in this case that only one of the three Sellers actually signed the proposed Second Amendment prior to its being revoked by the Buyers. [R p. 289; RE p. 041].

As a matter of law, the Proposed Second Amendment never became valid and enforceable because it was never signed by all parties as required by the Amendment itself. See *Robinson v. Martel Ent., Inc.,* 337 So.2d 698, 702 (explaining that the failure to accept an offer in the manner prescribed by the contract will not result in the formation of "a binding contract"). Under Mississippi law, the signing of the Proposed Second Amendment by the Buyers constituted an offer to be bound, which until accepted in the manner provided for in the Agreement, could be revoked/rescinded/cancelled at the will of the Buyers. *Bancroft v. Martin*, 109 So. 859, 860 (Miss.

1926)(stating that in the absence of consideration, an offer "may be revoked before it has been accepted by the offeree"); and *Baird v. Lewis*, 90 So.2d 184, 185 (Miss. 1956)(explaining that where there is no consideration, an offer "could be revoked at will"). There is no Mississippi case or statute which precludes an offeror from verbally rescinding an offer. See *Bancroft*, 109 So. at 860 (stating with respect to cancellation that "'[f]ormal notice of revocation, however, is not necessary and if the other party has, before accepting the offer, actual knowledge of any act of the offerer inconsistent with the continuance of the offer . . . that will constitute an effectual revocation'")(quoting Benjamin on Sales, 6th Ed., 92, 23 R.C.L. 1288).

Under basic contract law, the Agreement was not a binding obligation until signed by the Buyers and each of the Sellers. Until signed by all parties, the proposed Second Amendment, legally speaking, was nothing more than an open offer to extend the Agreement. *Vice v. Hinton*, 811 So.2d 335, 338 (Miss. Ct. App. 2001)(stating that it "is basic contract law, that a contract is not formed until the offeree accepts the terms stated by the offeror").

Again, in this particular case, prior to the expiration of the Inspection Period, and prior to each of the Sellers executing the Proposed Second Amendment, the Buyers revoked/rescinded the offer to enter into the proposed Second Amendment. For these reasons, the Agreement between the parties terminated, and it was never reinstated.

As a matter of law, the trial court correctly found that the Proposed Second Amendment was never binding on the parties.

IV. THE SELLERS' CONTENTION THAT THE SECOND AMENDMENT IS ENFORCEABLE IS WITHOUT MERIT

The Sellers first contend that the Second Amendment became binding and irrevocable once signed by the Buyers and only one of the Sellers. The Sellers also contend that the Second Amendment was binding and irrevocable because the Sellers' purported "undisputed agent," Breck Hines, advised the Sellers in an email that while only one Seller had actually signed, the other two Sellers had verbally agreed to the terms of the Second Amendment and would sign it the following day.

The contention that the Second Amendment became binding, irrevocable and enforceable once it was signed by the Buyers and one of the three Sellers is without merit. The actual signatures of each of the three Sellers was necessary for the contract to be a "legal, valid and binding obligation." Furthermore, under the Statute of Frauds, contracts for the sale of land must be in writing. *Miss. Code Ann.* § 15-3-1. Equally important, the Sellers themselves chose to draft the proposed Second Amendment in such a way that it required the signatures of all three Sellers. *Robinson v. Martel Ent., Inc.,* 337 So.2d 698, 702 (Miss. 1976) (explaining that the failure to accept an offer in the manner prescribed by the contract will not result in the formation of "a binding contract"). Since all the necessary parties did not sign the proposed Second Amendment, it was never a binding obligation.

With regard to the second contention, that the email from Breck Hines was sufficient to create a binding executed Second Amendment, and assuming only for the sake of argument that the actual signatures of each of the Sellers was not necessary to create a binding Second Amendment, 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. The record demonstrates that at most he was

merely relaying what he was told by the Sellers. Furthermore, while the Sellers suggest that Mr. Hines was an actual agent with authority to bind the Sellers, he did not actually exercise that purported authority by signing the Second Amendment. In addition, because there was no consideration for the Second Amendment, it could be revoked at any time before being signed by each of the Sellers. *Bancroft v. Martin*, 109 So. 859, 860 (Miss. 1926)(stating that in the absence of consideration, an offer "may be revoked before it has been accepted by the offeree"); and *Baird v. Lewis*, 90 So.2d 184, 185 (Miss. 1956)(explaining that where there is no consideration, an offer "could be revoked at will").

V. THE SELLERS' CONTENTION THAT THE BUYERS GAVE THE REQUIRED NOTICE TO PROCEED NUMEROUS TIMES PRIOR TO THE EXPIRATION OF THE INSPECTION PERIOD IS WITHOUT MERIT

On October 10, 2007, there were numerous conversations and communications between the parties concerning the terms of a proposed Second Amendment. These conversations and communications were simply further negotiations. As a result of these conversations and communications, the proposed Second Amendment was drafted by Sellers and sent to the Buyers.

The Sellers have suggested that the required "notice to proceed" did not have to be in writing, but could, and was in fact, given orally by the Buyers. Or failing in that argument, the Sellers suggest that because the Buyers acted as if they intended to proceed with the Agreement during the Inspection Period, the Inspection Period was somehow waived or shortened. Both of these contentions fail as a matter of law.

Under Section 12.13 of the Agreement, "[a]ll notices . . . shall be in writing." Therefore, in the absence of a written notice of intent to proceed signed by the Buyers, and sent to both the Sellers and the Title Company prior to the expiration of the Inspection Period, or absent a fully executed and

binding Second Amendment, the Agreement itself terminated by the operation of its unambiguous terms. Additionally, nowhere is there any language in the Agreement that suggests that the Inspection Period would be shortened if the Buyers act consistent with an intent to proceed prior to the expiration of the Inspection Period. Rather, under the terms of the Agreement there could be no waiver of the Inspection Period except in a writing signed by the Buyers. Finally, while the Sellers contend that discussions with the Buyers on October 10 were sufficient to cause the "Inspection Period" to expire sometime prior to 5:00, or that they were sufficient to constitute the required written notice of intent to proceed, they cite no legal authority, much less from a Mississippi Court, which supports any of their arguments. For all of these reasons, the Sellers' contentions are without merit.

CONCLUSION

A review of the record demonstrates fully that the decision by the trial court was correct in all particulars. Therefore, for the reasons set forth herein, this Court must affirm the trial court's grant of summary judgment in favor of the Buyers.

CERTIFICATE OF SERVICE

I, Michael V. Cory, Jr., attorney for Prime Income Asset Management, Inc., and TCI Heritage Building, Inc., do hereby certify that I have this day mailed, via United States Postal Service mail, postage pre-paid, a true and correct copy of the above and foregoing document to the following counsel of record:

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THIS, the 9th day of March, 2009.

MICHAEL V. CORY, JR.