

IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-TS-01971

STONE INVESTMENT COMPANY, INC.

APPELLANT

v.

**ESTATE OF ARLAN ROBINSON AND
WILLIAM HEAD D/B/A WILLIAM HEAD REATLY**

APPELLEE

**ON APPEAL FROM THE CHANCERY COURT
OF STONE COUNTY, MISSISSIPPI**

BRIEF OF THE APPELLANT

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, Esquire and Jack Parsons, Esquire
Attorneys for Appellant


The Estate of Arlan Robinson
Appellee

Herb Stelly, Esquire
Attorneys for Appellee

William Head d/b/a William Head Realty
Appellee

John Moore, Esquire
Attorneys for Appellee

Honorable James H. C. Thomas, Chancellor
Presiding trial court Judge



TADD PARSONS, Attorney of Record for
Appellant

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APPELLANT'S BRIEF

ISSUES TO BE CONSIDERED BY THE COURT

1. THE CHANCERY COURT ERRED IN FAILING TO RETURN THE EARNEST MONEY TENDERED BY STONE INVESTMENT COMPANY, INC.
2. THE CHANCERY COURT ERRED IN FINDING THAT STONE INVESTMENT COMPANY, INC. BREACHED THE CONTRACT WHEN THE ESTATE OF ARLAN ROBINSON FAILED TO PROVIDE GOOD AND MERCHANTABLE TITLE TO THE SUBJECT PROPERTY.

STATEMENT OF FACTS

Arlan Robinson died *testate* on June 6, 2005. His Last Will and Testament was filed for probate in the Chancery Court of Stone County, Mississippi in Cause umber 2005-0205-3. His will provided the following:

V.

I do hereby direct my Executrix, at the discretion of m attorney, Honorable Herbert J. Stelly, Sr., to select an auctioneer who, in the opinion and discretion of the Honorable Herbert J. Stelly, Sr., shall be best suited for the purposes of selling the 20 somewhat acres of property situated at the corner of Highway 26 and 49 in Stone County, Mississippi next to McDonald's I desire that said property be auctioned off and that every effort be made to obtain the highest and best dollar for the said property. Honorable Herbert J. Stelly, Sr. is given discretion and is to guide and advise my Executrix with regard to selection of such auctioneer and the conditions and provisions in which such auction is to be held as well as the fee to be realized for such auctioneer for such services. Out of the proceeds of such auction I direct that any sums realized from the sale of such property be used to retire any obligations which may exist against the Denson property. If any proceeds remain after retiring the obligation against the Denson property, then such funds shall be applied toward payment of the mortgage on the home situation at 35 Walton Road with any monies left owed, if any, to be placed in an interest bearing account for the benefit of my son, Dalton: to be received by him at 21 years of age.

The Will was admitted to probate on October 5, 2005. Letters Testamentary were issued on December 9, 2006 and the Oath of the Executrix was file on April 8, 2008. The Chancery Court granted an Order Authorizing Sale of Real Property on May 24, 2006.

On March 14, 2006, an auction was held related to the subject property. Stone Investment Company, Inc., and Martha Robinson executed a purchase contract contemporaneous with an auction on the subject property. The contract price was \$312,400.00. Earnest money in the amount of \$31,240.00 was deposited with William Head Realty. Said earnest money was to be forfeited if the purchaser failed to close under the terms listed in the contract. The contract

had a specified closing date of April 13, 2006. Further the contract provided in Paragraph 6 the following:

WARRANTY DEED AAND CERTIFICATE OF TITLE shall promptly be furnished by the party responsible for the cost and shall be prepared by a mutually agreed upon attorney, a certificate of title insurance may be obtained from a title insurance company qualified to do and doing business in the State of Mississippi. Seller shall cure any title defects to the satisfaction of the title insurance company so that the purchaser may obtain an owner's title insurance policy subject to only standard exceptions and other matters specifically stated in this contract.

