IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-01260

DENNIS C. SWEET, III, AND KIMBERLY NOEL-SWEET — **APPELLANTS**

V.

TCI MS, INC MS INVESTMENTS, INC. (TCI MS INVESTMENT, INC.); AND JOHN DOES 1-5 — **APPELLEES**

On Appeal from the Chancery Court of Hinds County, Mississippi
First Judicial District
Civil Action No. G2008-334 W/4

BRIEF OF THE APPELLEE

(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 the Supreme Court may evaluate possible disqualification or recusal.

1. Dennis C. Sweet, III, Esq., and Kimberly Noel-Sweet, Appellants
2. TCI MS Investments, Inc., Appellee
3. Michael V. Cory, Esq., Danks, Miller, Hamer & Cory
4. Warren L. Martin, Jr., Esq., Thomas J. Bellinder, Esq. Attorneys for Appellants
5. Rebecca B. Cowan, Esq., Whitman B. Johnson, Esq., Attorneys for Appellee
6. Honorable Ray H. Montgomery, Special Chancellor, First Judicial District of Hinds County, Mississippi

SO CERTIFIED, this the 21st day of January, 2010.

Rebecca B. Cowan (MSB[redacted])
Whitman B. Johnson, III (MSB#[redacted])
Attorneys for Appellee, TCI MS Investments, Inc.

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STATEMENT OF THE ISSUES[1]

1. Did the chancellor properly grant summary judgment in favor of the Appellee, TCI Ms Investments, Inc. ("TCI"), and against Dennis C. Sweet, III and Kimberly Noel-Sweet ("the Sweets"), given the undisputed and indisputable proof that contract contingencies were not met?

2. Was the chancellor correct in granting TCI's motion for attorney's fees under the terms of the contract?

[1] TCI submits that the issues presented by the Sweets in their appellate brief do not reflect the true issues on appeal. As a result, TCI is submitting a separate "Statement of the Issues" for this Court to consider.

STATEMENT OF THE CASE

a. Nature of the Case.

The Sweets filed their original complaint against TCI on February 29, 2008, alleging negligence, gross negligence, breach of contract, anticipatory breach of contract, detrimental reliance, and conversion arising from a real estate contract ("the contract") entered into between the Sweets and TCI.[2] (R. 1-9). The Sweets filed an Amended Complaint on March 3, 2008, alleging the same causes of action and attaching the contract as an exhibit to their Complaint. (R. 10-18). As part of their damages, the Sweets sought the payment of $50,000 in earnest money TCI had deposited into a trust account after signing the contract. (R. 16). TCI was served with process on March 19, 2008, (R. 27), and filed its answer to the Amended Complaint on September 24, 2008. (R. 64-71).

From March 3, 2008, through April 29, 2009, various motions and orders were filed in the case. For example, Michael V. Cory, Esq., who was initially named as a defendant to the Sweets' original and amended complaints, filed a motion to dismiss on December 2, 2008. (R. 72-74). A hearing was held on Cory's motion to dismiss on January 30, 2009. (R. 81). Cory filed a petition to interplead the $50,000 in earnest money into the court on February 9, 2009. (R. 83-84). An order granting Cory's petition was entered on March 9, 2009, as well as an order dismissing Cory as a defendant. (R. 86-88). The Sweets did not propound any discovery in the case during these eight months. (See Docket Sheet preceding Record).

TCI filed a motion for summary judgment on April 29, 2009. The Sweets responded to TCI's motion for summary judgment on May 6, 2009, by arguing that discovery was incomplete and by

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[2]Michael V. Cory, Esq. the attorney who represented TCI during negotiations surrounding the contract was originally named as a defendant to the Appellants' original and amended complaints, but he was dismissed without prejudice by an Agreed Order.

propounding discovery to TCI for the first time. (R. 130-131, R. 138-153). Their response did not contain any substantive argument and was not accompanied by a motion for a continuance or MRCP 56(f) affidavit explaining why their post summary judgment discovery was necessary for them to respond to the motion. (R. 125-129). The Sweets also did not include a motion to strike any exhibit TCI attached to its motion in their response, including an affidavit by its President, Mark Small. (R. 125-129).

TCI filed its rebuttal in support of its motion on May 19, 2009, arguing, among other things, that the Sweets' attempt to conduct discovery after it had filed its motion for summary judgment was not permitted under MRCP 56 absent the filing of the affidavit required under subsection (f). (R. 132-132-137). Nevertheless, TCI quickly responded to the Sweets' May 6, 2007, discovery on May 29, 2009. (R. 154-155). The Sweets did not challenge these discovery responses or conduct any depositions in the case during the eight weeks that transpired from the date of TCI's responses and the date the chancellor heard TCI's motion.

The chancellor heard the motion for summary judgment on July 24, 2009, without the Sweets' having requested a continuance of the hearing[3], and granted the motion "based on a clear reading of the contract entered into between the parties." (R. 158, 160). A final judgment was entered in favor of TCI on July 31, 2009. (R. 163). On August 4, 2009, TCI filed a motion for attorneys' fees and costs. (R. 164). The Sweets filed their response to the motion on August 11, 2009, arguing that TCI was not the prevailing party in the case because they had filed a notice of appeal. (R. 192-194). TCI filed its rebuttal in support of its motion for attorneys' fees and costs on

[3] Interestingly, the Sweets took the position in their response to the motion for summary judgment that they needed more time to conduct discovery, but then argued only that the motion should be denied.

August 14, 2009. (R. 197-198). The trial court entered an Order granting TCI's motion for attorneys' fees and costs on August 20, 2009. (R. 199). An amended final judgment, which included an award of attorneys' fees and costs, was entered by the trial court on August 20, 2009. (R. 200).

