IN THE SUPREME COURT OF MISSISSIPPI
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-TS-00122

RAY FOUNTAIN — APPELLANT

VS. — CASE NO. 2009-TS-00122

SKL INVESTMENTS, INC. AND ALTON HALL — APPELLEES

APPEAL FROM THE CHANCERY COURT OF ADAMS COUNTY, MISSISSIPPI
CAUSE NO. 2007-449

BRIEF OF THE APPELLANT

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Oral argument is not requested.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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. Christopher H. Neyland, Esq.
   Neyland Law Firm, PLLC
   Thomas M. McNeely
   Attorneys for Ray Fountain.

2. Lisa Jordan Dale, Esq.
   Attorney for SKL Investments, Inc.

3. Claude Pintard, Jr., Esq.
   T. Jackson Lyons, Esq.
   Attorneys for Alton Hall

4. Hon. Kennie E. Middleton
   Chancellor

Christopher H. Neyland
Attorney of record for Ray Fountain

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STATEMENT OF THE CASE

PROCEEDINGS BELOW

On January 23, 2007, Ray Fountain (hereinafter, at times, "Mr. Fountain") entered into a Purchase Contract with SKL Investments, Inc. (hereinafter, at times, "SKL"), for the purchase of real property, located in Adams County, Mississippi at #1 Cornell Street, Natchez, Mississippi. The purchase price of the property was $3,000.00, payable in ten monthly installments of $300.00 each. Mr. Fountain tendered the first installment payment of $300.00 on January 22, 2007, as stated in the Purchase Contract (Record, page 7).

The Purchase Contract states that the monthly installments would be due on the 23rd day of each month, and specifically states "with the next monthly payment being due on or before February 23, 2007." (Record, page 5). The Purchase Contract also specifically states that there is a late fee of $25.00 for any payment not received within 10 days of the due date of the payment, and specifically states that if a payment is not received within 30 days of the due date, that Mr. Fountain would be in default and the contract "will be a nullity at seller's option". (Record, page 5). The Purchase Contract goes on to state that SKL will issue a quitclaim deed to Mr. Fountain upon the receipt of the final payment from Mr. Fountain. (Record, p. 6).

This 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. The Purchase Agreement was drafted by SKL, signed by SKL on January 23, 2007, mailed to Mr. Fountain, and signed by Mr. Fountain on February 28, 2007, which was also the date that he mailed his February payment to SKL. This February payment was received and accepted by SKL.

On March 19, 2007, Mr. Fountain had his March payment hand delivered to SKL. This

March payment was received by SKL and accepted by SKL. (Record, page 10).

On March 28, 2007, SKL conveyed by Quitclaim Deed all of its right, title and interest to the property in question to Alton Hall. This conveyance was pursuant to a contract between SKL and Mr. Hall, which was entered into after the Purchase Contract was entered into between Mr. Fountain and SKL.

On June 22, 2007, Mr. Fountain filed his Complaint for Specific Performance and Damages. The Complaint was served on both SKL and Mr. Hall, and both SKL and Mr. Hall answered the Complaint and both filed counter-claims against Mr. Fountain. Mr. Fountain answered both counter-claims, and responded to the discovery propounded by Mr. Hall. On March 6, 2008, a notice of trial was filed, setting the matter for trial on April 21, 2008 and continuing to April 22, 2008. A second Notice of Trial was filed on May 23, 2008, setting the matter for trial on June 30, 2008 and continuing to July 1, 2008. On June 17, 2008, a third Notice of Trial was filed, setting the matter for trial on July 7, 2008.

On July 3, 2008, a Motion for Summary Judgment was filed by Mr. Hall. Also on July 3, 2008, a Withdrawal of Motion for Summary Judgment was filed by Mr. Hall. On August 18, 2008, SKL filed a Memorandum Brief in Support of Motion to Dismiss Pursuant to MRCP 12(b)(6).

The Chancery Court held a hearing on a Motion to Dismiss, and after argument by counsel, but no testimony, the Court granted the Motion to Dismiss, holding that SKL had made acceptance of the Purchase Contract by February 23, 2007 a condition of its offer to Plaintiff. Judgment was entered on December 23, 2008. Mr. Fountain, by and through counsel, timely filed his Notice of Appeal and Designation of the Record on January 21, 2009.

