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

CASE NO. 2010-CA-01587

MICHAEL D. MAYER — APPELLANT

VERSUS

GLEN ANGUS — APPELLEE

ON APPEAL FROM THE CHANCERY COURT OF THE
SECOND JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI
CAUSE NO. A-2402-05-297(2)

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Local Rule 28(a)(1), 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.

1. Michael D. Mayer, Appellant
2. Nicholas Van Wiser, attorney for Appellant
3. Glen Angus, Appellee
4. James R. Reeves, Jr., attorney for Appellee

Dated: June 3, 2011

Respectfully submitted,

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

The underlying lawsuit centered around a Letter Agreement signed by the Plaintiff/Appellant and Defendant/Appellee. Despite admitting that he negotiated, understood, agreed to, and signed the Letter Agreement, the Appellant filed a complaint essentially asking the Chancery Court to change the Agreement to terms more to his liking. This, even though the Appellant was the one who wholly failed to abide by the terms he negotiated. The evidence showed that there was no legal basis for the Appellant's action, and that the Appellant's position was wholly without merit. The Appellant's claims were thus dismissed in their entirety.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On April 13, 2005, Mayer filed his Complaint against Angus, making a hodgepodge of baseless claims that Angus defrauded him, and that Mayer's participation in the Project was "procured by duress and fraud". (R. 452). Mayer asked the Chancery Court to give Angus' ownership interest to him, and sought specific performance of the Letter Agreement that he admitted he failed to comply with and yet claimed he was coerced into signing. (R. 452). Mayer also made claims for unjust enrichment, intentional interference with contract, breach of contract, and breach of fiduciary duty from an alleged "de facto partnership and/or joint venture." (R. 452).

Angus filed his Motion for Summary Judgment on October 8, 2008. (R. 453). Mayer filed his Response to Angus' Motion for Summary Judgment on January 26, 2009. (R. 453). The Motion for Summary Judgment was set for hearing on July 8, 2009. (R. 453).

At this time, the parties agreed to have the Chancery Court adjudicate the matter solely based on the pleadings and other documents of record. (R. 453). On December 1, 2009, the Chancery Court of the Second Judicial District of Harrison County, Mississippi entered its order granting summary judgment in favor of Angus on **all claims** made by Mayer. (R. 455-463).

Following the Chancery Court's order, **Mayer ignored deadline after deadline**. Specifically, any Notice of Appeal to the Chancery Court's order would have been due on or before December 30, 2009. Mayer missed this deadline. Then, on January 8, 2010, Mayer filed a motion asking the Chancery Court to allow him more time to file a Notice of Appeal. The Chancery Court never decided this motion.

Thereafter, Mayer filed an appeal, but failed to timely perfect it. On January 26, 2010, this Court notified Mayer that he had fourteen (14) days to correct the deficiencies of his tardy appeal. Mayer failed to meet this deadline as well. Then, on February 11, 2010, pursuant to Mayer's motion, this Court gave Mayer until March 1, 2010 to correct his appeal. On March 4, 2010, after Mayer had yet again missed a deadline, this Court dismissed Mayer's appeal. On March 6, 2010, two (2) days after his appeal was dismissed, Mayer filed a motion to reinstate the appeal.

Mayer's Motion was set for hearing on August 2, 2010, and counsel for both parties attended. Despite his blatant refusal to comply with court-imposed deadlines, at the hearing Mayer asserted for the first time that the Chancery Court's December 1, 2009 grant of summary judgment was not a final, appealable judgment pursuant to Miss. Rule of Civ. Proc., Rule 54.

The Chancery Court entered its Order on September 17, 2010. The Order denied Mayer's Motion as being moot because of this Court's dismissal, and also certified the Chancery Court's December 1, 2009 Judgment as being a final judgment satisfying the Rule 54(b) requirement. On September 24, 2010, Mayer filed another Notice of Appeal as to the final judgment entered by the Chancery Court. In his Appeal, Mayer alleges that the Chancery Court erred in granting summary judgment in favor of Angus.