STATEMENT OF THE FACTS

On February 29, 2008, the Sweets sued TCI, alleging that on June 26, 2007, TCI had agreed to purchase their property, which consisted of an office building and adjacent parking lot located on the corner of South Lamar Street and Pascagoula Street, in Jackson, Mississippi, for the sum of One Million, Two Hundred Thousand Dollars ($1,200,000.00). The Sweets claimed that TCI had paid earnest money in the sum of Fifty Thousand Dollars ($50,000.00) toward the purchase price, but that TCI did not close on the sale of the property by August 15, 2007, the closing date specified in the contract. The Sweets claimed that TCI's conduct amounted to a breach of contract and negligence, and that TCI's refusal to transfer the $50,000 in earnest money that it had deposited in trust after signing the contract amounted to conversion. (R. 10-29).

The contract in question contained the following language:

> 3. **EARNEST MONEY**. Earnest Money in the amount of Fifty Thousand Dollars ($50,000.00) shall be deposited by Buyer as Earnest Money. . . . All Earnest Money or Additional Earnest Money paid or deposited by Buyer shall be applied to reduce the Purchase Price at Closing.
>
> ***
>
> 5. **CONTINGENCIES**. The obligations of the Buyer herein, including forfeiture of any Earnest Money, **are subject to the Buyer obtaining financing; zoning; approvals, and certain environmental permits, satisfactory to the Buyer prior to the Closing Date**.
>
> 6. **DUE DILIGENCE AND FEASIBILITY PERIOD**. Buyer is expressly granted until July 12, 2007, in which to conduct due diligence and feasibility studies ("Due Diligence Period"). During the Due Diligence Period, Buyer shall have the right to perform any non-destructive studies or analysis Buyer deems necessary, and Buyer, upon giving reasonable notice to Seller, shall have the right to enter the Property in person, or by agent, to perform testing and analysis. If Buyer determines that the property is not suitable for Buyer's intended use; then Buyer may at Buyer's sole discretion, terminate this Contract, and the same shall be null and void . . .

7. **SURVEY**. Survey shall be provided by Seller within twenty days after the expiration of the due diligence period. . . . Should the Buyer determine after review of the of the Survey, in Buyer's sole discretion, that the Survey differs in any material way from the Property as described in Paragraph 1 above, or is otherwise unsuitable for Buyer's needs or intended use, buyer may terminate this Contract . . .

8. **POSSESSION, CLOSING AND CLOSING COSTS**. The Closing Date of this sale shall be on or before August 15, 2007. . . .

9. **ASSIGNMENT.** This Contract and the rights set forth herein may be assigned by the Buyer in whole or in part without the prior written consent of the Seller, and such assignment and assumption of Buyer's obligations hereunder by such assignee shall not result in a release of the Seller from any obligations herein. The Seller has no right to assign this Contract.

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13. **AGREEMENT OF THE PARTIES**: This contract contains the entire agreement of the parties and cannot be changed except by their written consent.

14. **ATTORNEY'S FEES**: Any signatory to this contract who is the prevailing party in any legal proceedings against any other signatory brought under or with relation to this contract or transaction shall be additionally entitled to recover court costs and reasonable attorney's fees from the non-prevailing party.

15. **DEFAULT**: If Buyer fails to comply with Buyer's obligations herein, Seller's sole and exclusive remedy shall be to terminate this contract and receive the Earnest Money as full and final compensation. . . . If Seller fails to comply with any obligation under this Contract for any reason, Buyer may: (I) enforce specific performance hereof and seek any such other relief as may be available under the law; or (ii) terminate this contract and receive the Earnest Money, thereby releasing Seller from the contract.

(R. 19-24)(emphasis added). Under the terms of paragraph 5 of the contract (the "Contingencies paragraph"), if TCI could not obtain financing that was satisfactory to it before the closing date, TCI no longer had any obligations to the Sweets, including the forfeiture of the earnest money it had deposited in trust toward the property.

In addition to the failure of the financing contingency, other conditions in the contract were never met. Under paragraph 7 of the contract, the "Survey" paragraph, the Sweets were required to provide TCI with a survey on the property by August 2, 2007, and, if TCI determined that the survey differed in any way to what it thought it was buying or determined that the property was unsuitable for the way it intended to use the property, TCI could terminate the contract. (R. 20). The Sweets did not comply with the "Survey" portion of paragraph 7 of the contract by providing TCI with a survey of the property by August 2, 2007. (R. 110).

On April 29, 2009, TCI filed a motion for summary judgment, arguing that because it was unable to find financing satisfactory to it for the purchase of the property, it was not obligated to close on the contract or to transfer the earnest money it had deposited into trust for the property. (R. 89-111). Its motion relied upon the language in the "Contingencies paragraph," which clearly stated that its obligations as the buyer of the Sweets' property, including the forfeiture of any earnest money, were subject to its obtaining financing satisfactory to it before the closing date. (R. 19). TCI attached an affidavit by its president, Mark Small, to its motion for summary judgment. (R. 110-111). In his affidavit, Small stated that TCI had attempted to obtain financing satisfactory to it from numerous institutions, but that it had failed in its attempts. (R. 110-111). TCI also attached the Sweets' amended complaint and the contract as exhibits to its motion for summary judgment. (R.94-110).

The Sweets did not conduct any discovery in the case before April 29, 2009, the date TCI filed its Motion for Summary Judgment. Instead, they argued that discovery was incomplete in their May 6, 2009, response to the motion (R. 125-131), and propounded discovery. (R.130-131, 138-153). TCI argued in its rebuttal in support of its motion for summary judgment that because the Sweets did not file a motion for a continuance or supply the chancellor with the affidavit

required under MRCP 56(f) along with their response to the motion, the chancellor should refuse to continue the summary judgment proceedings. (R. 132-137). Without waiving this objection, TCI responded to the discovery propounded by the Sweets on May 29, 2009. (R. 154, A.R.E. 1-21). TCI then noticed a hearing on its motion for summary judgment for June 19, 2009. (R. 156). When the Sweets asked for another date, TCI re-noticed the hearing for July 24, 2009. (R. 158).

The Sweets never filed a substantive response to the motion for summary judgment or moved to strike any exhibit attached to the motion. Eight weeks passed from the date TCI responded to the Sweets' discovery and the date the chancellor heard its motion for summary judgment. During this time, the Sweets never filed any motion to compel, challenging TCI's responses to their discovery. They also never noticed any depositions. Instead, they waited until the hearing to argue that the motion should be denied because TCI had not fully responded to their discovery. (T. 9-28).

