IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-01971

STONE INVESTMENT COMPANY, INC.	**APPELLANT**
VS.	
ESTATE OF ARLAN ROBINSON AND WILLIAM HEAD D/B/A WILLIAM HEAD REALTY	**APPELLEE**

ON APPEAL FROM THE CHANCERY COURT
OF STONE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE,

WILLIAM HEAD D/B/A WILLIAM HEAD REALTY

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 and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Stone Investment Company, Inc.
Appellant

Tadd Parsons, Esq. and Jack Parsons, Esq.
Attorneys for Appellant

The Estate of Arlan Robinson
Appellee

Herb Stelly, Esq.
Attorney for Appellee

William Head d/b/a William Head Realty
Appellee

John D. Moore, Esq.
Attorney for Appellee

Honorable James H.C. Thomas, Jr., Chancellor, deceased
Presiding trial court judge

John D. Moore, Attorney for Appellee

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ISSUES TO BE CONSIDERED BY THE COURT

1. Whether the Chancellor was correct in holding that the sale of the subject real property was proper.

2. Whether the chancellor was correct in determining that Stone defaulted on the contract before merchantable title could be transferred.

STATEMENT OF FACTS

Arlan Robinson, deceased, executed a Will on March 30, 2001. (R. at 80).[1] This will provided that *inter alia* certain property owned by Mr. Robinson, situated at the corner of Hwy 26 and Hwy 49 in Stone County, Mississippi, including the subject parcel, be sold at auction. (R. at 81). Martha Robinson, the named executrix, requested that an estate be opened to probate this will, and, on October 12, 2005, an Order Allowing Will to Probate was entered with the Chancery Clerk of Stone County, Mississippi. (R. at 83). Apparently, all appropriate Creditor Notices, including publication was done and several creditor claims were filed with the Estate. (R. at 85-97 and 122-125).

On January 17, 2006, pursuant to the instructions in her late husband's will, the executrix, Martha Robinson, entered an Auction Listing Agreement. (R. at 119). Paragraph 14 of this listing agreement provided that Head would be paid a 10% fee of the contract price. *Id.* It also provided in paragraph 8 that all deposits would be divided up to Auctioneer's full commission, if forfeited by Buyer. *Id.* The full commission was $31,240.00. Therefore, Mr. Head would be entitled to the full commission. Finally, the contract provides in the last sentence of paragraph 16, that if there is any litigation or dispute, "The prevailing party shall be entitled to an award of court costs and attorney fees incurred." (R. at 121).

On April 20, 2006, a Motion for Authority to Sell Real Property was filed in the Estate of Arlan Robinson, attaching and incorporating in the Motion, several Purchase Contracts, including a Purchase Contract signed by Stone Investments wherein Stone

[1] The following abbreviations will be used: "R" refers to the clerk papers provided and "Tr" refers to the trial transcript. Any reference to "Trial Exhibit" refers to the exhibits not numbered in the clerk's papers, but exist as a separate part of the official record.

agreed to purchase the subject property (Parcel 1) for $312,400.00. (R. at 7). Also included in this Motion was an Auction Listing Agreement for Sale of Real Estate which was entered by the Executrix and William Head Realty. (R. at 119). As part of the Motion, the Executrix requested the waiver of a bond upon the sale of the property. (R. at 100).

On May 26, 2006, the Stone County Chancery Court entered an Order Authorizing Sale of Real Property following the aforementioned Motion. (R. at 12). As part of this Order, the Court found that certain obligations were owed related to the Real Property, and ordered that these obligations be satisfied in full, with the balance of the proceeds to be held in trust by the Estate and to not be removed until further order of the court. (R. at 13). This Order went further and ordered that it would make such further orders as it deemed necessary for the disbursal of the funds. *Id.*

Pursuant to the instructions in the Will, an auction was held on or about March 14, 2006. Prior to any bidding, a "Buyer's Guide", prepared by Head, with Robinson's assistance, was issued to all bidders, including Stone. See Trial Exhibit 6. This Buyer's Guide included a "Terms of Sale" provision displayed prominently on the first page. *Id.* This provision provided, in part:

> . . . A 10% **non-refundable** deposit based on the contract price day of auction must be paid after being awarded the bid. . . . Should the buyer default and fail to close as specified, the buyer will forfeit his/her deposit, which will be immediately released to William Head, Broker . . . .