The closing on the property never took place. On April 11, 2006 the attorney for Stone Investment, Inc. sent a letter advising that it was prepared to close upon presentation of a deed conveying good and merchantable title on or before the expiration of the contract. The Estate of Arlan Robinson failed to tender a deed or come to a closing prior to the stated date of expiration on the contract.

In July of 2006 the Estate of Arlan Robinson presented a deed to Stone Investment Company, Inc., however this deed was subject to all applicable restrictions, declarations, assessments, easements, or encumbrances, on file in the Office of the Chancery Clerk of Stone County, Mississippi. Stone Investment Company, Inc. rejected the deed as tendered and there never was consummation of the sale of the property.

ARGUMENT

Standard for Review

It is well established law in the State of Mississippi that the Mississippi Supreme Court will only review a Chancellor's findings through the manifest error/substantial evidence rule. In Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005), this Court found, "This Court's 'review of a chancellor's findings of fact is the manifest error/substantial evidence rule.' This Court has held that a chancellor's finding of fact may only be disturbed if the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or applied the wrong legal standard." Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005) (citing Med. Devices, Inc., 624 So. 2d at 989 and Denson v. George, 642 So. 2d 909, 913 (Miss. 1994)).

"We will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous. In other words, where the chancellor's factual findings are supported by trustworthy evidence, they are insulated from reversal on appellate review." In re Estate of Davis, 832 So.2d 534, 536 (Miss.App 2001). (citing Bowers Window and Door Co., Inc. v. Dearman, 549 So.2d 1309, 1312-13 (Miss.1989); Jones v. Jones, 532 So.2d 574, 581 (Miss.1988)). Respectfully, the Chancellor in this case erred when he rendered a judgment in favor of the Appellee and against the Appellants.

1. THE CHANCERY COURT ERRED IN FAILING TO RETURN THE EARNEST MONEY TENDERED BY STONE INVESTMENT COMPANY, INC.

The Estate of Arlan Robinson was not in the position to convey good and merchantable title to said property in question during the term of the contract. The Executrix for Estate of Arlan Robinson had not properly qualified at this date of the contract and was without authority to execute any documents and more particularly a deed to the property in question or even perform

the duties of an Executrix.

The appointed Executrix had wholly failed to comply with the law in the following respects which prevented the Estate from being in a position to carry out the purported contract, to-wit:

There was no Oath filed by the appointed Executrix as required by the law and in violation of Miss Code Ann §91-7-41, which is essential for Letters Testamentary to legally issue therefore Letters Testamentary were issued improperly and she was not legally qualified. She was without authority to act as an Executrix. If there is no oath filed by the appointed Executrix then no Letters Testamentary may be issued. The law states an oath be filed prior to issuance of Letters Testamentary or Administration. This is not discretionary. The first sentence of the statute says in part "Every executor or administrator with the will annexed, at or prior to the time of obtaining letters testamentary or of administration, shall take and subscribe the following oath...." (Emphasis added). This being the case she could not have executed a Deed nor acted in any capacity for and on behalf of the estate who owned the property. The devisee individually never at any time, tendered a Deed to the property.

The Executrix did not comply with Miss Code Ann §91-7-197 by failing to serve all of the parties in interest by summons or by publication as provided for in said section to sell, transfer or dispose of real property that was owned by the decedent at the time of his death. The Executrix could not convey good and merchantable title until this is done correctly. The statute says, "When a petition shall be filed to sell or lease land to pay debts or otherwise affecting the real estate of a deceased person, all parties interested shall be cited with summons or publication, which shall specify the time and place of hearing the petition. If the petition be filed by a creditor or by a purchaser to correct a mistake in the description of the land, the executor or

administrator shall be cited.” (Emphasis added). This was not done therefore the purported Executrix could not have conveyed title much less good and merchantable title to said property even had she properly qualified without complying with this section which states “shall” do those things set out in the statute. The Appellant could not secure good and merchantable title to said property and the Seller wholly failed to what is required by state law (personal service or by publication returnable to a specific time and place) which was not done in this case.