The chancellor granted the motion for summary judgment at the conclusion of the July 24, 2009, hearing. He held that under a clear reading of the contract, no genuine issue of material fact existed as to TCI's liability to the Sweets under their amended complaint since TCI, under the "Contingency paragraph" of the contract, no longer had an obligation to close on the property on August 15, 2007, once it determined that it could not find financing satisfactory to it. A final judgment was entered in favor of TCI on August 4, 2009. (R. 163). TCI then filed a motion for court costs and attorney's fees, which it supported by an attorney's affidavit and a copy of its legal bills. (R. 164-179). The chancellor granted the motion and amended the final judgment to include an award of costs and attorney's fees to TCI. (R. 200).

SUMMARY OF THE ARGUMENT

The Sweets never attempted to conduct discovery in the case before TCI filed its motion for summary judgment on April 29, 2009. Their response to the motion argued only that the motion should be denied because discovery was incomplete in the case. The Sweets did not file any motion to continue the hearing on the motion or attach the affidavit required under MRCP 56(f) to any such motion specifically telling the chancellor why any post summary judgment discovery was necessary for them to respond adequately to the motion. Rule 56(f) states as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

TCI submits, therefore, that the Sweets were not entitled to conduct **any** discovery in the case post summary judgment. *See, e.g., Vaughn v. Mississippi Baptist Medical Center*, 20 So.3d 645, 656 (Miss. 2009)("vague assertions" by plaintiff that further discovery would enable her to survive summary judgment did not satisfy requirements of Rule 56(f)); *Morton v. City of Shelby*, 984 So.2d 323, 342 (Miss. App. 2007)(plaintiff's merely noting in his opposition to motion for summary judgment that discovery was incomplete did not comply with mandates of Rule 56(f)).

TCI, out of an abundance of caution, responded to the Sweet's discovery within twenty-three days after it received the discovery. When TCI noticed its motion for summary judgment for June 19, 2009, the Sweets asked for another date. When TCI noticed the hearing for July 24, 2009, the Sweets never objected to the hearing date or filed a motion to continue the hearing date. During the eight weeks that transpired from the date TCI responded to the Sweets' discovery and the date the chancellor heard the motion for summary judgment, the Sweets made

no effort to conduct any more discovery in the case, *e.g.*, taking depositions or filing motions to compel.

The Sweets were given ample time to conduct and complete discovery **before** TCI filed its motion for summary judgment. Because TCI voluntarily responded to the Sweets' post summary judgment discovery eight weeks before the hearing on its motion, the Sweets were given even more time to conduct discovery in the case. Their failure to pursue discovery diligently in the case cannot now be a reason for this Court to reverse the chancellor's decision to hear and grant the motion for summary judgment.

Nonetheless, under the unambiguous language in the "Contingencies paragraph" of the contract, nothing the Sweets hoped to gain through an extension of the discovery process would have defeated TCI's motion for summary judgment. Specifically, the affidavit of Mark Small stated that TCI sought financing from numerous institutions, but that it did not obtain financing that was satisfactory to it before the closing date of August 15, 2007. Given the lack of TCI's ability to obtain satisfactory financing, the Sweets had no enforceable claim under the unambiguous language in the "Contingencies paragraph." Furthermore, because the contract specified that TCI's purchase of the property was contingent on TCI's satisfaction with the financing it could get on the property, the affidavit by TCI's president, Mark Small, established that this contingency was never met. As a result, the chancellor correctly granted summary judgment in favor of TCI.

The Sweets never made a claim against TCI for a breach of the duty of good faith and fair dealing in either of the complaints they filed in the case. It is ironic, however, that the Sweets now want to argue on appeal that TCI breached this duty in connection with the financing contingency by failing to close on the property by August 15, 2007, while, simultaneously

ignoring the fact that they did not provide a survey to TCI by August 2, 2007, as required in the "Survey" paragraph of the contract.

Reading the contract as a whole, the purpose of the "Contingencies paragraph" is clear. TCI was preparing to invest $1,200,000.00 in a building in downtown Jackson, Mississippi. It was only willing to do so if it could finance the purchase of the property according to terms that were satisfactory to it. If it could not purchase the property with financing satisfactory to it, it wanted the ability to withdraw from the sale. Knowing today's litigious society, it wanted protection from suit for merely exercising its right under the contract to withdraw due to its inability to obtain satisfactory financing. Hence, it placed the attorney's fees provision, paragraph 14, in the contract to avoid the expenses of unsuccessful litigation against it. For these reasons, the chancellor correctly awarded TCI its costs and reasonable attorney's fees once it obtained summary judgment in the case.

STANDARD OF REVIEW

To the extent that the Sweets claimed that the hearing on the motion for summary judgment should have been continued so that they could conduct additional discovery, the chancellor's decision at the hearing that the Sweets could not have discovered anything from TCI through further discovery to defeat the motion is to be reviewed under an "abuse of discretion" standard. Under this standard, this Court is not to disturb the decision by the chancellor unless he abused his discretion. *Scoggins v. Baptist Mem'l Hosp.-DeSoto*, 967 So.2d 646, 648(¶ 8) (Miss.2007) (quoting *Earwood v. Reeves,* 798 So.2d 508, 514(¶ 19) (Miss.2001)). This Court employs a de novo standard of review of a chancellor's grant or denial of summary judgment. *Germany v. Denbury Onshore, LLC*, 984 So.2d 270, 275 (Miss. 2008) (citations omitted)(trial court correctly granted summary judgment against holder of option to purchase certain rights in royalty interests since option was never triggered). The standard of review for questions concerning the construction of a contract is a question of law that is committed to the trial court rather than to a jury. *Mississippi State Highway Comm. v. Patterson Enters., Ltd.*, 627 So.2d 261, 263 (Miss.1993). This Court also reviews questions of law de novo.