STATEMENT OF THE FACTS

Ray Fountain entered into an agreement with SKL Investments, Inc., for the purchase of real property, located in Adams County, Mississippi at #1 Cornell Street, Natchez, Mississippi. The purchase price of the property was $3,000.00, payable in ten monthly installments of $300.00 each. Mr. Fountain tendered the first installment payment of $300.00 on January 22, 2007, as stated in the Purchase Contract (Record, page 7). SKL received and accepted this payment. (Record, page 7)

After the parties had agreed upon the terms of the purchase of this real property, SKL drafted a Purchase Contract which memorialized the agreement of the parties. SKL signed the Purchase Agreement, dated it as signed on January 23, 2007, and mailed it to Mr. Fountain. There is no evidence as to when it was mailed by SKL to Mr. Fountain, nor was there any testimony as to when it was received by Mr. Fountain.

The Purchase Contract states that the monthly installments would be due on the 23rd day of each month, and specifically states that "with the next monthly payment being due on or before February 23, 2007." (Record, page 5). The Purchase Contract also specifically states that there is a late fee of $25.00 for any payment not received within 10 days of the due date of the payment, and specifically states that if a payment is not received within 30 days of the due date, that Mr. Fountain would be in default and the contract "will be a nullity at seller's option". (Record, page 5). The Purchase Contract goes on to state that SKL will issue a quitclaim deed to Mr. Fountain upon the receipt of the final payment from Mr. Fountain. (Record, p. 6).

The Purchase Contract makes no statement that Mr. Fountain must accept its terms in writing. It makes no statement as to when Mr. Fountain must return the signed contract to SKL. The Purchase Contract contains no provision which makes Mr. Fountain's signature a condition

precedent to acceptance by SKL. There is no provision in the Purchase Contract which states when Mr. Fountain must return the executed Purchase Agreement to SKL. There is nothing in the Purchase Contract which indicates that it is but a mere offer to Ray Fountain.

On February 28, 2007, Mr. Fountain signed the Purchase Agreement and returned it to SKL, along with his February payment of $300.00.

On March 1, 2007, SKL entered into another Purchase Contract, this time with Alton Hall, for the purchase price of $3,500.00, which was tendered by Mr. Hall in one lump sum. (Record, p. 57). Also, purportedly on March 1, 2007, SKL drafted a letter to Mr. Hall informing him that the property in question had been sold to another individual "due to the fact that no signed contract has been received for this property." (Record, p. 58). This letter is unsigned, and there was no testimony as to when, or if, it was ever mailed to Mr. Fountain. The only evidence of the existence of this letter is that a copy of such a letter was attached as an exhibit, without an affidavit, to Alton Hall's Motion for Summary Judgment. This Motion for Summary Judgment was withdrawn on the same day it was filed.

On March 19, 2007, Mr. Fountain had his March payment hand delivered to SKL. This March payment was received by SKL and accepted by SKL. (Record, page 10).

On March 28, 2007, SKL conveyed by Quitclaim Deed all of its right, title and interest to the property in question to Alton Hall. Mr. Fountain proceeded to file his Complaint for Specific Performance and Damages on June 22, 2007.

SUMMARY OF THE ARGUMENT

Ray Fountain and SKL Investments, Inc. entered into a valid contract to purchase real property. The terms of the agreement were clear: Mr. Fountain would pay SKL $3000.00 in ten monthly installments, and SKL would quitclaim its interest in the property to Mr. Fountain after receipt of the last payment. The first payment pursuant to this agreement was received, confirmed and accepted by SKL on January 22, 2007. After this agreement was made, and Mr. Fountain tendered his first payment pursuant to the agreement, SKL drafted a Purchase Contract, signed it, and mailed it to Mr. Fountain, who himself signed the Purchase Contract on February 28, 2007 and mailed it to SKL, together with his second monthly payment.

SKL then found a purchaser of the real property in question who would pay more money for the property, and pay the higher amount in one lump sum to SKL. SKL then attempted to rescind its contract with Mr. Fountain by claiming that the Purchase Contract was only an offer to Mr. Fountain, and that Mr. Fountain had to return to the Purchase Contract, signed, to SKL by February 23, 2007. But there is nothing in the Purchase Contract to support SKL's position, which is the position which was adopted by the Chancery Court.

