2008-CA-01853R+

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Mississippi Supreme Court or the Judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal:

Name	Connection and Interest
Norma Slater Moore	Appellant
Robert M. Bailey	Appellee and Officer and Director of Appellee DeSoto Land Corporation
DeSoto Land Corporation	Appellee
Annice Kyle	Appellee
Honorable Robert P. Chamberlin	Circuit Court Judge
Goeldner, Porter & McDowell	Attorneys for Norma Slater-Moore
Myers Law Firm	Attorneys for Robert M. Bailey and DeSoto Land Corporation
Glassman, Edwards, Wade, & Wyatt	Attorneys for Annice Kyle

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ARGUMENT

Moore relies upon her Appellant Brief and stands by her arguments therein; however, she hereby addresses the following issues raised by Kyle's Appellee Brief for sake of clarity:

A. The Trial Court Erred in Ruling that No Private Right of Action Exists Under Miss. Code Ann. §§ 73-35-1 et seq.

Kyle argues that there is no private right to an action under Miss. Code Ann. § 73-35-31 and that Miss. Code Ann. § 73-35-21 is only applicable to penalize real estate agents who act without a valid license.

The statute provides on its face that if an agent has received money as a result of a violation of any part of Chapter 35, regardless of from whom such money was received, the agent shall be liable to any person aggrieved by the violation for a penalty of no less than the amount received and up to four times the amount received. Any person so aggrieved may sue for and recover the penalty in any court of competent jurisdiction. Miss. Code Ann. § 75-35-31(2). There must be a causal connection between the grievance and the violation. *Leary v. Stockman*, 937 So. 2d 964 (¶ 50) (Miss. Ct. App. 2006).

The statute explicitly creates a private right of action and recovery which has been recognized repeatedly by Mississippi courts. The Mississippi Real Estate Commission is not itself "a court of competent jurisdiction" in which individuals may sue for and recover money. As for § 73-35-21, this statute provides the grounds for the Real Estate Commission's revocation or suspension of a license. The argument that this section only applies to unlicensed individuals is ludicrous. Obviously the Commission cannot revoke or suspend the license of someone who was unlicensed to begin with.

B. Moore's Professional Home Inspection Does Not Operate to Waive Her Right to Rely on Kyle's or Bailey's Representations

It is currently the law in Mississippi, as it has been for many decades, that:

> A purchaser has a right to rely upon the representations of a seller [or seller's agent] as to facts within the latter's knowledge, and the seller cannot escape responsibility by showing that showing that the purchaser upon inquiry, might have ascertained that such representations were not true. ... If a false statement is made by one who may be fairly assumed to know what he is talking about, it may be accepted as true, without question and without inquiry, although the means of correct information are in reach.
> ...
>
> We cannot say, as a matter of law, that because a purchaser makes an independent investigation before purchasing an automobile he may not rely upon representations as to the distance the car has been operated, particularly where that representation agrees with the reading on the speedometer. ... We have no doubt these were questions to be submitted to the jury.

Nash Mississippi Valley Motor Co. v. Childress, 156 Miss. 157, 125 So. 708, 709-10 (Miss. 1930) (citations omitted).

Similarly, a purchaser of a home does not waive his or her right to rely on representations of the seller or seller's agent simply by having a home inspection performed, especially when the defects or condition are not observable to the home inspector.

C. The Trial Court Erred in Considering Kyle's Motion for Summary Judgment Despite Noncompliance with Ten-Day Notice Requirement

Contrary to Kyle's counsel's misrepresentations to both the trial court and to this Court,[1] Moore never sought or received any extension from any defendant to "late file" a response to any motion for summary judgment. Kyle served her motion for summary judgment on Moore by mail on August 22, 2008. R. 350. According to Miss. R. Civ. P. 56 and 6, Moore's response was not due until September 4, 2008 (ten days plus three days). Moore's response was filed on September 2, 2008, two days early. R. 522. Clearly, no extension was necessary. Kyle's argument on pp. 14-15 of her Appellee Brief that Kyle was entitled to an automatic extension of the hearing deadline because "counsel for the Plaintiff was enjoying an extension to file their Response by counsel for Ms. Kyle" fails because it is based upon a blatant falsehood.

[1] See Kyle's brief at 14-15, Tr. 23 lines 21-22.

Furthermore, Moore did not at any time consent to allowing Kyle's motion for summary judgment to be heard. Moore's counsel voiced her objections but the trial court ordered that the motion be heard on September 4, 2008. Tr. 22-23. Moore did not consent merely because her counsel showed up at the court-ordered hearing.