C. STATEMENT OF FACTS

Plaintiff/Appellant Michael D. Mayer (hereinafter "Mayer") is an experienced businessman. (R. 451). Mayer operates under various limited liability companies, including Site Ventures, LLC; Associated Ventures International; Phoenix Highlands Associates, LLC; Highland Hotel Associates, LLC; and Napa Resorts or Napa Hotel Associates. (R. 814-815). Mayer states his occupation is to "raise capital" to "invest in various projects around the country." (R. 819). Mayer describes himself as a "classic sponsor" who identifies a project and then helps raise capital to fund the project and get it "kicked off." (R. 819). Mayer defines his job description of a "sponsor" as "where you don't put any money into a deal" but instead you "have raised the capital ... then the money comes in, and the money gets a preference, and the sponsors participate in the excess over the preference." (R. 822). For being the "sponsor" of the project and "getting the capital together," Mayer attempts to take a percentage of the operating profits of the hotel. (R. 823).

One of Mayer's projects was to procure a contract to purchase the President Hotel in Biloxi (hereinafter "the Project"). (R. 451). Mayer and Defendant/Appellee Glen Angus

(hereinafter "Angus") decided to work together to develop the Project. (R. 451). Mayer has conceded that his role in the Project was to locate an investor:

> Q. So your duties were to locate an investor?
>
> A. Yes. ... It's not a duty. I'm a sponsor. I'm putting together the deal.

(R. 833-834).

While Mayer's responsibility for the Project was to locate an investor and "put together" the deal, he spent most of his time outside of Mississippi. Angus handled the day-to-day responsibilities of the Project in Mississippi. Angus testified that he was working on the Project on a daily basis, and got "hundreds and hundreds of e-mails" from Mayer about it. (R. 621-622). Angus "worked it like it was [his] own project" and did "ninety-nine percent of the work." (R. 632). To the contrary, Mayer was in California "dealing with investors." (R. 632).

In order to secure the purchase of the President Hotel (hereinafter "the Hotel" or "the property" or "the Ocean Club"), Angus and Mayer had to raise a deposit of $100,000. Angus secured payment of the $100,000 from two investors, Mr. Milton and Mr. Stacker.[1] (R. 685). Nevertheless, because of Mayer's unprofessional conduct, these investors refused to invest the money if Mayer was to be involved in the Project. (R. 688). Mayer readily conceded that these two investors refused to invest because of conflicts with him. (R. 860).

Mayer then located two other investors, Mr. Leher and Mr. Lipton, and they provided $100,000 to secure the Project. (R. 689). To provide the deposit, Leher and Lipton

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[1] Sometimes referred to as "Stackler."

required: (1) that they get their money back at the close of escrow plus a 10% yield, and (2) that they remain a partner in the Project for a percentage. (R. 836). Mayer alleged that he paid back the $100,000 personally. (R. 836-837). It was Angus' understanding, however, that Lehrer and Lipton would be repaid through the closing proceeds, and that 50% of the repayment came from his portion thereof. (R. 694).

After securing the property, Angus and Mayer prepared an offering memorandum that described the Project and sent it out to potential investors. (R. 841). Nevertheless, shortly before closing on the property, Mayer and Angus had still not raised the capital necessary to complete the purchase. Another investor, Mr. Drake Leddy, agreed to provide the funds necessary to close the deal. A deal was reached with Mr. Leddy, in which Mr. Leddy would share in the ownership of the property in exchange for his investment of capital. (R. 451-452). **Said deal was memorialized in the Operating Agreement**. (R. 451-452). Mayer testified:

> Q. And so, basically, Mr. Drake Leddy came up with the additional money needed, right?
>
> A. Correct.
>
> Q. And ya'll went ahead and entered into an operating agreement for the Ocean Club, right?
>
> A. Correct.
>
> Q. And it sets forth in the exhibit to the operating agreement what shares were going to be between Mr. Leddy, you, and Mr. Angus, right?
>
> A. Correct.
>
> Q. And you signed that, right?