The actions of the parties demonstrate that a valid agreement was entered into between them. They performed pursuant to their agreement. There was no requirement in their agreement that a Purchase Contract be signed. However, a written contract was drafted by SKL, signed by SKL, and mailed to Mr. Fountain. There was no requirement in the Purchase Contract that SKL could rescind their agreement if the Purchase Contract was not signed by a certain date or delivered to it by a certain date. Contracts executed by one party alone and delivered to the second party can be valid, according to the Mississippi Supreme Court, and such is the case at hand. Further, the attempted rescission of the contract by SKL occurred after Mr. Fountain had

himself executed the Purchase Contract.

STANDARD OF REVIEW

"A motion to dismiss under Mississippi Rule of Civil Procedure 12(b)(6) challenges the legal sufficiency of the complaint and raises an issue of law." Mieger v. Pearl River County, 986 So.2d 1025, 1026 (Miss. Ct. App. 2008). Therefore, the trial court's grant or denial of a motion to dismiss is reviewed de novo. "When considering a Rule 12(b)(6) motion to dismiss, the trial judge must accept the allegations in the complaint as true and the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim." Id.

This Court will not disturb the chancellor's findings of fact unless the findings are "manifestly wrong, clearly erroneous or an erroneous legal standard was applied." Nichols v. Funderburk, 883 So. 2d 554, 556 (Miss. 2004). An appellate court will review questions of law under a de novo standard. Threlkeld v. Sisk, 992 So. 2d 1232, 1238 (Miss. Ct. App. 2008) (quoting Keener Props., L.L.C. v. Wilson, 912 So. 2d 954, 956 (Miss. 2005).

ARGUMENT

1. Whether the trial court erred in dismissing this action on a motion to dismiss prior to a hearing on the merits of the Complaint.

"A motion to dismiss under Mississippi Rule of Civil Procedure 12(b)(6) challenges the legal sufficiency of the complaint and raises an issue of law." Mieger v. Pearl River County, 986 So.2d 1025, 1026 (Miss. Ct. App. 2008). Therefore, the trial court's grant or denial of a motion to dismiss is reviewed de novo. "When considering a Rule 12(b)(6) motion to dismiss, the trial judge must accept the allegations in the complaint as true and the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim." Id.

A valid contract must include the following essential elements: "(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation." Lanier v. State, 635 So.2d 813, 826 (Miss. 1994).

In the case at hand, the chancellor erred in granting a motion to dismiss. There was a valid contract between Ray Fountain and SKL Investments. Consideration was given by Ray Fountain in the form of payments of money to SKL, and SKL was obligated to tender a quitclaim deed to Mr. Fountain once it received the total of the agreed upon price. The agreement was definite, each party knew what they had bargained for. Each party had the legal capacity to make this agreement. Each party assented to this agreement. Ray Fountain made his first payment even before the Purchase Contract was drafted. The Purchase Contract was signed by SKL Investments, and SKL received and accepted not only the first payment from Mr. Fountain, but the second and third payments from Mr. Fountain. The parties were proceeding with their

agreement exactly as they had bargained to proceed. Finally, there was no legal prohibition from these parties agreeing to a contract for the purchase of real property.

The case at hand is very similar to Austin v. Montgomery, 336 So.2d 745 (Miss. 1976). In Austin, Montgomery filed suit against Austin, seeking specific performance and injunctive relief. Montgomery asserted that he and Austin had entered into a binding contract wherein Montgomery would purchase from Austin his 1973 cotton crop. An agreement was reached, the agreement was reduced to writing, signed by Austin, and delivered to Montgomery. There was a dispute as to whether Montgomery signed the written contract prior to July 28, 1973, the date on which Austin informed Montgomery that he would not sell him his cotton crop. Austin's reason for refusing to sell Montgomery his cotton crop was identical to SKL's reason for attempting to rescind its contract with Ray Fountain: there had been no delivery of a signed contract to Austin.