Id. (Emphasis Added). The Buyer's Guide also included surveys of each parcel to be sold. The survey of the subject parcel, which was included in the Buyer's Guide, clearly indicated a sewer easement. *Id.*

At this auction, Stone Investments was the high bidder on Parcel 1 of the subject property. As required by the purchase contract, Stone Investments issued check number 7841 in the amount of $31,240.00 to William Head Realty as a deposit or earnest money for Parcel 1. (R. at 11). Mr. Head testified that, pursuant to his obligation as a Broker, he still holds the funds in his segregated, non-interest-bearing account. (Tr. at 237). He also testified that he has never received any court order directing him to do anything with the earnest money. *Id.*

Following the conclusion of the auction, Stone Investments signed a purchase Agreement. (R. at 7). Nowhere in this contract is the term of art, "time is of the essence" found. *Id.* The contract provides *inter alia* that the purchaser accepts the property subject to easements of record. *Id.* It also provides in paragraph 3 that the property is accepted "as is" with no warranties as to merchantability or fitness for a particular purpose. *Id.* The contract goes on to provide in paragraph 6 that a Warranty Deed and Certificate of Title are to be provided, on which title insurance may be obtained subject only to standard exceptions **and other matters specifically stated in this contract.**[2] *Id.* We know from Bill Pettey's testimony and the HUD-1 (Trial Exhibit 13) that Mr. Pettey stood ready to issue title insurance on the property. (Tr. at 195). We also know from Mr. Pettey's testimony and the proposed Warranty Deed that a Warranty Deed was presented to Stone Investments. (Tr. at 191).

On April 11, 2006, Jack Parsons, on behalf of Stone Investments sent a letter to William Head Realty conveying its intent to purchase the property "upon the Robinson Estate being able to convey said property with good merchantable title." (R. at 75). No

[2] "Other matters" includes the referenced "easements of record" in paragraph 1 of the contract.

time limitation was placed on this condition, and immediately thereafter, on April 19, 2006, the Estate proceeded with its Motion to Sell Property. (R. at 99.) Also, as part of this April 11, 2006, letter, Mr. Parsons referenced an April 11, 2006 letter concerning property to be purchased by Wesley Parker. (R. at 75.) The April 11, 2006, letter stated that "the same conditions have to be fulfilled" as outlined in the letter related to the Wesley Parker property. *Id.* Nowhere in the Wes Parker letter was any mention of a bond or any condition related to the estate, other than adjudication of claims, made.

No further correspondence was exchanged until August 15, 2006. However, we know from the testimony of Bill Pettey, Esq., the closing attorney, and Dana Parsons, that on or about July 28, 2006, more than two months after the sale was approved by the Court, that Mr. Pettey traveled to Jack Parsons office with the intention of closing the sale on the subject property. (Tr. at 189 and 45). Mr. Pettey carried with him a HUD-1 Settlement Statement bearing the date July 28, 2006. See Trial Exhibit 13. He also prepared a Warranty Deed with a July 2006 date. (R. at 137.) We also know from Mr. Pettey and Mrs. Robinson's testimony that Stone Investments requested that this closing take place. (Tr. at 189 and 171). It is completely implausible that Mr. Pettey and Mrs. Robinson "just showed up" at the Parsons law office without Stone's knowledge, as Dana Parsons testified. (Tr. at 171).