ARGUMENT

1. The chancellor properly granted summary judgment in favor of TCI.

To avoid summary judgment, the non-movant must set forth specific facts and/or evidence establishing that a genuine issue of material fact exists to defeat the motion. *Richmond v. Benchmark Constr. Corp.*, 692 So.2d 60, 61 (Miss.1997). If a chancellor determines that there is no genuine issue of material fact, the moving party is entitled to summary judgment in its favor. *Thames v. Jackson Production Credit Ass'n*, 600 So.2d 208, 211 (Miss.1992). Furthermore, a chancellor's decision to grant summary judgment will be affirmed if the record demonstrates that no genuine issue of material fact exists as to the liability of the movant. *Id.*

a. The Sweets were never denied an opportunity to conduct discovery in the case before the chancellor decided TCI's motion for summary judgment.

The Sweets made absolutely no effort to propound discovery in the case until **after** TCI filed its motion for summary judgment in the case. When they responded to the motion, they did not file any motion for a continuance accompanied by a Rule 56(f) affidavit, specifically telling the chancellor why they could not respond to the motion without conducting discovery. When TCI voluntarily responded to their post summary judgment motion discovery, the Sweets never filed a motion to compel TCI to respond more fully to any discovery,[4] never propounded any further discovery to TCI, and never noticed the deposition of any individual identified by TCI in its discovery responses during the eight weeks that passed from the date of TCI's response to the agreed-to hearing date on the motion.

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[4] Interestingly, pages 29 through 34 of the Sweets' appellate brief contain language that would normally be included in a motion to compel.

This Court has held that a party must be diligent in opposing a motion for summary judgment. *Gresham v. John Q. Long V.F.W. Post No. 4057, Inc.*, 519 So.2d 413, 415 (Miss.1988) (citations omitted). TCI submits that the Sweets did nothing to oppose TCI's motion for summary judgment based on the lack of complete discovery in the case. First, they simply asked the Chancellor to deny the motion for summary judgment in their response to the motion without filing a motion to continue, supported by a detailed affidavit Rule 56(f) affidavit. In *Morton v. City of Shelby*, 984 So.2d 323, 342 (Miss. App. 2007), this Court held that the plaintiff's "merely not[ing] in his opposition to the motion for summary judgment" that discovery was incomplete did not satisfy the mandates of Rule 56(f). *Id.* Second, the Sweets exercised no interest whatsoever in following up on the discovery they propounded with their response to the motion. TCI submits that the Sweets' failure to exercise any diligence in this regard is sufficient grounds for this Court to affirm the chancellor's decision to grant the motion for summary judgment more than eight months after TCI filed its answer in the case, and more than eight weeks after TCI voluntarily responded to the Sweets' post summary judgment discovery. This Court, while adopting the Mississippi Rules of Civil Procedure, specifically stated in Rule 1 that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

TCI further submits that even if the Sweets had included a Rule 56(f) affidavit with their response to the motion for summary judgment, the chancellor would have been correct in refusing to allow them to conduct any more discovery before hearing the motion for summary judgment. In *Prescott v. Leaf River Forest Products, Inc.*, 740 So.2d 301 (Miss.1999), the Court held that a trial court should consider the following while deciding whether to hear a motion for summary judgment before the completion of discovery:

> Rule 56(f) provides that when a party is unable to produce affidavits to oppose a motion for summary judgment, that party may instead file a motion or affidavit with the court explaining his inability to oppose the motion for summary judgment. In such cases, the court, at its discretion, *may,* if it finds the reasons offered to be sufficient, postpone consideration of the motion for summary judgment and order among other things that discovery be completed. *See* 10A Wright, Miller & Kane, Federal Practice and Procedure, § 2728 at 191. The rule itself contemplates that the completion of discovery is, in some instances, desirable before the court can determine whether there is a genuine issue of material fact. *See Smith v. H.C. Bailey Companies,* 477 So.2d 224 (Miss.1985).

In *AAA Cooper Transp. Co. v. Parks,* 18 So.3d 909, 912 (Miss. App.2009), the Court, citing *United States v. Little Al*, 712 F.2d 133, 135 (5th Cir.1983), held that "the party resisting summary judgment must present specific facts why he cannot oppose the motion and must specifically demonstrate 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.'" *Id.* The Court reasoned as follows while making its decision:

> Rule 56(f) is not designed to protect the litigants who are lazy or dilatory and normally the party invoking Rule 56(f) must show what steps have been taken to obtain access to the information allegedly within the exclusive possession of the other party. 10A Wright, Miller & Kane, Federal Practice & Procedure, § 2741 at 549. Finally, the determination as to the adequacies of the non-movant's Rule 56(f) affidavits and the decision to grant a continuance or order further discovery rests within the sound discretion of the trial judge and will not be reversed unless his decision can be characterized as an abuse of discretion.

Id.

The Court concluded that although the plaintiff, AAA Cooper, had claimed in its motion for a continuance that there was discovery that it had not had an opportunity to conduct, the plaintiff had not demonstrated how a continuance of the hearing on the motion for summary judgment would have allowed it to obtain any discovery that would have defeated the defendant's position that no genuine issue of material fact existed as to its liability under the theories of negligent entrustment or vicarious liability. The Court, therefore, concluded that the trial court did not abuse its discretion by denying the

plaintiff's motion for additional time to conduct discovery before ruling on the motion for summary judgment. *Id.*

TCI submits that the chancellor made this same decision at the hearing on its motion for summary judgment. Specifically, the following exchange occurred between the chancellor and the Sweets' attorney:

> MR. MARTIN: Your Honor, they're saying that he did not obtain satisfactory financing. There are other documents, Your Honor, that I submit exist that would support their affirmative defense. The documents from the banks, maybe an application for credit, the asset statement of TCI Mississippi, Inc., TCI Mississippi Investments. Your Honor, discovery in this case is not complete. Until we get the documents, Your Honor, I would submit to the Court that there is a genuine issue of material fact and that the defendant is not entitled to a judgment as a matter of law.
>
> THE COURT: The question that I have would be **if you got statements from the bank, who would make the determination as to whether it was satisfactory or not**?

(T. 27-28)(emphasis added).

