IN THE SUPREME COURT OF MISSISSIPPI

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

VS. **CASE NO. 2008-TS-01463**

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

APPEAL FROM RANKIN COUNTY CHANCERY COURT, FIRST DISTRICT

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

ORAL ARGUMENT NOT REQUESTED

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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 this Court may evaluate possible disqualification or recusal.

1. The Heritage Building Property, LLC; Jenkins Heritage LLC; and Elverton Investments, LLC, Appellants.

2. Prime Income Asset Management, Inc. and TCI Heritage Building, Inc, Appellee.

3. Mandie B. Robinson, Steven M. Hendrix, and the law firm of Forman Perry Watkins Krutz & Tardy LLP, attorneys for Appellants.

4. Michael V. Cory, Jr., Dale Danks, and the law firm of Danks, Miller, Hamer & Cory attorneys for Appellees.

Mandie B. Robinson

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STATEMENT OF THE ISSUES

1. Whether the trial court erred in finding that the Buyers could revoke their acceptance of the Second Amendment to the Purchase Agreement even after acceptance by the Sellers?

2. Whether the trial court erred in finding that the Buyers' oral and written statements of their intention to continue with the purchase of the Heritage Building did not constitute the "notice of intention to proceed" required by the Purchase Agreement?

STATEMENT OF THE CASE

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 as follows:

On September 12, 2007, the Sellers entered into a Purchase and Sale Agreement (the "Purchase Agreement") with the Buyers[1], for the purchase of "The Heritage Building." (R. 200; R.E. at D). Pursuant to the Purchase Agreement, the Buyers were required to forward $100,000 into an Escrow Deposit with Chicago Title Insurance Company. (R. 202; R.E. at D). The Buyers did not forward the deposit in the time required under the Purchase Agreement, resulting in the lapse of the agreement. (R. 378; R.E. at E). However, they informed the Sellers that they were still interested in purchasing the property. (R. 378; R.E. at E). As such, the parties signed a Reinstatement and First Amendment to Purchase Agreement on September 21, 2007. (R. 269; R.E. at D). On that same date, the Buyers wire-transferred the $100,000 Escrow Deposit as required. (R. 379; R.E. at E).

Under the original Purchase Agreement (and not changed under the First Amendment), the Buyers had the right to terminate the contract on or before the expiration of the "Inspection

[1] The Purchase and Sale Agreement is between the Sellers and Prime Income Management. However, the Purchase and Sale Agreement allows Prime Income Management to assign its rights under the Agreement to a subsidiary. (R. 226; R.E. at D). Pursuant to that provision, Prime Income assigned its rights as "purchaser" under the Agreement to TCI Heritage Building, Inc., but without releasing Prime. (R. 267; R.E. at D)

Period," scheduled to end at 5:00 p.m. Central Standard Time on October 10, 2007. (R. 209; R.E. at D). The Purchase Agreement specifically states: "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." (R. 212; R.E. at D).

On the last day of the Inspection Period, Garry Gibbons – (a representative of the Buyers) - informed Breck Hines – (an agent of 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. 301-02; R.E. at D). 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. (R. 274, 277-280; R.E. at D).

Counsel for the Sellers forwarded the amendment to counsel for the Buyers for signature. (R. 379; R.E. at E). 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. 275, 281-84; R.E. at D).

Breck Hines then obtained the signature of Ted Duckworth on behalf of The Heritage Building Property, LLC, on the Second Amendment. (R. 302, 289; R.E. at D). At 4:41 p.m., Mr. Hines sent a copy of the Second Amendment - which had now been signed by the Buyers and one Seller - back to Steven Shelley and others via email. (R. 302, 285; R.E. at D). In his email, Mr. Hines gave the Buyers written confirmation that the other two Sellers had verbally agreed to the extension, but that they were out of state and that it could be the next day before they signed the Second Amendment. (R. 302, 285; R.E. at D).

The Second Amendment signed by the Buyer and one of the three Sellers stated that "the Inspection Period has expired" and the Buyer has "no further right to terminate the Agreement . . . ." (R. 307; R.E. at D).