It is undisputed, based on the testimony of Dana Parsons, Martha Robinson, and Bill Pettey, that Stone Investments refused to close in July 2006. (Tr. at 42, 171, and 189). Thereafter, on August 23, 2006, Jack Parsons, on behalf of Stone Investments, wrote a letter to Herb Stelly, the attorney for the Estate, indicating that Stone Investment "was not interested in consummating the purchase of the Robinson property because

there is a sewer line going across it, as it is presently located." (R. at 168.) However, Mr. Parsons went on to write, "Stone Investment Company, Inc. would consider buying both parcels if it would be commiserate with the value with the sewer line thereon. If your client wants to talk about that, we will be happy to do so otherwise we request the deposit be returned." *Id.* Thereafter, following an exchange of correspondence, Mr. Parsons again wrote to Mr. Stelly offering to purchase the subject property for 65% of the bid price. See Trial Exhibit 8.

SUMMARY OF THE ARGUMENT

The Plaintiff's reasons for refusing to consummate the contract are pretextual. Good and merchantable title was able to be conveyed by the Seller. The Seller stood ready, willing and able to convey good and merchantable title even on April 13, 2006, the original date set for closing. The Seller was not required to obtain court approval. Even so, at the request of Stone Investments (See April 11, 2006, letter), the Seller filed a Motion to Sell the Property and obtained an Order Authorizing the Sale. (R. at 99 and 12).

After obtaining this valid Order, which did not require a bond, Stone Investments still refused to close. This time, the reason was a sewer easement. A sewer easement is not a title defect. Even if it were, Stone Investments was made aware of the easement on at least two separate occasions prior to the sale. Moreover, the Purchase Contract required acceptance of the property "as is".

The parties agreed, through their words and deeds, to extend the closing of the property to at least July 28, 2006, when all appeared for a closing. The "sewer easement"

excuse, it seems obvious, was a pretext to back out of the deal for reasons unrelated to the subject property.

ARGUMENT

I. WHETHER THE CHANCELLOR WAS CORRECT IN HOLDING THAT THE SALE OF THE SUBJECT REAL PROPERTY WAS PROPER.

Arlan Robinson's Will directed that certain real property be sold at auction. (R. at V.1, 8.) Therefore, when such direction is given, the executor's authority is governed by the language of the will. *Kyle v. Wood*, 86 So.2d 881 (1956). In fact, "[u]nder a testamentary power of sale there is no need to obtain a court order justifying the sale. *Davis v. Sturdivant*, 19 So.2d 499 (1944). *Mississippi Probate and Estate Administration* (Third Edition) § 12:1, Robert E. Williford. Therefore, it was entirely unnecessary for the Estate of Arlan Robinson to petition the court to sell the real property. The only time such authority would have been necessary is if there was **no** authority to sell granted under a will. *Id.* Williford writes, "If no authority to sell is given under the will, the sale of realty is ***then*** governed by statute." *Id.* (emphasis added). As such, for the statutory scheme which has been argued by the Plaintiff to apply, the will would have had to have been completely silent as to the sale of real property. Therefore, since the subject sale is **outside** the statutory scheme by virtue of the testamentary power of sale, no bond is required. The requirement of a bond is entirely a creature of statute - not a will. Indeed, the Will of Arlan Robinson specifically waived all requirement of posting a bond. (R. at 80.)

Moreover, assuming *arguendo* that authority was required, a bond would **only** need to be posted pursuant to Miss. Code Ann. § 91-7-205 (1972)[3], prior to the expiration of the time to probate claims. The ninety day period for probation of claims expired on June 18, 2006. (R. at 12.) Therefore, on July 28, 2006, when all of the parties met at Jack Parsons' office to consummate the closing, the time for probating claims had long passed. As such, no bond was required. Further, as Robin Roberts and Bill Pettey testified, even if the lack of a bond was a deficiency, it was readily curable after the closing.

Additionally, the statutes provide a cure if the executor fails to secure a bond. Miss. Code. Ann. § 91-7-207 (1972) provides that the court, upon failure of the executor to secure bond, may appoint a master or special commissioner to make the sale and secure the bond. The bond statutes, after all, are for the purpose of securing proper application of the funds, not the transfer of title. *See 91-7-205.* Robin Roberts, rendered his expert opinion at trial that the failure of a bond does not affect the validity of the sale, it is only to insure proper application of the funds. (Tr. at 251).