The chancellor correctly determined that nothing the Sweets could have discovered from TCI, including any bank document, any loan application or any other financing document, would have defeated TCI's undisputed position that it could not find financing satisfactory to it to purchase the property. Under the "Contingencies paragraph" of the contract,[5] TCI had total discretion to decide whether it was satisfied with available financing, and nothing the Sweets could have discovered would have allowed them to defeat TCI's claim that it could not receive this kind of financing. Therefore, even though the Sweets never addressed this discovery issue properly through a Rule 56(f) affidavit, the

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[5] It is important for this Court to note that the contract at issue in this case was not a boilerplate or pre-printed contract submitted to an uneducated party.

chancellor correctly held that their request for more discovery at the hearing on the motion for summary judgment should be denied.

Finally, the Sweets never sued TCI for a breach of the duty of good faith and fair dealing. Under Mississippi law, an appellant is not entitled to raise a new issue on appeal, since doing so prevents a trial court from having an opportunity to address the alleged error. *Cooper v. Lawson,* 264 So.2d 890, 891 (Miss.1972) (citing *Clark v. State,* 206 Miss. 701, 39 So.2d 783, *suggestion of error overruled,* 206 Miss. 701, 40 So.2d 591 (1949). Their failure to sue TCI for a breach of this duty now prevents them from trying to get summary judgment reversed on appeal under a theory they never alleged in either of their complaints, never conducted discovery on, never presented to the chancellor during summary judgment proceedings, and on which they have no basis.[6] More important, the terms of the contract gave TCI total discretion to make the decision whether financing it could obtain on the property was satisfactory to it.[7] Therefore, their argument that the chancellor should hold that a genuine issue of material fact exists in the case as to whether TCI breached some duty of good faith and fair dealing simply because they had no say in whether TCI had obtained satisfactory financing must fail.

This Court has held that:

> Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is **consistent with justified expectations** of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness.

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[6] The Sweets also were to have alleged facts supporting this claim with particularity under MRCP 9(b) since any conduct supporting this claim must have amounted to fraud, which they did not do.

[7] If the Sweets wanted to be involved in making this decision, they could have insisted that the contract contain this provision.

Cenac, 609 So.2d 1257,1272 (Miss. 1992)(quoting Restatement (Second) of Contracts § 205, 100 (1979)). There can be no doubt that the "Contingencies paragraph" told the Sweets that if TCI did not obtain financing satisfactory to it, it would not buy their property. This condition precedent contained no qualifications as to how TCI could make this decision, and it did not limit TCI's discretion while making this decision.

Furthermore, this Court requires a plaintiff suing for a breach of good faith and fair dealing to establish that a defendant has committed "some conscious wrongdoing 'because of dishonest purpose or moral obliquity.'" *Univ. of S. Miss. v. Williams,* 891 So.2d 160, 170-71 (Miss.2004)(quoting *Bailey v. Bailey,* 724 So.2d 335, 338 (Miss.1998)). *See also Standard Const. Co. v. Brantley Granite Co.*, 43 So. 300 (Miss. 1907)(plaintiff did not make a single allegation that architect, who had sole discretion to determine whether granite was satisfactory, was guilty of fraud or dishonesty while exercising his decisions). The Sweets never alleged this kind of conduct in either of their complaints, and the chancellor never received any evidence that TCI committed any such dishonest act during the summary judgment proceedings.[8] As a result, even if the Sweets had included this claim in their original or amended complaints, the motion for summary judgment filed by TCI would have disposed of this claim as well.

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[8] The Sweets argue that because they played no role in soliciting financing for the property, TCI must have provided the chancellor with examples of what financing it found to be unsatisfactory. While making this argument, the Sweets do not explain why they never attached any affidavit to their response informing the chancellor of financing that was available on the property at that time and questioning TCI's rejection of this financing as unsatisfactory. TCI submits that this is because at the time it sought financing on the property, the real estate market as well as any financing it could obtain was beginning to spiral downward to where it is today.

b. The clear and unambiguous language of the "Contingencies paragraph" in the contract allowed TCI to avoid closing on the property once it determined that it could not obtain satisfactory financing for the property.

In interpreting a contract, the first thing a court must do is to determine the legal purpose or intent of the parties by conducting an objective review of the language used in the contract without reference to any parol or extrinsic evidence. *Cooper v. Crabb*, 587 So.2d 236, 241 (Miss.1991). While conducting this objective review, a court is not free to infer a party's intent that would be contrary to the clear language of the words of the contract. *Id.* Instead, a court is to look to the "four corners" of the contract whenever possible to determine how to interpret it. *McKee v. McKee,* 568 So.2d 262, 266 (Miss.1990). Therefore, while interpreting a contract, a court should not focus on what the parties may have intended; instead, its focus should be on what they said through the language of the contract. *Simmons v. Bank of Mississippi,* 593 So.2d 40, 42-43 (Miss.1992)(the words of a contract are "the best resource for ascertaining the intent and assigning meaning with fairness and accuracy").

Under Mississippi law, so long as language in a contract is not ambiguous, the parties' intent while entering the contract should be decided solely from the wording of the contract. *Miller v. Tatlon Telecommunications Corporation*, 907 F.Supp. 227, 320 (S.D. Miss. 1995), citing *Todd v. Deposit Guaranty National Bank*, 849 F.Supp. 1149 (S.D. Miss. 1994). In his order granting the motion for summary judgment, the chancellor held that TCI was entitled to judgment in its favor as a matter of law "based on a clear reading of the contract entered into between the parties." (R. 160). Paragraph 5 of the contract contained the following language:

> 5. **CONTINGENCIES.** The obligations of the Buyer herein, including forfeiture of any Earnest Money, are subject to the Buyer obtaining financing; zoning; approvals, and certain environmental permits, **satisfactory to the Buyer** prior to the Closing Date.