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 Sellers' counsel, asking her to "trash" the Second Amendment, stating he wanted to further "modify" it. (R. 275; R.E. at D). This conversation and request was confirmed by an email at 4:55 p.m. from Ms. Luckett to Mr. Agrest with copies to Mr. Hines and Sellers' counsel. (R. 275, 290; R.E. at D).

At 5:14 p.m., counsel for the Buyers forwarded a "Revised" Second Amendment to Ms. Luckett via email. (R. 275-76, 291; R.E. at D). In his email, Buyers' counsel noted that the Buyers were requesting that the Inspection Period be extended, or in the alternative – if the Inspection Period could not be extended, that his email should "serve as a termination notice." (R. 275-76, 291; R.E. at D).

Negotiations for the purchase of the Heritage Building continued between the Parties until the Buyers finally informed Mr. Hines on November 1, 2007, that they no longer intended to go through with the purchase. (R. 302; R.E. at D).

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

Following the Buyers' failure to consummate the transaction, the Sellers demanded payment of the Escrow Deposit as liquidated damages under the terms of the original Purchase Agreement. In response, the Buyers claimed the Escrow Deposit should be returned to them under the terms of the Purchase Agreement. 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.

SUMMARY OF THE ARGUMENT

The Buyers and Sellers were bound by the terms of the Purchase Agreement. The Buyers specifically requested that a Second Amendment to the Purchase Agreement be drafted that would extend the deadline for the Buyers to perform a title and survey review, and for assumption of financing. (R. 301-02; R.E. at D). Sellers' counsel drafted the Second Amendment as requested, and circulated it to the Buyers. The Buyers' representative signed the Second Amendment. A representative for one of the Sellers then also signed the Second Amendment, and the Sellers' agent indicated in writing that the other two Seller representatives had agreed – but were simply unable to execute the document at that moment. At the time the Second Amendment was signed by a representative of the Sellers, the Buyers' ability to revoke their acceptance of the Second Amendment ended. Therefore, the Buyers' later revocation of the Second Amendment was not effective and the Second Amendment became effective upon the signing by the remaining Sellers. Because the Second Amendment ended the Inspection Period, the Buyers no longer had the right to terminate the Purchase Agreement without forfeiting the Escrow Deposit.

In addition, even if the Second Amendment was not effective, the Sellers are still entitled to the Escrow Deposit under the provisions of the original Purchase Agreement that the contract would be canceled if the Buyers did not give notice to proceed. Because the Buyers gave continual verbal and written notice to proceed - ***up through and after the end of the inspection period*** - then their later refusal to go through with the purchase was a breach requiring forfeit of the Escrow Deposit to the Sellers.

ARGUMENT

I. THE SECOND AMENDMENT IS ENFORCEABLE.

The draft Second Amendment to the Purchase Agreement was forwarded to Buyers' counsel, who presumably reviewed the terms before forwarding the document to his client for signature. (R. 274; R.E. at D). The Buyers then ***signed the Second Amendmen,*** and returned it as an offer to the Sellers and their counsel. (R. 275, 281-84; R.E. at D). The offer was then accepted by the signature of one Seller. In addition, written confirmation of the agreement of the other two Sellers was given by the Sellers' undisputed agent.[2] This all took place before the Buyers attempted to revoke their acceptance of the amendment. (R. 302, 285-89; R.E. at D).

The Buyers have now asserted that they had the right to revoke their agreement to the Second Amendment ***even after*** (1) it was signed by one Seller, and (2) receiving written confirmation of the other two Sellers' agreement. However, this is not the law.