Finally, the Court cured all purported defects by its Order Authorizing Sale. (R. at 12.) The Petition for Sale requested a waiver of the bond. *Id.* The Court did not require a bond, and, thus, effectively and constructively, waived the requirement. Moreover, the Court directed, in lieu of a bond, that the proceeds be used to pay all purchase money liens on the property with the remainder to be held in the estate lawyer's trust account. *Id.* There is no manifest error in such an instruction. Chancery Court is one of equity and it is well within the power of the court to make such an order without requiring bond.

[3] Statutes have been reproduced in addendum.

Again, however, it is really a moot point as no order was even required. The will directed the sale and, as such, the estate was not required to seek approval of the sale.

II. WHETHER THE CHANCELLOR WAS CORRECT IN DETERMINING THAT STONE DEFAULTED ON THE CONTRACT BEFORE MERCHANTABLE TITLE COULD BE TRANSFERRED.

As outlined in the facts, *supra*, it is objectively clear that the parties intended to extend the contract beyond the anticipated closing date of April 13, 2006. First, the contract provides for an automatic extension of up to 30 days. (R. at 8.) Second, Stone Investments wrote a letter on April 11, 2006, prior to the closing date, indicating its intent to close "upon the Robinson Estate being able to convey said property with good merchantable title." (R. at 75.) No time limitation was placed on this condition. Third, a closing was actually scheduled for July 28, 2006. All of the parties attended the closing, but, according to the testimony of Bill Pettey and Martha Robinson, Stone Investments refused to close due to an easement on the property. (Tr. at 189 and 171). This easement was disclosed to Stone Investments prior to the closing date when, on October 24, 2005, Herb Stelly sent a copy of the plat of the property to Stone Investments. *See Trial Exhibit 9.* Moreover, this easement was disclosed prior to the subject auction in the Buyer's Guide. *See Trial Exhibit 6.*

In light of the clear agreement to extend the contract, the question then arises as to whether these contractual extensions were valid in light of the contract. Several cases make it clear that these extensions were, in fact, valid, and that Stone Investments is obligated to purchase the subject property.

In 2004, the Court of Appeals held that a contract did not lapse for failure to close on the contract's performance date. *Estate of Pickett v. Johnson*, 879 So.2d 467 (Miss. Ct.

App. 2004). The facts of *Pickett* involved the execution of a contract to sell real property. After the execution of the contract, Mr. Pickett died and an estate was opened. The purchaser attempted to tender performance, but, because of some initial problems in properly opening the Pickett estate, the estate was not in a position to close on the initial closing date. The Court held that:

> [W]here one party having the right to demand performance stands ready and willing to carry out an executory contract but the other party cannot perform due to a temporary impossibility, the passing of the designated date for performance does not result in voiding the contract. Rather, that event simply extends the time of performance appropriately until the impossibility ceases. *Culp v. Tri-County Tractor, Inc.*, 112 Idaho 894, 736 P.2d 1348, 1354 (1987) (citing Restatement (Second) of Contracts § 269, cmt. a (1981)). If the non-performing party fails to perform after removal of the impossibility, a ready and able purchaser may seek specific performance or such other legal remedy as may appear appropriate in the particular case. (citation omitted).
>
> ***
>
> For the reasons we have discussed, we find that the chancellor was entirely correct in concluding that the contract had not lapsed for its failure to close by the December deadline under the circumstances.

Id. at 471. The *Pickett* case is similar to the case at bar in that both estates (Robinson and Pickett) were taking action with the court prior to the sale. Therefore, even if the parties had not agreed to an extension (we argue they did) the contract would not lapse for failure to perform prior to the closing date set forth in the contract.