The Executrix failed to comply with Miss Code Ann §91-7-199. The necessary recitations to meet requirements of §91-7-199 should have been recited in the Order Authorizing Sale of Real Property which it wholly failed to do. The Executrix failed to comply with the required section of the Mississippi law in several respects, some of which are:

- a. Did not serve summons personally or by publication;
- b. Did not give notice of a hearing at a specific time and place wherein evidence was given to substantiate the allegations of the petition which is essential;
- c. The Court did not find that the personal estate was insufficient to pay the debts of the deceased and real property had to be sold for that purpose;
- d. The Court did not make a judgment stating that a part of the whole of the land would pay the debts or whether it took the entire property to pay the debts.
- e. The Court did not decree what part of the property was to be sold to pay the debts if it did not take the entire parcel.
- f. The Court did not find it was without manifest prejudice to the heirs of the devisees for the whole parcel of property to be sold. (In this instance several parcels separately.)

These are some of the deficiencies just in this statute alone that prevents the sale from being legal and binding and permitting to convey good and merchantable title.

The Executrix failed to comply with Miss Code Ann §91-7-187 when she failed to get the Court to adjudicate the selling of real property in preference to selling personal property to pay debts of the estate. Failing to do so this prevents the Executrix having authority to legally sell the real property. Estate of Manscoe vs. Simmons, 512 So.2d 682 (Miss. 1987).

The Executrix did not post a bond to sell the real property as provided for in Miss Code Ann §91-7-41, Miss. Code 1972 Annotated, which is necessary and essential to convey merchantable title to real property owned by an Estate. In addition to the oath being required and filed, requires a bond be posted to sell the property even with a judgment having all of the necessary findings and this was not done in this instance therefore a good and merchantable title could not be conveyed to Plaintiff as a result of this failure. The Executrix failed to comply with the statutes and case law and as a result did not have authority to sell or transfer title to said property.

The Executrix did not comply with Miss Code Ann §91-7-199 which requires after summons by publication a hearing must be had and the Court hear evidence and be satisfied and enter in the Judgment with findings of facts justifying the sale of real property to pay debts. This was not done in this matter. No facts are recited at the hearing or in a purported Judgment.

The Seller failed to tender good and merchantable title within the time constraints of the contract and further was not properly qualified to sale the property at the execution of the contract and the earnest money should be returned to Stone Investment, Inc.

2. THE CHANCERY COURT ERRED IN FINDING THAT STONE INVESTMENT COMPANY, INC. BREACHED THE CONTRACT WHEN THE ESTATE OF ARALN ROBINSON FAILED TO PROVIDE GOOD AND MERCHANTABLE TITLE TO THE SUBJECT PROPERTY.

Further the Estate of Arlan Robinson completely failed to tender good and merchantable title

and a proper deed conveying said property to the prospective purchaser, Stone Investment Company, Inc., within the prescribed term set out in the contract. The contract expired on its face on April 13, 2006 and no deed had been tendered on or before that date. Stone Investment Company, Inc. elected to purchase said property well within the time set out in the contract. The Executrix wholly failed to tender or deliver a good and valid deed within contract period. Even at this date of the purported tender of the deed all of the above mentioned deficiencies existed and the Executrix could not execute a deed conveying merchantable title to said property.

The deed tendered was improper in that it provided among other things the sale of property was subject to the encumbrances on said property. This being the case, title was not good and merchantable and the purchaser could not and would not accept the deed as tendered because they would not receive a good and merchantable title without any indebtedness thereon. The contract called for all debt to be paid. However, the sale could not legally be consummated within the term of the contract even had the Estate of Arlan Robinson tendered a proper Deed