A. Correct.

(R. 849).

On March 16, 2004, the parties also entered into a separate Letter Agreement which was prepared and signed by all parties. (R. 451-452). **Mayer readily agreed that he also read the Letter Agreement, knew its contents, and signed it**:

Q. You signed it as well, right?

A. Correct.

Q. And it states in basic terms - and we'll go through it specifically in a minute - but in essentially basic terms, it has an option where if an additional investor is not found in a certain period of time, then you had the option to purchase Mr. Angus's interest for a specified price, right?

A. Correct.

Q. Okay. And so you signed that as well, right?

A. Correct.

Q. Who was present when that was signed and prepared?

A. Glen Angus, myself, Drake Leddy, Pat Sheehan.

(R. 850).

The Letter Agreement stated, in pertinent part: (1) that it was a "binding agreement" on Mayer and Angus, as well as Mr. Leddy and LMZ Ventures[2]; (2) that Mr. Leddy contributed $750,000 to Ocean Club and that Angus and Mayer would "attempt to replace such funds"; (3) that if $750,000 was raised to repay LMZ, the ownership of Ocean Beach

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[2] LMZ and Mr. Leddy are one and the same for purposes of this Agreement and this Motion.

would change to LMZ 50%, Mayer 33.3%, and Angus, 16.7%; (4) that if, however, $750,000 was not raised to repay LMZ, **there would be no change in the ownership and LIMZ would own 67%, Mayer would own 16.5%, and Angus would own 16.5%**; and (5) in addition, Mayer had the right, but not the obligation, to purchase all of Angus' interest in Ocean Beach for $170,000 **on specific terms and deadlines**. (R. 451-452, 458).

It was undisputed that neither Angus nor Mayer raised $750,000 to repay Mr. Leddy. (R. 870). Under the **clear and unambiguous** terms of the Letter Agreement, therefore, Angus and Mayer each own 16.5% of Ocean Beach.

As stated, Mayer was also given the option of purchasing Angus' 16.5% share of Ocean Beach for $170,000.00. (R. 458). If Mayer elected to make this purchase, however, he was required to do so within 60 days of the date of the Letter Agreement. (R. 458). Then, **$50,000 was due within 90 days**, and the balance of **$120,000 was due on the anniversary** of the Letter Agreement. (R. 458).

On May 7, 2004, Mayer sent a letter to Angus advising Angus that he exercised his option to purchase Angus' share of Ocean Beach. (R. 458). Mayer admitted, however, that he did not pay $50,000 to Angus within the time frame outlined in the Letter Agreement. (R. 875). Mayer testified that he refused to pay $50,000 as required by the Letter Agreement because he felt Angus owed him this money as half of the repayment to the investors who originally paid the $100,000 to secure the property. (R. 458).

Not only did Mayer not pay the first installment of $50,000, but **he also never tendered the remaining balance of $120,000**. (R. 458). Mayer testified that he issued checks for the remaining balance of $120,000 "to Pat Sheehan in escrow or somebody.

I don't recall." (R. 458, 875). Mayer later testified, however, that **he was not sure whether he actually brought a check for $120,000 "or just said I would. I don't recall which"**:

> Q. So you don't know if you actually tendered a $120,000 check to anybody?
>
> A. I don't recall whether I did or didn't.
>
> Q. You may have just simply advised Mr. Angus that you were prepared to do that?
>
> A. Yes.

(R. 884).

It is undisputed, therefore, that **Mayer did not comply with the plain language of the Letter Agreement that he admitted he read, understood and agreed to**. Specifically, he did not timely pay $50,000 as provided in the Letter Agreement, and he did not timely pay the balance of $120,000 as provided in the Letter Agreement. (R. 459).