In another similar case, the Court of Appeals found that a contract could be enforced if title defects could be cured even after a **three year** delay in the closing. *Lee v. Schneider*, 822 So.2d 311 (Miss. Ct. App. 2002). The *Lee* Court also found, "Unless the contract expressly so states, or unless there is otherwise shown to be a clear indication of intent, time is not ordinarily considered to be of the essence in the performance of a

contract. *Gault v. Branton* 222 Miss. 111, 125, 75 So.2d 439, 445 (1954)." *Id. at 314.* Nowhere in the subject contract is the term of art "time if of the essence" found. (R. at 7.) For additional authority regarding "time is of the essence" language, see *Ferrara v. Walters*, 919 So.2d 876 (Miss. 2006); and also *Gunn v. Heggins*, 964 So.2d 586 (Miss. 2007). Both of these cases held, as *Gault* did, that when this term of art is not found in the contract, then time is not of the essence minus a clear indication that the parties intended for time to be of the essence. Therefore, even three years later, as in *Gault*, the contract is still enforceable when all factors are considered.

No clear indication, or any indication at all, was given to communicate that time was of the essence in the subject transaction. In fact, there is evidence that indicates just the opposite. No indication that time was of the essence was communicated with the seller or anybody else associated with the seller. With a wealth of experience in such transactions, Mr. Parsons was not without the knowledge of how to make sure that all of the parties to this transaction were made aware that time was of the essence.

CONCLUSION

The Court correctly held Stone Investment Company in breach of contract for their actions. It was never conveyed to the Estate of Arlan Robinson that time was of the essence and furthermore, actions on behalf of Appellant were the cause for such delays. For the foregoing reasons, it is respectfully requested that the Judgment of the Chancery Court be affirmed in all respects.

CERTIFICATE OF SERVICE

I, John D. Moore, attorney for Appellee, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing *BRIEF OF APPELLEE, WILLIAM HEAD REALTY* to the following at their respective addresses listed below:

Jack Parsons
Tad Parsons
Parsons Law Office
P.O. Box 6
Wiggins, Mississippi 39577
Attorneys for Stone Investment Co., Inc.

Herbert J. Stelly, Sr.
P.O. Box 1204
Gulfport, Mississippi 39502
Attorneys for Estate of Arlan Robinson

THIS, the 29th day of November, 2010.

John D. Moore

Law Offices of John D. Moore, P.A.
John D. Moore, MSB No [redacted]
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Ridgeland, Mississippi 39158-3344
Telephone: 601-853-9131
Fax: 601-853-9139

CERTIFICATE OF FILING

I, John D. Moore, attorney for the Appellee, William Head Realty, do hereby certify that I have this date submitted and filed by depositing an original and three copies of *BRIEFOF APELLEE, WILLIAM HEAD REALTY* via hand delivery to the Clerk of Appellate Courts.

THIS, the 19th day of November, 2010.

John D. Moore

Addendum

Miss. Code Ann. § 91-7-205 (1972)

> Whenever an executor or administrator sells land pursuant to a decree of the court or chancellor in vacation, said executor or administrator shall execute bond with sufficient sureties in an amount equal to the proceeds of the sale of the land. Said bond shall be executed any time before confirmation of sale, either by the court or chancellor in vacation, and may be approved by the court, chancellor in vacation, or the clerk of the chancery court. Such bond shall be payable to the state and shall be conditioned for the faithful application of the proceeds of the sale. When, however, decree ordering the sale of land shall fix an amount or estimated amount to be paid in cash before confirmation, the executor or administrator shall, before sale, execute bond with sufficient sureties to cover such amount or estimated amount to be paid in cash, conditioned for the faithful application of the same which bond may be approved by the court, the chancellor in vacation, or the clerk of the chancery court.
>
> After the expiration of the time in which all claims against the estate of deceased persons must be registered, probated and allowed as provided in section 91-7-151, Mississippi Code of 1972, the chancellor may waive all or any part of the bond when all the beneficiaries to the proceeds of the sale petition the court to authorize the sale and waive the necessity of a bond.

Miss. Code Ann. § 91-7-207 (1972)

> If an executor or administrator who has been ordered to sell land of a decedent fail to give the bond required, the court may, after five days' notice to the executor or administrator, direct a master or special commissioner to make the sale, who shall give bond with sureties, as the executor or administrator was required to do, and make sale and report it and, after a confirmation of the sale, convey the land as the executor or administrator might have done under the decree. The master or commissioner shall be allowed by the court such commissions as would accrue from the sale to the executor or administrator, or such compensation as the court may order.

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