Title to real property vests immediately to the devisee at the death of the decedent and if the decedent had no will it passes to the heirs at law on death immediately. Gunn v. Heggins, 964 So.2d 586 (MissApp 2007) states “The chancery court reasoned that the property vested in Heggins upon Henry Heggins’s death and she acted “within her capacity as sole devisee in entering the contract to sell the property.” While a deceased’s real property vests immediately at death in his heirs or devisees, “whether by intestate death and succession or by last will and testament”. In re Estate of McRight, 766 So.2d 48, 49 (Miss App 2000) (citing Beach v. State, 178 Miss. 336, 173 So. 429, 430, (1937)), we do not agree that the heirs or devisees have merchantable title. Our courts have long held that a will not probated is ineffectual as an instrument of title. Virginia Trust Co. vs. Buford, 86 So. 356, 357 (Miss 1920). Good title is

not merely a title valid in fact, but a marketable title, which may be sold or mortgaged. Union & Planters' Bank & Trust Co. v. Corley, 132 So. 78, 79 (Miss 1931). Although it may have been a simple judicial procedure to probate and cure title to the property, the fact remains that Heggins never did so during the contractual period. This failure constituted a defect in the title. She never obtained merchantable title as of March 23, 2005, and, like Gunn, never tendered performance under the agreement. In addition, the chancellor noted that all of Heggins' children agreed she should receive the entire estate and there was no indication that anyone would contest the will. While we subscribe to Gunn's assertion that Heggins did not possess merchantable title during the contract period, we cannot accept her assertion that specific performance of the contract is warranted. We find there is no indication that a valid contract existed between the parties after the final closing date of March 23, 2005, and a more detailed analysis of this finding immediately follows. Additionally, Gunn has never tendered performance under the contract, making specific performance an inappropriate remedy. "One party cannot maintain an action [for specific performance] against the other without showing performance or a tender of performance on his part." Marshall County v. Callahan, 130 Miss. 271, 286, 94 So. 5, 6 (1922). We find that the chancellor did not err in denying specific performance of the contract at issue." Paragraph 18 stated "Earnest money is considered liquidated damages, and "the only grounds for such recovery are the unwillingness or inability of a vendor to convey according to contract, or a mutual abandonment of the contract" Vanlandingham v. Jenkins, 207 Miss. 882, 891, 43 So.2d 578, 581 (1949) (quoting Sims v. Hutchins, 16 Miss. 328 (1847))." and the conclusion states "Neither party to the agreement was ready, willing and able to perform the duties under the contract on either closing date, and the contract terminated as of March 24, 2005. We affirm the chancellor's ruling that time was of the essence in the agreement and that no specific

performance or permanent injunctive relief was warranted. However, on the issue of damages, we reverse and remand the judgment of the chancery court as Heggins was unable to produce clear, merchantable title as of the closing dates and, as such, owes Gunn a refund of the \$10,000.00 in earnest money.”



Even at the date of trial the deficiencies of the title in the subject property owned by the Estate of Arlan Robinson had not been cured. They were curable, but had not been cured. Stone Investment Company was not in breach of contract when some 3 months after the expiration of the contract the Estate of Arlan Robinson failed to tender a deed without exceptions and could not provide good and merchantable title.

CONCLUSION

The Court erred when found that Stone Investment Company, Inc was in breach of contract and the earnest money should be forfeited. Granted the deficiencies of title were curable, however there were not cured, even as of the date of trial. The Estate of Arlan Robinson failed to timely tender performance under the contract prepared by its Agent and the judgement of the lower Court should be overturned and the earnest money be returned to Stone Investment Company, Inc.

STONE INVESTMENT COMPANY, INC.

By: PARSONS LAW OFFICE

By: 
TADD PARSONS
MS Bar 

CERTIFICATE OF SERVICE


I, TADD PARSONS, of counsel for Appellants, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing APPELLANT'S BRIEF to the following at their respective addresses listed below:

John D Moore, Esquire
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Honorable James H. C. Thomas
Chancellor
Post Office Box 807
Hattiesburg, MS 39402

THIS, the 23rd day of September, 2010.


TADD PARSONS

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