SUMMARY OF THE ARGUMENT

Despite his blatant lack of respect for this and the lower court deadlines and procedure, Mayer now requests this Court overturn the Chancery Court's summary judgment ruling against him. Nevertheless, as already shown, **there are no genuine issues of material fact to support any of Mayer's claims**. Mayer's request that the Court accept a myriad of "factual inferences" in order to find that genuine issues of fact exist is not well-taken. Summary judgment was proper, and this Court should affirm the Chancery Court's ruling.

ARGUMENT

A. STANDARD OF REVIEW

The appellate standard for reviewing a grant or denial of summary judgment is the same as that of the trial court under Rule 56 of the Mississippi Rules of Civil Procedure. *Williamson ex rel. Williamson v. Keith*, 786 So.2d 390, 393 (Miss. 2001)(citations omitted). The Court applies a *de novo* standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it. *Id.* See also *Roffman v. Wilson*, 914 So.2d 279, 281 (Miss. Ct. App. 2005)

Rule 56(c) of the Mississippi Rules of Civil Procedure provides that a party is entitled to summary judgment as follows:

> If the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Miss. Rule Civ. P. 56(c). In other words, a party is entitled to summary judgment when there is "no genuine issue as to any material fact," and the undisputed facts warrant judgment for the moving party as a matter of law. *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Franklin County Mem. Hosp. v. Miss. Farm Bureau Mut. Ins. Co.*, 975 So.2d 872, 874 (Miss. 2008).

Once the moving party meets its burden of demonstrating the absence of a genuine issue of material fact as to the essential elements of the plaintiff's claims, the burden shifts to the non-movant to present sufficient evidence to create a factual dispute on material issues. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). A factual dispute between the parties will not defeat a motion for summary judgment unless it is both genuine and

material. See *Anderson*, 477 U.S. at 247-48. [I]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.*

The non-moving party must establish sufficient facts beyond the pleadings to show that summary judgment is inappropriate. *Exxon Corp. v. Burglin*, 4 F.3d 1294, 1297 (5th Cir. 1993); *Green v. Allendale Planting Co.*, 954 So.2d 1032, 1037 (Miss. 2007). Not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment ." *Anderson,* 477 U.S. at 248.

The non-moving party must oppose the summary judgment motion either by referring to evidentiary material already in the record, or by submitting additional evidentiary documents which set out specific facts indicating the existence of a genuine issue for trial. Miss. Rule Civ. Proc. 56(e); *Matsushita Electrical Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Assertions unsupported by facts are insufficient to oppose a summary judgment motion. *Williams v. Weber Management Services*, 839 F.2d 1039 (5th Cir. 1987). The Court is not required to accept a nonmovant's conclusory allegations, speculation, and unsubstantiated assertions which are either entirely unsupported, or supported by a mere scintilla of evidence. See *Reaves Brokerage Co., Inc. v. Sunbelt Fruit & Vegetable Co., Inc.*, 335 F.3d 410, 413 (5th Cir. 2003). The "opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If the opponent fails in his duty, after the court has viewed the evidence

in the light most favorable to the non-movant, summary judgment is implicated. Miss. Rule Civ. Proc. 56(e); *Exxon*, 4 F.3d at 1297.

The Chancery Court of Harrison County, Mississippi was correct in its finding that Mayer's claims are without merit and are unsupported by law or evidence. There are no genuine issues of material facts, and therefore the Chancery Court's summary judgment ruling should be affirmed on all claims.

B. NO GENUINE ISSUES OF MATERIAL FACT EXIST TO SUPPORT ALL OF MAYER'S CLAIMS AGAINST ANGUS

1. There are No Genuine Issues of Material Fact to Support Mayer's Claim for Fraud.

First, Mayer claimed that Angus made representations constituting fraud. Specifically, Mayer claimed that Angus defrauded him regarding the existence of an investor and the ability to obtain financing for the Project, and that he fraudulently concealed the "non-existence" of an investor. (R. 455). Mayer also referred to other "additional" projects, and alleged that Angus misrepresented: (1) that he would include Mayer, (2) the terms and conditions of these "additional" projects, and (3) fraudulently concealed Mayer's exclusion from the "Gulf Towers" acquisition. (R. 455). Mayer testified that the "sum and substance" of his lawsuit is that Angus was supposed to provide investors, he did not provide investors, and therefore he is not entitled to any money from the Project. (R. 847-848).