Instead, once one of the Sellers signed the Second Amendment, ***the Buyers no longer had any right to revoke it*** – even without the acceptance of the Amendment by the other two Sellers. *See Holifield v. Veterans' Farm & Home Bd. of State*, 67 So.2d 456 (Miss. 1953)("if the offer had been accepted before its withdrawal or revocation, the complainant would have been entitled to the relief prayed for."); 17A Am. Jur.2d (Contracts) § 60 ("the revocation of an offer must be communicated to the offeree before he or she has accepted. If the offer is accepted before withdrawal, it becomes a binding contract and cannot be withdrawn.")(attached in the Appendix of Authorities). In other words, the Buyers are correct that they had the right to revoke their signature on the Second Amendment, - but that right to revoke ended once the first

[2] The Buyers have not disputed that Breck Hines was acting as the agent of the Sellers at all times, or otherwise disputed the authority of an agent to enter into contracts binding his disclosed principal. *See* Restatement (Second) of Agency, § 320 Principal Disclosed.

Seller signed. *See Hollingsworth v. Nix*, 51 So. 2d 229 (Miss. 1951)(offer could be revoked before acceptance); *Bancroft v. Martin*, 109 So. 859 (Miss. 1926)(same).

In *Holzberger v. Holzberger*, 2005 WL 1399258 (Wis.App. June 14, 2005) (attached in the Appendix of Authorities), 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. 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.

In other words, basic contract law does not require the signature of all parties before a signatory can no longer revoke his assent and is bound by an agreement he signed. As long as the non-signatory has manifested his acceptance of the contract, then it is binding. *See* 17 C.J.S. Contract § 75 (explaining "the signatures of one or both parties are not always essential to the binding force of an agreement, and a written agreement may be effective even if both parties have not signed, if the parties otherwise demonstrate an intent to have a contract.")(attached in the Appendix of Authorities); *Haufler v. Zotos*, 446 Mass. 489, 845 N.E.2d 322 (2006) (A written contract, signed by only one party, may be binding and enforceable even without the other party's signature if the other party manifests acceptance.)(attached in the Appendix of Authorities). Therefore, the Chancery Court erred in finding that the Second Amendment was

not binding merely because two of the Sellers had not been able to sign before the Buyers revoked their acceptance, as the signature of one Seller was enough. (R. 395; R.E. at B).

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). It 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 <u>all parties</u> 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. In fact, 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.

Further, just as in *Holzberger, supra*, the fact that there were additional signature lines for the other Sellers is not enough for the Court to find that the parties agreed it would not be

binding absent the signatures of all. Instead, the signature of the first Seller ended the Buyers' right to revoke, and the agent's written confirmation of acceptance by the other two followed by their signatures was completely effective to form a binding contract. Because the Second Amendment was binding, the Escrow Deposit correctly belongs to the Sellers.

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 backed out of 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.

Notice to proceed was given repeatedly with phone calls and emails between the parties. Both the broker of the deal, Frank Quinn, and the Sellers' agent, Breck Hines, testified that the Buyers' representative, Garry Gibbons, gave "notice of the Buyer Defendants' intention to proceed with the purchase of The Heritage Building" during a phone conference around 1:30 that very afternoon. (R. 296, 301-02; R.E. at D). Written emails evidencing this intention to proceed followed continuously throughout the day, culminating in the Buyers' signing of the Second Amendment. Certainly signing an amendment to the very contract at issue ***is written***

notice of your intention to proceed with that contract – especially taking into consideration the Buyers' counsel's statement that he wanted to further "modify" the Second Amendment that had already been signed. (R. 275; R.E. at D). Why would he want to modify the Amendment if the Buyers did not intend to proceed with the sale?

Indeed, if the Buyers believed the contract had lapsed as of 5:00 p.m. that day, they would not have sent a Revised Second Amendment (again showing their continued intention to proceed) at 5:14. (R. 275-76; R.E. at D). If they believed the contract had terminated of its own accord, their counsel would not have stated in his 5:14 correspondence that he was giving "notice of the intention to terminate." (R. 275-76; R.E. at D). Instead, the Buyers seem to be contending that the notice to proceed must somehow be sent right at 4:59 p.m. to be effective – and that all other notices of their intentions throughout the day would be irrelevant.

Clearly, all parties to this transaction were fully aware that the Buyers had given continual "notice to proceed," both verbally and 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 verbal and 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.

This the 5th day of December, 2008.

Respectfully submitted,

Mandie Robinson

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