IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-00122

RAY FOUNTAIN — APPELLANT

VS.

SKL INVESTMENTS, INC., AND
ALTON HALL, DVM — APPELLEES

APPEAL FROM THE CHANCERY COURT OF ADAMS COUNTY, MISSISSIPPI

BRIEF OF APPELLEE ALTON HALL

ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

Statutes and Other Authorities:

ISSUES

Whether the chancellor was correct that the complaint states no set of facts that could lead to relief because it shows that no contract was ever formed between SKL and Fountain due to Fountain's failure to accept the offer within the time provided in the offering document.

Alternatively, assuming *arguendo* that SKL and Fountain entered into a contract for the sale of real property, the question is whether the chancellor's ruling still must be upheld because SKL, under the express terms of the agreement as shown in the complaint, held the power to rescind based on Fountain's admitted failure to make timely payment.

STATEMENT OF THE CASE

A. Procedural History

In July of 2007, Fountain filed suit against SKL and Dr. Hall claiming, *inter alia*, that in January of 2007 Fountain and SKL had entered into a "Purchase Contract" for property with a street address of 1 Cornell Street in Natchez. (V. 1: C.P. 1) Instead of fulfilling its obligation to Fountain, he alleges that SKL entered into a contract to sell the property to Dr. Hall. (V. 1: C.P. 2)

For remedy, Fountain asked for specific performance, avoidance of the deed to Hall, and unquantified damages against SKL. (V. 1: C.P. 3) Fountain also asked for "contributory damages" against Dr. Hall. (V. 1: C.P. 3) There is no allegation against Hall that Hall knew of any purported agreement between SKL and Fountain, or that Hall was anything other than a good faith purchaser for value.

dismissed with prejudice. The chancellor specifically noted that Fountain failed to state a claim against Hall. (V. 1: C.P. 84-85, 86) Fountain, represented by current counsel, timely filed his notice of appeal in January, 2009. (V. 1: C.P. 91)

There was a procedural fumble by Fountain at the appellate level. The certificate of compliance with Rule 11(b)(1), Miss.R.App.P., was due on or before January 28, 2009. The Clerk of the Supreme Court dismissed the appeal on February 26, 2009, due to Fountain's failure to deposit the estimated costs and his subsequent failure to respond to the Clerk's deficiency notice. The Notice of Dismissal is found in the trial court's record (V. 1: C.P. 95), and the deficiency notice will be found in the Clerk's file.

Fountain's counsel filed a motion to reinstate the appeal and explained that the Chancery Clerk had been tardy in supplying an estimate, but that the costs had been paid. (V. 1: C.P. 96) The record totals 119 pages and Rule 11(b)(1) provides an alternative means to estimate costs. SKL and Hall responded to the motion to reinstate and both argued in essence that a rule not observed, and a rule not enforced, is no rule at all. These responses are not in the record but will, of course, be found in the Clerk's file.

A panel of the Supreme Court, the Hon. James Graves, Jr., presiding, ruled that since the costs had been paid a hearing on the merits should go forward. (V. 1: C.P. 105)

B. Facts

Since the case was dismissed on the pleadings, the only facts available are

if Fountain did not meet his obligations. Fountain's complaint admits that he did not make a timely payment and that SKL rescinded, refunded Fountain's payments, and sold the property to Dr. Hall.

There is, however, one preliminary matter. In his blue brief Fountain states that the "agreement between Mr. Fountain and SKL was entered into prior to January 23, 2007, and the Purchase Contract memorialized the previous agreement of the parties." (Blue brief at 2) There are no record citations for this or similar statements (see blue brief at 4). Fountain appears to rely for support of the statements in his brief on his complaint's averment that "[o]n January 23, 2007, Defendant SKL Investments, Inc. entered into a Purchase Contract with Plaintiff, Ray Fountain, for the purchase of realty located in Adams County . . .." Fountain states in the blue brief at 11, "the [chancellor] was obligated to accept as true the allegations in the Complaint, and the Complaint clearly states that a contract was entered into between SKL and Ray Fountain."

The conclusory assertion that a contract was formed is a legal conclusion "masquerading as [a] factual [statement that] will not suffice to defeat a motion to dismiss." *Ellis*, 997 So.2d at 999 ¶ 7. The complaint is devoid of details about when, where, and how the putative contract was formed – whether on January 23, 2007, as the complaint alleges, or before that date as the blue brief claims.