Mayer failed to present triable issues of fact regarding these claims, and the Chancery Court ruled that Angus was entitled to summary judgment thereon. (R. 455).

In the present appeal, Mayer contends that he submitted sufficient factual evidence to support his claim of fraud.

Fraud in the inducement arises when a party to a contract makes a fraudulent misrepresentation, i.e., by asserting information he knows to be untrue, for the purpose of inducing the innocent party to enter into a contract. *Lacy v. Morrison*, 906 So.2d 126, 129 (Miss. Ct. App. 2004). A proper claim of fraud in the inducement requires proof, **by clear and convincing evidence**, of the following elements: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person and in the matter reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance upon its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. *Great Southern National Bank, v. McCullough Environ. Services, Inc.*, 595 So.2d 1282, 1289 (Miss. 1992).

Not every spoken untruth is actionable as a fraud. *Lacy*, 906 So.2d at 130. **It is only if the untruth was designed to, and did in fact, induce the hearer to change his position in justifiable reliance on the untruth that it becomes potentially actionable**. *Id.* Further, an affirmative intent to deceive must be shown. *Russell v. Southern National Foods, Inc.*, 754 So.2d 1246, 1256 (Miss. 2000). Finally, even if an investment is induced by fraud which is relied upon by the plaintiff, recovery is not permitted if the proximate cause of the monetary loss is other than the fraud alleged. *Id.*

Other than Mayer's unsupported allegations, there is no evidence (much less clear and convincing evidence) that Angus misrepresented anything to Mayer. Angus testified that he spoke with numerous investors about investing in the Project. (R. 637-639). Two

of Angus's investors, Milton and Stacker, wanted to be involved in the Project but wanted Mayer out because "[t]hey wouldn't do business with him, especially in a management control position." (R. 640). Another of Angus' contacts, David Silver of Silver Equity, was very interested in the Project but declined to go forward because it was too fast. (R. 640-641). In fact, Angus testified that Mayer had "burned off a lot of people by overnegotiating and we burned off people because we were looking for too much from them." (R. 642).

There simply is no **clear and convincing** evidence that Angus made any known false representations to Mayer, or that Mayer acted out of reliance on any alleged false representations. To the contrary, the evidence establishes that both Angus and Mayer were very experienced businessmen and that they had a short time to raise a large amount of capital to fund the Project. At the time Mayer executed the Letter Agreement, he was fully aware that Angus had not secured an investor and he was fully aware that Mr. Leddy was going to be the sole investor. (R. 455). Mayer agreed to the terms of the Letter Agreement anyhow. (R. 455).

Mayer was not deceived in any way. Further, any alleged misrepresentation by Angus regarding securing an investor was hardly the proximate cause of damages to Mayer. Summary judgement on Mayer's claim for fraud should be affirmed.

2. There are no Genuine Issues of Material Fact to Support Mayer's Claim that the Operating Agreement should b Reformed because of Fraud and/or Duress.

Second, Mayer alleged that the Chancery Court should have reformed the Operating Agreement (and the Letter Agreement) to reallocate all ownership interest of

Ocean Beach from Angus to Mayer, because Mayer's participation in the agreements was procured by duress and fraud. (R. 456).

Mayer failed to present triable issues of fact regarding these claims, and the Chancery Court ruled that Angus was entitled to summary judgment thereon. (R. 457). In the present appeal, Mayer contends that genuine issues of material fact are present to support his claim that the Operating Agreement should be invalidated and/or reformed as to Angus' interest, due to the Agreement being procured out of fraud and economic duress.

As demonstrated previously, there is a complete lack of evidence to establish (by clear and convincing proof) that Angus committed any fraud. Further, Mayer's claim that he agreed to the terms of the agreements only because he was under "duress" is completely without merit.