(emphasis added). This contingency clause provides that the obligations of TCI under the contract, including forfeiture of the earnest money it had paid toward the purchase price of the property, were completely subject to a decision by TCI that any financing it could receive for the purchase of the building was "satisfactory to it" before the closing date of August 15, 2007. This contingency gave **no one** other than TCI the authority to decide whether it could receive satisfactory financing before the closing date. The language contained in this contingency also clearly and unambiguously provides that this clause was placed in the contract solely to protect TCI from having to perform the terms of the contract or from forfeiting its earnest money if it could not obtain satisfactory financing for the purchase of the property. The "Contingencies paragraph" of the contract did not require any level of "satisfaction" on the part of TCI or require TCI to provide the Sweets with a reason why it was not satisfied with any financing in regard to the property. In other words, the terms of the contract were not ambiguous and definitely revealed TCI's intent while entering into the contract – if it did not receive financing satisfactory to it, it no longer wanted to be obligated to the Sweets to buy the property. The Sweets, one of whom is an attorney, were given an opportunity to read the contract before signing it, and there has been no claim that they were not competent to sign the contract. As a result, they cannot challenge the reasons why TCI decided that the financing available to it was unsatisfactory.

In *Carlo Corporation v. Casino Magic of Louisiana*, 26 F.Supp.2d 904, 907-908 (S.D. Miss. 1998), the court held that a seller of a vessel could not challenge the reasons a buyer gave for finding that the vessel was not "acceptable" since the language in the sales contract never limited the buyer's decision on the acceptability. The buyer withdrew from the purchase of the vessel after inspecting the vessel, and sued the seller after it refused to refund a deposit the buyer had made toward the purchase price of the vessel. The buyer then moved for summary judgment, arguing that a condition precedent in the contract, along with its right to terminate the contract if it was not satisfied with the vessel's

condition, allowed it, as a matter of law, to withdraw from the purchase of the vessel without forfeiting its deposit so long as it decided that it was not satisfied with the vessel's condition. *Id.* at 907. The seller argued that the buyer's actions or inactions while inspecting the vessel were not "diligent enough" to allow it to claim that it was not satisfied with the vessel. The seller then argued that when the buyer decided, after inspecting the vessel, that it was not satisfied with its condition, it had a duty under a due diligence condition precedent to articulate to the seller why it made this determination. The Court decided that the terms of the contract were unambiguous, and that they should be enforced. It then held that since the contract never specified what condition would be "acceptable" to the buyer, the buyer had clearly placed the "termination" language in the policy to protect it from being bound to having purchased the vessel in its "as is" condition after its purchase. *Id.* at 908. It concluded that the seller had wrongfully retained the buyer's deposit and granted summary judgment as to this claim in favor of the buyer. *Id.* at 909.

A "condition precedent" is either a condition that must be performed or satisfied before an agreement between parties becomes a binding contract or a condition that must be satisfied before a particular party's duty to perform a contract exists. *See, e.g., Standard Const. Co. v. Brantley Granite Company*, 43 So. 300 (Miss. 1907)(stipulation in contract that granite at site of building "must be satisfactory to the architect" was plain, unequivocal, and unambiguous condition precedent in contract); *Airport Inn Enterprises, Inc. v. Ramage*, 679 N.W. 2d 269, 272 (N.D. 2004)(acceptable financing condition precedent in real estate contract must have been satisfied before contract became enforceable). The contract entered into between the Sweets and TCI contained many conditions, clearly exhibiting the parties' intent that the sale would not go through unless certain things occurred. For example, paragraph 6 of the contract allowed TCI to perform a study or analysis on the property to determine whether the property was suitable to TCI for its intended use of the property before being obligated to perform under

the contract. Paragraph 7 of the contract required that the Sweets provide TCI with a survey on the property by August 2, 2007, and allowed TCI to withdraw from the sale if the property described in that survey differed in any way from what TCI thought it was buying or if the property was unsuitable for TCI's intended use the property.

In *Austin v. Carpenter*, 3 So. 3d 147 (Miss. Ct. App. 2009), cert. denied (Miss. June 4, 2009), the buyers under a contract for the sale of real property sued the owners of the property for specific performance. The sellers denied liability to the buyers, arguing that there was never an enforceable contract from which specific performance could be ordered because the survey they obtained on the property showed that the buyers would be buying a part of their cabin, which they never intended to sell. The Court of Appeals affirmed the chancellor's finding that the sellers' obtaining an acceptable survey of the property was a condition precedent in the sales contract. The Court concluded that the "sale was contingent upon [the] buyer[s] obtaining an acceptable survey of the property," and, because this condition was never satisfied, the buyers could not enforce the contract. *Id.*

The Court of Appeals looked to the language of the sales contract and answered the question of whether the sale in question was contingent upon the buyers' obtaining an acceptable survey of the property. The Court held that this language clearly required that an acceptable survey be obtained before the contract became enforceable. While holding that the contingency language existed for the benefit of both the sellers and the buyers, the Court concluded that the sellers' obtaining of an acceptable survey was a condition precedent that had to be satisfied before the contract could become enforceable. As a result, the Court affirmed the Chancellor's finding that no contract existed under which the buyers could seek specific performance.

In the instant case, the "Contingencies paragraph" of the contract between the Sweets and TCI unambiguously provided that if **TCI** did not obtain financing that was satisfactory **to it** before the

closing date on the property, TCI could withdraw from the contract and keep the earnest money it had deposited. This language did not limit how TCI could decide that financing on the building was unsatisfactory, and it did not qualify the meaning of the word "satisfactory." Instead, the language gave TCI total discretion to decide whether it was satisfied with its possible financing. The motion for summary judgment filed by TCI, through the affidavit testimony of Mark Small, stated unequivocally that TCI attempted to obtain satisfactory financing from numerous institutions, but it was unsuccessful with doing so before the closing date. The Sweets were given an opportunity to read the contract before signing it. By signing the contract, the Sweets agreed that if TCI could not find financing to purchase the property that was satisfactory to it before the closing date, TCI no longer had any obligations under the contract. As a result, the chancellor correctly held that under a clear reading of the contract, the Sweets had no claim against TCI for breach of contract, negligence or conversion.