The complaint does not state or describe any negotiations; the complaint does not state or describe any verbal agreement that was then memorialized in writing. Instead, Fountain's complaint relies upon the statements found in the

document attached to the complaint to establish a subsisting contract.[1] The Court should ignore the revisionist reasoning offered in the blue brief because it does not comport with the actual allegations in the complaint and the attached documents nor can the complaint now be amended via an appellate brief.

Turning to the first issue, the complaint requests specific performance of a contract for sale of land. It is fundamental that there first must be a contract in existence for which specific performance may lie. The fundamentals of contract formation are, of course, an offer, acceptance of the offer within the offer's terms, and consideration flowing between the parties. *Scott v. Magnolia Lady, Inc.*, 843 So.2d 94, 96 (Miss.App. 2003). The question is whether Fountain's acceptance on February 28, 2007, of an offer stating – in underlined bold type – that payment was due on February 23, 2007, was effective to form the contract.

The terms used within the document to describe what it is are internally consistent. The final paragraph, in bold type, states that it is an "offer." Further, it self-referentially states that the document is a "proposed sale" from which it may "refund and withdraw" at any time unless good funds have been "received, confirmed, and accepted." These words are not inconsistent with the title,

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[1]As required by Rule 10, Miss.R.Civ.P., Fountain attached a copy of the instrument upon which he based his allegations to the complaint. A document attached to a pleading under Rule 10 becomes "a part [of the pleading] for all purposes." A document attached to a pleading does not convert a motion to dismiss to a Rule 56 motion inasmuch as "matters outside the pleadings" are not being presented. Rule 12(c), Miss.R.Civ.P.; *see*, *Sennett v. United States Fidelity and Guar. Co.*, 757 So.2d 206, 209-10 (Miss. 2000)(concern over matters outside of the complaint not providing adequate notice to plaintiff dissipate where plaintiff has relied on documents to frame complaint; no reasoned basis to convert Rule 12 motion into one under Rule 56).

The Court should hold that, as in *Magnolia Lady*, the offering document here stated that it was on "offer" and a "proposed sale" and emphatically required payment by February 23, 2007. Also similar to *Magnolia Lady*, the "Purchase Contract" was tentative because it stated the terms of the proposed sale: payment by the due date. Fountain's signing the document and mailing it and funds on February 28, 2007, five days after the due date, was not an acceptance within the terms of the proposed sale. Fountain cannot create a contract by altering the terms of SKL's offer and then purporting to accept what amounts to his own offer.[2]

In his complaint and the blue brief Fountain mentions that there are "grace periods" in the contract with the implicit suggestion that his late payment was within the confines of these time lines. This averment necessarily assumes that he may take advantage of contract provisions. Fountain cannot prove, under any facts stated or reasonably implied from his complaint, that a contract existed. It is fundamental that to claim benefit of a contract's provisions there must first be an enforceable contract.

The provision for a late fee to be charged by SKL is not a contract "right" for the buyer that creates a reciprocal obligation for SKL. In other words, the document does not state that SKL has the obligation to allow a buyer to pay late if

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[2]As for the $300.00 previously deposited with SKL, under Mississippi law the receipt or deposit of a check, without more, does not constitute an acceptance of an offer. *Houston Dairy, Inc. v. John Hancock Mut. Life Ins. Co.*, 643 F.2d 1185, 1187 (5th Cir. 1981), *citing Becker v. Clardy*, 96 Miss. 301, 51 So. 211 (1910); see also, *Austin v. Padgett*, 678 So.2d 1002, 1004 (Miss. 1996)(receipt and retention of unsigned note and checks not acceptance of settlement offer as a matter of law). Fountain's assertion that the contract was formed with his deposit – which he admits occurred prior to SKL's offering document being written – is not correct.

the buyer exercises the right to pay late by paying a fee. Rather, it is a penalty that SKL has the right to exact – and that the buyer has the corresponding obligation to pay.

Research has not revealed any Mississippi cases – other than those cited above relating to option agreements – having decided whether a purported acceptance of an offer past the time when acceptance was required operates as an effective acceptance. The trial court cited general contract law from 17A Am.Jur. 2nd, *Contracts* § 76. (V. 1: C.P. 84) The specific issue of whether an acceptance delivered past the time contained in the offer for acceptance has been addressed by other appellate courts.

The Georgia high court has stated that "[u]nlike performance of an existing contract which must be completed within a reasonable time, an offer must be accepted as made and any change as to time of performance converts the purported acceptance into a counter offer." *Benton v. Shiver*, 254 Ga. 107, 326 S.E.2d 756 (1985).