Plain and simple, the trial court's ruling on August 29, 2008, that "Giving today, that gives adequate time to notice the motion and set it for September the 4th . . ."[2] is erroneous. The five-day notice provision of Miss. R. Civ. P. 6(d) does not apply to motions for summary judgment. *Hurst v. Southwest Mississippi Legal Services Corp.*, 610 So. 2d 374, 384-85 (Miss. 1999) (overruled on other grounds by *Rains v. Gardner*, 731 So. 2d 1192 (Miss. 1999)); *Partin v. North Mississippi Medical Center, Inc.*, 929 So. 2d 924 (¶34) (Miss. Ct. App. 2005). Notice of hearing on a motion for summary judgment be served at least ten days prior to the date of the hearing, regardless of whether the motion itself was filed before that time. *Id.* Moore relied on the September 5 hearing deadline in the scheduling order in asserting that once August 26 (ten days before the deadline) had passed, the motion was abandoned. At the August 29 hearing, Moore had not responded to the motion, in reliance that the trial court would enforce both the scheduling order and the Rules of Civil Procedure, which read together require that the motion be deemed abandoned as of August 26.

D. Defendant Kyle Failed to Meet Her Burden of Proof and No Such Burden Shifted to Moore

The burden is on the party seeking summary judgment to demonstrate beyond a reasonable doubt that there are no genuine issues of material fact to be tried. *Hurst,* 610 So. 2d at 383; *Duckworth v. Warren*, 10 So. 3d 433 (¶ 22) (Miss. 2009). Further, the moving party must produce exhibits and/or testimony that not only resolve all factual issues but also show that the

[2] Tr. 23-24.

moving party is entitled to a judgment as a matter of law. *Hurst* at 384; *Yowell v. James Harkins Builder, Inc.*, 645 So. 2d 1340, 1343 (Miss. 1994). Only then can the burden shift to the non-moving party to present evidence of triable factual issues. *Hurst* at 383-84; *Yowell* at 1343.

Kyle's defense appears to be: (1) Kyle had no duty to inspect or investigate the property, therefore there is no reason she should have known that the house sat open and unfinished for many months before being finished by an unlicensed builder, therefore she did not know, therefore she had no duty to disclose this information to Moore; (2) Kyle's written representations to Moore, although deceptive, were carefully worded so as to not be technically false; and (3) Kyle's misrepresentations had no bearing on Moore's decision to purchase the home.

It makes no difference whether Kyle should have known of the circumstances of this home or whether she had a duty to learn those circumstances. There is a factual dispute in this case over whether Kyle did in fact know that the house was left open to weather, animals, insects and mold for eleven months before it was finished by an unlicensed builder. Moore alleges Kyle had such knowledge; Kyle swears she did not have such knowledge. When one party alleges something is true and the other swears otherwise, that is a factual issue which precludes summary judgment. *Yowell*, 645 So. 2d at 1343. "The best way and perhaps the only way" to resolve this factual dispute would be to test the credibility of both parties before the trier of fact. *Allen v. Mac Tools, Inc.*, 671 So. 2d 636, 643 (Miss. 1996).

In any case, Kyle did not meet the burden of presenting evidence which resolves this factual dispute beyond a reasonable doubt. Kyle offered no evidence that she did not have such knowledge, other than her own self-serving affidavit (which cannot be considered for such purposes pursuant to *Quay v. Archie L. Crawford and Shippers Exp., Inc.*, 788 So. 2d 76 (¶ 20)

(Miss. Ct. App. 2001)).[3] That Kyle did not have a duty to know something does not conclusively establish that she did not in fact know it. Kyle's own testimony on the matter is laden with contradiction and itself creates a reasonable doubt as to whether she did in fact have such knowledge. Because Kyle did not meet her burden of producing evidence which resolves all factual disputes beyond a reasonable doubt, no burden of rebuttal ever shifted to Moore on the matter.

Likewise, Kyle submitted no evidence that establishes beyond a reasonable doubt that her representations to Moore were not false, or that her statements/omissions were not relevant to Moore's decision to purchase the home. Moore testified that she would not have purchased the home if she would have been aware of its history. A reasonable juror could find that if Kyle had disclosed the property's history, Moore would not have purchased the home. At the very least, a reasonable juror could find that this information, if disclosed, would have had some bearing upon Moore's decision to purchase the home and pay the purchase price. No burden of rebuttal ever shifted to Moore on these matters.

CONCLUSION

The trial court erred in granting summary judgment in this case. Accordingly, Moore respectfully requests that the order of the trial court be reversed and the case be remanded for trial.

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[3] The evidentiary obstacle of proving Kyle's knowledge cuts both ways – it is nearly impossible for Kyle to prove her own knowledge or lack thereof other than through her own affidavit, which is insufficient to support summary judgment. The *Allen* Court's logic applies equally to both parties. As that Court recognized, "[C]ases which involve allegations of fraud or misrepresentation generally are inappropriate for disposition at a summary-judgment stage. ... Fraud is essentially a question of fact best left for the jury." *Allen*, 671 So. 2d at 642-43.