Like the buyer of the vessel in *Carlo Corporation v. Casino Magic of Louisiana, Corp.*, 26 F.Supp.2d 904 (S.D. Miss. 1998), most home buyers in the State of Mississippi include an "acceptable inspection" contingency in a contract when they are buying a house. As this Court held in *Theobald v. Nosser*, 752 So.2d 1036 (Miss.1999), while citing *Osborne v. Bullins*, 549 So.2d 1337 (Miss. 1989), "if a party who contemplates purchasing a piece of property wishes to protect himself against" a certain contingency, *e.g.*, "the possibility that he may be unable to secure financing adequate to make the purchase," that party needs to provide for this contingency "by clear language in the contract." *Id.* at 1339. TCI wisely did this, and the Sweets never challenged the placement of this contingency in the contract. TCI respectfully submits that this Court cannot encourage parties to protect themselves by placing these kind of contingencies in real estate contracts, and then allow a disgruntled party to challenge the application of such a contingency.

Finally, although TCI based its summary judgment on the fact that the "Contingencies paragraph" in the contract was not satisfied, it could have easily demonstrated that no genuine issue of material fact existed whether other conditions precedent in the contract were ever satisfied. For example, the Sweets were required under Paragraph 7 of the contract to provide TCI with a survey of the property within twenty days after the due diligence period expired, or by August 2, 2007. However, as stated by Mark Small in his affidavit attached to TCI's motion for summary judgment, no survey was ever supplied to TCI by the Sweets. Therefore, this Court, under its de novo review of the chancellor's decision to grant summary judgment to TCI, should hold that in addition to the "Contingencies paragraph" of the contract never being satisfied, the Sweets never satisfied the "Survey" section of the contract. As a result, had any genuine issue of material fact existed whether TCI obtained financing satisfactory to it for the purchase of the property, the Sweets' failure to provide a survey of the property to TCI by August 2, 2007, was a breach of the contract, thereby preventing the Sweets from seeking to enforce any of the contract's provision in their lawsuit against TCI.

c. The affidavit of Mark Small TCI attached to its motion for summary judgment addressed an issue of fact about which he was competent to testify at trial.

The Sweets argue in their appellate brief that the affidavit of Mark Small TCI submitted with its motion for summary judgment contained conclusory, self-serving testimony. In his affidavit, which the Sweets never moved to strike before the hearing on the motion, Small stated that he had personal knowledge and was competent to testify that:

1. He was the President of TCI;

2. TCI had authorized him to sign the affidavit;

3. The Sweets never provided a survey of the property that was the subject of the contract within 20 days after the due diligence date in the contract, July 12, 2007; and

4. TCI attempted to obtain financing satisfactory to it from numerous financial institutions before the August 15, 2007, closing date, but it was unable to obtain this financing.

(110-111).

Rule 56(e) of the Mississippi Rules of Civil Procedure requires the following in regard to any affidavit submitted in support of a motion for summary judgment:

> **(e) Form of Affidavits; Further Testimony; Defense Required.** Support and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

TCI submits that Small's affidavit satisfies each requirement of Rule 56(e). Small states in his affidavit that as President of TCI, he has personal knowledge and is competent to testify that TCI attempted to obtain financing satisfactory to it for the purchase of the property, but that it did not receive this kind of financing. The chancellor, therefore, properly considered Small's affidavit testimony while granting summary judgment in favor of TCI since his affidavit was based on his personal knowledge, and it set forth facts that were admissible into evidence at trial. *See, e.g., Stewart v. Southeast Foods, Inc.*688 So.2d 733, 734-735 (Miss. 1996)(affidavit of municipal court judge that contained statement by judge regarding his intentions and state of mind while dismissing criminal charges satisfied requirements of Rule 56(e)).

Finally, not only did the Sweets fail to challenge the contents of Small's affidavit in their response to the motion for summary judgment, but they also never moved to strike the affidavit prior to the hearing on TCI's motion for summary judgment. This Court has held if a non-moving party wants to attack an affidavit submitted with a motion for summary judgment, he must file a motion to strike that

affidavit with the trial court or else he waives his objection to the affidavit. *Brown v. Credit Ctr., Inc.*, 444 So.2d 358, 365 (Miss.1983)(quoting 10 Wright & Miller, *Federal Practice & Procedure* § 2738, at 507-09 (1973)). *See also Van v. Grand Casinos of Mississippi, Inc.*, 767 So.2d 1014, 1023 (Miss.2000) (plaintiffs' failure to challenge affidavit of surveillance employee of casino stating that plaintiffs irregularly shuffled cards resulted in their waiver of any alleged deficiency in the affidavit). Although TCI submits that Small's affidavit was not self-serving or conclusory, the Sweets' failure to challenge the affidavit before the hearing on the motion for summary judgment on these grounds resulted in their waiver of these claims.

The Sweets liken the affidavit testimony of Small to the affidavit of the mayor of Biloxi in *Scott v. City of Biloxi*, 1003 (Miss. 1991). In that case, the city responded to discovery from the plaintiffs, indicating that an insurance policy covered their claims, but the city did not produce a copy of that policy. Later, the city filed a motion for summary judgment, claiming that this insurance policy no longer provided it with coverage and, as a result, it was immune from suit.[9] Rather than submitting the insurance policy as an exhibit to its motion and referring to the specific portion of that policy that excluded coverage, the city submitted an affidavit by the mayor simply stating that the city no longer had insurance coverage for any claims, past or future. The plaintiffs filed affidavits in response to the motion, pointing out that the city had admitted earlier in the case that it had insurance coverage, and then argued that the city should have attached the actual insurance policy to its motion for summary judgment demonstrating that its coverage no longer existed. The trial court granted the city's motion for summary judgment without reviewing the language in the policy. The plaintiffs appealed, arguing that the only way the trial court could have made a determination that the city no longer had coverage was to review

[9] At that time, Miss. Code Ann. §21-15-6 provided that a municipality that purchased insurance coverage waived its sovereign immunity up to the limits of that insurance.

the policy itself. This Court agreed, holding that the mayor's affidavit was not the best evidence of whether the city's earlier coverage no longer existed. It based its decision on the fact that in any insurance coverage dispute, the best evidence of whether coverage exists is the language in the policy. *Id.* at 1006.