Similar to this case, Benton "accepted" Ms. Shiver's offer but wanted to make a later payment. The Georgia Supreme Court, speaking *per curiam* in a single page two paragraph opinion, drily noted that "the date of receipt of consideration [] is important to a seller." *Id.* In similar circumstances, the Supreme Court of Oregon was equally succinct: "The document here specifically provided: 'Escrow to be closed on October 1, 1986.' We find that to be a condition of [the] offer, and that the offer terminated after that date. Any attempt by [the offerees] to

accept [the] offer after October 1, 1986, was a counter-offer because such 'acceptance' necessarily would have involved a closing date different from that specifically stated in [the] offer." *Heinzel v. Backstrom*, 310 Or. 89, 97, 794 P.2d 775 (1990).

Fountain relies on *Austin v. Montgomery*, 336 So.2d 745 (Miss. 1976), to support his argument that he and SKL entered into an executory contract. (Blue brief at 10-12) *Austin* is distinguishable. First it is a UCC case involving the sale of goods between merchants. The modern version of the law merchant has specific rules that apply to merchants involved in the sale of goods. "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. [] An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined." *Id.* at 747-48, *quoting* Miss. Code Ann. § 75-2-204, as enacted in 1976.

Contrary to the revisionist assertions in the blue brief at 11-12, Fountain's complaint does not claim a contract was formed between himself and SKL based on a course of conduct or course of dealing. No facts based on a course of conduct or dealing are stated in the complaint. Fountain obviously had an opportunity to request leave to amend his complaint and did not do so. The only complaint before the Court relies solely on the documents attached to the complaint – the "Purchase Contract" and payment schedule – to establish a contract between Fountain and SKL. As noted *supra*, a party cannot amend a complaint through an appellate

brief.

Here, to use the UCC's terms, the "moment of [the contract's] making" is expressly stated in the Purchase Contract: it is an offer of a proposed sale that requires payment by February 23, 2007. As the face of the complaint shows, the payment was not made on that date. In *Austin* the parties' agreement – set out in relevant part in the margin[3] – contains no provision for the timing of payment; it does not state that it is an "offer" of a "proposed sale." It is true as Fountain points

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[3]This contract, entered into between Austin Farms . . . and V & M Cotton Co. . . . covers cotton produced by [Austin] for the 1973 crop year. [Austin] agrees to sell all and only the cotton produced from approximately 2,500 acres planted in cotton for the 1973 crop year . . ..

[Austin] agrees to practice normal good farming methods as to cultivation, harvesting, and handling said cotton and to harvest, gin and store the cotton in a bonded warehouse as rapidly as possible. . . . [] Cotton to be defoliated before picking, and all available cleaning equipment at gin to be used . . . [] All samples to be delivered to V & M Cotton Company. [] All Cotton harvested by hand or spindle picked-no ground machine or stripper cotton acceptable on this contract. [] Official Government class card determines class of cotton and the Compress receiving date on receipt determine date. [] V & M Cotton Co. agrees to pay [Austin] prices as listed below, net weights, FOB Compress, for all and only cotton produced on the above mentioned farm or farms.

30.00 cents for all cotton with micronaire 3.3-5.2

29.00 cents for all cotton with micronaire 5.3 & up

28.00 cents for all cotton with micronaire 3.0-3.2

28.00 cents for all cotton 3.0 & up and reduced in grade a/c grass or bark

26.00 cents for all other cotton and any cotton harvested after 12/7/73

20.00 cents for all Below Grades

. . .

[Austin] agrees to pay transportation cost of the cotton to the compress and to pay the first's month storage and Cotton Board Fees, and a commission of $1.25 per bale to be deducted.

Id. at 752.

out that Austin, the seller who signed the document, claimed that he did not need to perform where the buyer failed to sign the contract by the time the seller attempted to rescind.

But it is the dissimilarity of the documents in that case and this one that is relevant here, not the similarity of the parties' relative positions. The Court is asked to interpret a written document's words under Mississippi's rules to decide whether a contract was ever formed, not whether both cases involve the claim that a defaulting seller is being sued for breach of contract. Aside from a superficial resemblance to some facts and arguments in this case, *Austin* is irrelevant because the documents are entirely different.

The face of the Complaint shows that Fountain did not accept SKL's offer within the terms of the offer: Fountain did not attempt to accept it until the time for performance under the offer had elapsed. There is no set of facts that Fountain can show that would rebut his failure – shown on the face of the Complaint – to remit funds by the date required in the document.