Austin's argument was that there was no contract, only an offer of a contract, and by refusing to sign a written agreement and deliver it to him, Montgomery had not accepted his offer and there was no contract. However, the Mississippi Supreme Court held that the actions and conduct of the parties indicated that an acceptance by Montgomery had been made, even without a signature on the written contract. In Austin, the Mississippi Supreme Court, citing Fanning v. C.I.T. Corporation, 187 Miss. 45, 192 So. 41 (1939), held as follows:

> "The rule is that acceptance of a contract as binding upon a party may be shown by his actions, and any definite and unequivocal course of conduct disclosing that the party has acceded or assented to it, is as binding on him as had he endorsed his assent in formal writing. And although he may have stipulated that the contract shall not be binding on him until formally accepted by him in writing, that stipulation may be waived by him and is waived when he acts upon and under the contract by conduct of the nature aforementioned. 1 Restatement, Contracts, § 21 et seq. The conduct of appellee, as shown by the undisputed testimony, brings the contracts within the stated rule."

Fanning v. C.I.T. Corporation, 187 Miss. at 52, 192 So. at 43. (as cited in Austin v. Montgomery, 336 So.2d 745 (Miss. 1976).

In Austin, the Court went on to hold that contracts executed by one party alone and delivered to the second party are valid, and cited various other jurisdictions which had held the same. Austin, 336 So.2d at 748 (citing Tow v. Miners Memorial Hospital Ass'n., Inc., 305 F.2d 73 (4th Cir. 1962); R. H. Lindsay Co. v. Greager, 204 F.2d 129 (10th Cir. 1953) cert. den. 346 U.S. 828, 74 S.Ct. 50, 98 L.Ed. 353 (1953); Means v. Dierks, 180 F.2d 306 (10th Cir. 1950); Moss v. Cogle, 267 Ala. 208, 101 So.2d 314 (1958); Sewell v. Dolby, 171 Kan. 640, 237 P.2d 366 (1951); Miller v. Herrmann, 230 Md. 590, 187 A.2d 847 (1963); Ford v. Culbertson, 158 Tex. 124, 308 S.W.2d 855 (1958). Ultimately, the chancellor in Austin granted the relief sought by Montgomery, which was specific performance, and the Mississippi Supreme Court upheld the decision.

As the Chancery Court in the case at hand dismissed the claim on a motion to dismiss, and as there was no evidence or testimony considered, there was no way for the court to determine whether the actions of the parties evidenced the existence of a contract. However, the court 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. Additionally, without any testimony, there was no way for the court to know when the contract was mailed by SKL, and when it was received by Ray Fountain. It is possible that SKL held the Purchase Contract in its possession after it drafted and signed the Purchase Contract, marketed the property in question for a higher bidder, and only sent the Purchase Contract to Mr. Fountain after its attempts to further market the property were unsuccessful. It is possible that Mr. Fountain did not receive the contract until after February 23, 2007, the date the Court held was a cut off period for Mr.

Fountain accepting the Purchase Contract (Record, p. 84). Without any testimony or other evidence, there was simply no way for the court to determine this.

The court erred in not considering the conduct of the parties. The court also erred in holding that there was a requirement that Ray Fountain return a signed copy of the Purchase Contract to SKL by February 23, 2007. The law is clear that a contract can exist when signed by one party only and delivered to another, exactly the scenario here, if the parties' actions indicate that the elements of a contract, cited above, have been met.

2. Whether the Chancery Court erred in holding that the Purchase Contract was just an offer from SKL, and that Ray Fountain had to accept this offer prior to February 23, 2007.

In its Judgment, the Chancery Court cites the well known rule that a contract should be construed as written and words should be given their ordinary and properly accepted meaning when they are unambiguous. (Record, page 83, citing Reynolds v. Druetta, et al., 417 So.2d 917, 918 (Miss. 1982).

However, the court then proceeded to ignore that well known rule and hold that the Purchase Contract signed by SKL was nothing but an offer, and that this offer must be accepted by Ray Fountain prior to February 23, 2007. (Record, p. 84).