TCI submits that it provided the chancellor during the summary judgment proceedings with the best evidence on whether it had any duty to close on the property once it determined that it could not find satisfactory financing for the property. That evidence was a copy of the contract and the affidavit testimony of Mark Small. Unlike language in an insurance policy that must be examined before a Court can determine coverage, the only way TCI could prove at trial that it never obtained satisfactory financing was through the introduction of the contract and the testimony of one of its officers regarding his inability to find satisfactory financing. The affidavit of Mark Small, therefore, supplied the best evidence of why TCI could rely on this contingency by not closing on the property.

The Sweets also claim that Small's affidavit is similar to the affidavit submitted by the plaintiff's expert witness in *Davis v. Christian Broth. Homes of Jackson, Mississippi, Inc.*, 957 So.2d 390 (Miss. App.2007). The Court in *Davis* affirmed the trial court's refusal to consider the expert's affidavit because his testimony was "nothing more than just a compilation of conclusory statements [and] provide[d] no factual basis." *Id.* at 408. The expert's affidavit stated that "inadequate lighting increases the chance of criminal activity, and the inadequate lighting at CBA on February 4, 2003 contributed to the death of Lucius Davis." The Court concluded that this testimony contained nothing more than legal conclusions, which were not supported by any specific fact. *Id.* at 410.

TCI submits that the affidavit of Mark Small is nothing like the expert's affidavit in *Davis*. Small, as president of TCI, stated that he had personal knowledge that TCI had attempted to obtain satisfactory financing from several institutions, and that it had been unsuccessful with doing so. Small's

description of the financing TCI attempted to obtain as not "satisfactory" does not constitute an expert opinion. Instead, Small was one of the persons who had total discretion under the "Contingencies paragraph" of the contract to decide whether any financing TCI sought to obtain was "satisfactory." Therefore, his testimony did not consist of some legal conclusion.

4. The chancellor correctly awarded attorneys' fees to TCI under the terms of the contract.

Paragraph 14 of the contract entered into between the Sweets and TCI provided that any party who signed the contract and prevailed in a legal proceeding brought as a result of the contract could recover court costs and reasonable attorney's fees from the non-prevailing party. (R. 21). Under Mississippi law, parties may by contract provide that in the event of a dispute, the losing party must pay the winner attorney's fees. *Grisham v. Hinton*, 490 So.2d 1201, 1206 (Miss.1986), citing *Faulkner Concrete Pipe Co. v. U. S. Fidelity and Guaranty Co.*, 218 So.2d 1 (Miss. 1968); *Barron v. Murdock Accept. Corp.*, 240 Miss. 521, 127 So.2d 878 (1961); and *Alexander v. The Fidelity & Casualty Co.*, 232 Miss. 629, 100 So.2d 347 (1958). This is exactly what the parties did under the contract at issue in this case.

The Sweets argue that TCI was not entitled to an award of attorney's fees because TCI took the position in its motion for summary judgment that the contract became unenforceable once the "Contingencies paragraph" was not satisfied. TCI submits that the Sweets are correct that TCI argued that once this portion of the contract was not satisfied, TCI, as the buyer, was relived of any further obligations under the contract. However, TCI never took the position that the Sweets, as the purchasers, were relieved of their obligations under the contract. Paragraph 5 only applied to TCI as the buyer of the property. Paragraph 14 applied to either party to the contract and protected that party from having to defend a lawsuit filed against it simply because they signed the contract. Since the lawsuit filed by the

Sweets was pursued "under or with relation to" the signed contract, and they did not prevail in their lawsuit, TCI was entitled to an award of court costs and reasonable attorney's fees from the Sweets.

CONCLUSION

Before entering into the contract with the Sweets, TCI wisely included language in the contract stating that its obligations under the contract, including its purchase of the Sweets' property and its forfeiture of any earnest money it paid for that purchase, were contingent on its obtaining financing "satisfactory to the Buyer prior to the Closing Date." The chancellor correctly held that the language TCI placed in the contract's "Contingencies paragraph," which clearly existed only for TCI's benefit, relieved TCI of any further obligations under the contract once TCI was unable to obtain satisfactory financing. Furthermore, the Sweets never propounded any discovery to TCI before it filed its motion for summary judgment, never properly moved the chancellor to allow them to conduct discovery after the summary judgment was filed, and never diligently pursued their post summary judgment discovery to obtain any evidence to defeat TCI's motion. Despite their failure, the chancellor was correct in concluding at the hearing on the motion for summary judgment that the Sweets could not have obtained any evidence through discovery that would have allowed them to challenge the subjective decision TCI made that it could not find financing satisfactory to it for the purchase of the property.

Although the Sweets never included a claim for breach of the duty of the duty of good faith and fair dealing in either of their complaints, the chancellor was presented with undisputed evidence at the hearing on the motion for summary judgment that TCI did attempt to obtain financing satisfactory to it from numerous financial institutions, but was unable to do so. Without some evidence to dispute this position by TCI, the Sweets had no claim against TCI in this regard. Finally, TCI's position in its motion for summary judgment that once the conditions precedent in the "Contingencies paragraph" were not satisfied, it no longer had any obligations to perform any duty under the contract is consistent with its position that the Sweets, as non-prevailing parties, owed it attorney's fees under Paragraph 14 of the contract. For these reasons, the chancellor's decision to grant summary judgment in favor of TCI, along

with his decision to award TCI attorney's fees from having to defend the Sweets' lawsuit against it, should be affirmed by this Court.

This the 21st day of January, 2010.

RESPECTFULLY SUBMITTED,

TCI MS INVESTMENTS, INC.

BY: _____

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a true and correct copy of the above and foregoing instrument by causing a copy of same to be hand delivered and/or mailed, postage prepaid, to the following counsel of record at the address shown:

Honorable Ray H. Montgomery
Special Judge
710 West Kathy Circle
Canton, MS 39046

Dennis C. Sweet III, Esq.
Warren L. Martin, Jr., Esq
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158 E Pascagoula Street
Jackson, MS 39201

THIS, the 21st day of January, 2010.

Rebecca Bl

REBECCA B. COWAN