The Court should affirm the late chancellor's ruling.

C. Alternatively, Fountain's reliance on a document that expressly states SKL may rescind and refund "at any time" if good funds are not timely received is misplaced where Fountain's complaint admits that he failed to make payment as required by the contract and his complaint shows that SKL rescinded and refunded.

It is an appellate common-place that "[a]n appellate court may affirm a trial court if the correct result is reached, even if the trial court reached the result for the wrong reasons." *Methodist Hosp. of Hattiesburg, Inc. v. Richardson*, 909 So.

2d 1066, 1070 ¶7 (Miss. 2005), *citing Puckett v. Stuckey*, 633 So. 2d 978, 980 (Miss. 1993). The Supreme Court of Mississippi, relying on federal procedural law, has stated that an "appellate court does not have to affirm a decision on a [motion for judgment as a matter of law] for the same reasons that persuaded the court below to grant the motion. On the contrary, it can find another ground for concluding that the movant is entitled to judgment as a matter of law and ignore any erroneous basis that the [trial court] may have employed." *Brocato v. Mississippi Publishers Corp.*, 503 So. 2d 241, 244 (Miss. 1987).

The usual reason given for this rule is one of judicial economy. But it should be kept in mind that the economies are not only to the tax-payer supported judicial system. All parties – regardless of which side is disappointed by a judgment in a particular case – expend fewer resources with a system that provides for the earliest fair hearing and judgment. Given the large number of cases filed in Mississippi trial courts – and all know we are one of the poorest and least populous states in the Union – the earliest possible termination of litigation bids fair to reduce litigants' diversion of resources into litigation from more constructive purposes. The economic importance of the social policy rationale underlying the rule allowing appellate courts to correct a trial court's reasoning while affirming its result is hard to overestimate.

In this case both defendants alleged that Fountain failed to state a claim for which relief could be granted. They are, therefore, entitled to raise any argument based on the pleadings even if that argument is in the alternative. *Id.* Hall

advances an alternative argument to demonstrate that whether or not SKL and Fountain formed a contract, the lower court's decision was manifestly correct.

With respect to written documents, Mississippi courts accept the plain meaning of the words used in the document as the exclusive expression of the intent of the parties, so long as no ambiguity exists in the words selected to express that intent. *Ferrara v. Walters*, 919 So.2d 876, 882 (Miss. 2006). At least since *Pursue Energy Corp. v. Perkins,* 558 So.2d 349 (Miss.1990), Mississippi courts have adhered to a three-tiered process of contract interpretation and construction.

If examining the words used within the "four corners" of the contract yields a clear understanding of the parties' intent, then courts enforce the document as written. Second, if the document is ambiguous, then canons of construction will be used to construe the instrument. *Id.* at 352. Third, if the parties' intent remains elusive, "then the court may resort to . . . [the] consideration of extrinsic or parol evidence." *Id.* at 353.

Other supporting rules are relevant to the three-tier process. In applying the initial "four corners" test, a court looks to the language the parties used while reading the document as a whole to give effect to all of the provisions. *McMurphy v. Three Rivers Planning and Dev. Dist.*, 966 So.2d 192, 195 ¶ 15 (Miss. App. 2007), *citing Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So.2d 107 ¶ 7 (Miss. 2005). Obviously, if there are separate provisions that cannot be harmonized, then an ambiguity exists. "Ambiguity" in a contract is found where

there are at least two reasonable meanings to be derived from the words chosen. *Mississippi Farm Bureau Cas. Ins. Co. v. Britt*, 826 So.2d 1261, 1265, ¶ 14 (Miss. 2002). Unless the words used are terms of art, the words selected by the parties in their contract are afforded their ordinary meaning. *Anglin v. Gulf Guaranty Life Ins. Co.*, 956 So.2d 853, 859 ¶ 15 (Miss. 2007).