There is simply nothing in the Purchase Contract which gives any evidence of this position. The Purchase Contract is clear. SKL agreed to sell the property in question. Ray Fountain agreed to buy the property in question. A definite price was agreed upon. The method of payment of the purchase price was agreed upon. The Purchase Contract even provided for what happens should the payments be late ($25.00 late fee for payments not received within ten days of the due date, SKL's right to rescind if payments are not received within thirty days of the due date). The Purchase Contract even states that the parties have already begun performing their agreement, as Mr. Fountain had already made the first payment.

In fact, Mr. Fountain had made the first payment prior to the Purchase Contract being drafted and executed by SKL (Record, pages 6, 7). Yet the Chancery Court took the position that, despite the actions of the parties, despite the performance of the parties, despite the clear language of the Purchase Contract, and despite the total absence of any language which makes the contract dependent on anything other than timely payments from Mr. Fountain, the Purchase Contract was a mere offer. The court then goes even further and writes into the contract a

provision which requires Mr. Fountain to accept SKL's "offer" before February 23, 2007. (Record, p. 84).

There are no ambiguities in this Purchase Contract, but if there were any ambiguities, they would be held against its drafter, SKL. Wade v. Selby, 722 So.2d 698, 701 (Miss. 1998). The Purchase Contract is very clear. SKL is selling and Ray Fountain is buying a piece of property in Adams County. The price was agreed upon, the terms of payment were agreed upon, even the penalty provisions for late payment were agreed upon. The parties were performing pursuant to their agreement. The initial payment had been made. The second payment was made within ten days of its due date, so no penalty was due. The third payment was made prior to the due date.

But SKL found a better deal with Mr. Hall, one which would pay it more money and do so in one immediate payment. So it had to take the position that there was no binding contract between it and Ray Fountain, and their reason became, ostensibly, that there was no contract between them because they had not received the signed Purchase Contract prior to February 23, 2007, despite this not being a condition listed in the Purchase Contract. And as no evidence or testimony was taken in this matter, there was no way to know if the parties had in fact agreed that Mr. Fountain had to return a signed copy of the Purchase Contract on or before February 23, 2007. All the court could have known about any such provision or agreement or codicil was that it was not contained in the actual Purchase Contract itself.

Quite simply, the Chancery Court altered both the agreement of the parties herein, and added material language to the Purchase Contract which clearly is not there. There is nothing in the Purchase Contract which indicates that it was nothing but an offer from SKL. There is nothing in the Purchase Contract which indicates that, even if it were an offer, it must be

accepted in a certain manner or by a certain date. There is nothing in the Purchase Contract which indicates that it must be returned by Mr. Fountain to SKL at all. All of these provisions and conditions were created by the Chancery Court, not by the agreement of the parties.

Mr. Fountain's claim should have proceeded to trial, and if specific performance was not available as a remedy, then his claim for damages should have proceeded and testimony should have been taken as to how Mr. Fountain was damaged.

CONCLUSION

Ray Fountain and SKL Investements, Inc. entered into a valid contract for the sale of real property. The terms were know by all parties, from the purchase price, to the due dates of the installment payments, to the penalties for making late payments, to the ability of SKL to rescind the contract should a payment be over thirty days late. The Purchase Contract was clear and unambiguous, it was not a mere offer to Mr. Fountain, and there is no provision in the Purchase Contract which makes it a condition of acceptance that Mr. Fountain return an executed copy of the Purchase Contract to SKL by a certain date. In fact, there is nothing in the Purchase Contract which indicates that it must be returned to SKL at all.

As there was a valid contract between Mr. Fountain and SKL, Mr. Fountain is entitled to either specific performance, or he is entitled to damages. Either way, his claim should have proceeded to trial, and as such, the granting of a motion to dismiss was in error.

CERTIFICATE OF SERVICE

I, Christopher H. Neyland, counsel for Appellant Ray Fountain, do hereby certify that I have this day mailed, via U.S. mail, postage pre-paid, a true and correct copy of the Brief of the Appellant to the following:

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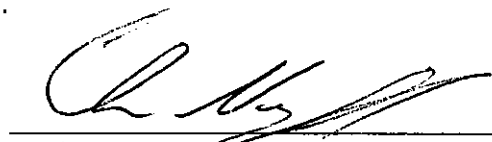
This the 11th day of September, 2009.



Christopher H. Neyland