The face of the "Purchase Contract" shows that it bears a date of January 23, 2007, and was signed by SKL's representative on that date. However, it was not signed by Fountain until February 28, 2007. Nor did he remit a payment until February 28, 2007. The Parties agree the "Purchase Contract" states that "[t]he monthly payment will be due on the 23rd of each month with the next monthly payment being due on or before February 23, 2007." (Bold typeface omitted)

There are two important aspects of the ten monthly installments as stated in the contract. First, only upon receipt of the final payment will a deed be issued. Second, "until good funds have been received, confirmed, and accepted, [SKL] reserves the right to refund or withdraw the proposed sale **at any time**." (Bold typeface in original)

To summarize, the document requires good funds be remitted by the 23rd of each month, and SKL's obligation to convey title does not mature until all payments are received and credited. Otherwise, SKL retained the right to rescind the transaction and refund amounts previously paid "at any time." There are no provisions that are inharmonious and no ambiguities. Consequently, the agreement should be enforced as written and no extrinsic means need be used to elucidate the

Parties' intent.[4]

SKL's contract form, predictably enough, places all power over the transaction with SKL. Under the SKL contract, Fountain, and others in his position, have only one contract duty and one contract right: the duty to make timely payments and the right to receive a quitclaim deed when the final payment is tendered and, importantly, accepted. The contract provides that SKL can rescind and refund at its sole discretion if the buyer deviates from the contract's requirements. Alas for Fountain, his complaint shows that he failed to make a timely payment (the first one aside from a prior deposit) and SKL promptly rescinded, refunded his money, and went on about its business as was its right under the contract.

Reading all the contract's provisions together, the final paragraph expressly conditions SKL's obligation to quitclaim the property upon the timely receipt of payments. As Fountain's complaint shows, SLK did not waive this provision. It refunded Fountain's money and sold its rights in the real property to Dr. Hall.

Fountain argues in the blue brief that his admittedly late payment was nevertheless within a grace period provided in the document. Fountain is correct that the document states, "[i]f payment is not received within 10 days of the due

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[4]The contract is in the form of an "installment land contract" or "contract for deed" where the buyer makes periodic payments toward the purchase price and only upon completion of the payments is the seller obligated to convey title. As related in *Girard Savings Bank v. Worthey*, 761 So.2d 230 (Miss.App. 2000), some states view the buyer under an installment contract as the equitable owner with the seller holding legal title in trust and as security. By contrast, as the *Worthey* Court explained and as argued herein, "Mississippi has traditionally deferred to the terms of the agreement." *Id.* at 232 ¶ 10.

date . . . the purchaser will be charged a $25.00 late fee." It also says that "until good funds have been received, confirmed, and accepted, we reserve the right to refund or withdraw the proposed sale at any time."

As noted *supra*, the contract is quite one-sided with SKL having the express power either to charge a late fee or to say, in so many words, "we've had enough of this guy." SKL's refusal to accept Fountain's late payment was within its express right to rescind and refund "at any time." These alternatives – the contract rights to charge a late fee or to rescind – were solely available to SKL. The contract does not give Fountain the right to pay a "late fee," nor does it state that SKL has the corresponding duty to accept a late fee, to enable Fountain to make late payments whenever it was convenient for him to do so.

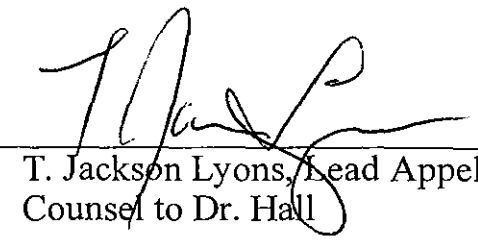
The Court should affirm the late chancellor's ruling whether or not the Court accepts the chancellor's reasoning.

II. Conclusion

The complaint states facts showing that SKL and Fountain never executed a contract because of Fountain's failure to timely accept the express offer contained in the document. Alternatively, there are no set of facts stated in the complaint that show SKL did any more than exercise rights it held under the terms of the Parties' contract. The Court should affirm the trial court's dismissal with prejudice.

Respectfully submitted,

ALTON HALL, DVM

By: 
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CERTIFICATE OF SERVICE AND FILING

The undersigned attorney for Appellee Alton Hall hereby certifies that the original and three copies of the above and foregoing brief, together with an electronic copy, have been hand delivered by the undersigned to the Clerk of the Court, and that copies have been deposited into the United States mail, postage prepaid, to the following addressees:[5]

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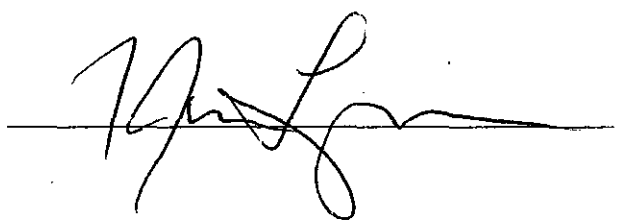
SO CERTIFIED, this the 13th day of October, 2009.



[5]Due to the untimely death of Chancellor Middleton on September 17, 2009, no service copy will be sent to the Chancery Court of Adams County.