Under Mississippi law, procedural unconscionability is proved by showing a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legal language, disparity in sophistication or bargaining power, and/or a lack of opportunity to study the contract and inquire about its terms. *Washington Mutual Finance Group, LLC*, 364 F.3d 260, 264 (5th Cir. 2004); see also *Community Care Center of Vicksburg, LLC v. Mason*, 966 So.2d 220, 229 (Miss. 2007). Mississippi law imposes a duty to read the terms of a contract, such that a party to a contract may not later complain that he did not have knowledge of the terms and conditions of the agreement he signed. *Mississippi Credit Ctr., Inc. v. Horton*, 926 So.2d 167, 177 (Miss. 2006).

To invalidate a contract on terms of economic duress, Mayer must establish: (1) that the dominant party threatened to do something which he had no legal right to do, and (2) that the wrongful threat overrode the volition of the victim, and caused him to enter into an

agreement against his free will. *Bailey v. Kemp*, 955 So.2d 777, 783 (Miss. 2007). It is well established that **economic duress cannot be predicated upon a demand which a party has a legal right to make**. *In re Estate of Davis*, 832 So.2d 534, 538 (Miss. Ct. App. 2001). "It is never duress to threaten to do that which a party has a legal right to do." *McGehee v. McGehee*, 85 So.2d 799, 804 (Miss. 1956). As the Mississippi Supreme Court has stated on several occasions:

> It is the well-established general rule that it is not duress to institute or threaten to institute civil suits, or take proceedings in court, or for any person to declare that he intends to use the courts wherein to insist upon what he believes to be his legal rights. It is never duress to threaten to do that which a party has a legal right to do, and the fact that a threat was made of a resort to legal proceedings to collect a claim which was at least valid in part constitutes neither duress nor fraud such as will avoid liability on a compromise agreement.

Patterson v. Merchants Truck Line, Inc., 448 So.2d 288, 291 (Miss. 1984) (internal quotations and citations omitted); see also *Attorney M v. Mississippi Bar*, 621 So.2d 220 (Miss. 1992) (it is never duress to threaten to do that which party has legal right to do; a threat to resort to legal proceedings constitutes neither duress nor fraud). Further, even if "it is subsequently determined that there is no legal right to enforce the claim," it is not duress "where the threatened action is made in good faith, that is, in the honest belief that a good cause of action exists, and does not involve some actual or threatened abuse of process." *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 876 (5th Cir. 1984) (internal citations omitted).

Despite Mayer's claim otherwise, **Mayer already conceded that he was not under "duress" when he signed the Operating Agreement**. Mayer testified:

Q. But you don't contend you were under duress when you signed the operating agreement, do you?

A. No.

(R. 911-912). Only later did Mayer change his mind and say that he signed it under duress.

Mayer's sole basis for his claim of "duress" is that Angus allegedly "threatened to file a lawsuit if he wasn't involved and wasn't given his share." (R. 457; 850). The extent of the this alleged "duress" was described by Mayer as follows:

Q. And my understanding is you allege from the complaint that in terms of the letter, that you - that Mr. Angus threatened to file a lawsuit if he wasn't involved and given his share. Is that fair? Is that what you're saying?

A. That's correct.

Q. And that because he threatened to file a lawsuit, you went ahead and signed the letter agreement.

A. Correct.

Q. Did Mr. Angus threaten anything else?

A. Just that he was going to raise a stink and file a lis pendens on the property and generally make it difficult to do business.

Q. Just that he was going to assert his legal right as he saw them, right?

A. As he saw them.

Q. Right. Okay. He didn't threaten to take you outside and beat you up or anything like that, right?

A. No.

(R. 850-851).

Mayer further described Angus' "duress", stating:

> ... Drake said that Glen was threatening to file lis pendens if I didn't come in and get down there and straighten it out. And so otherwise Drake Leddy was going to walk on the deal and I'd lose a couple hundred grand, so I had no choice.

(R. 862). In sum, Mayer has conceded that the alleged "duress" was based on a statement allegedly made by Angus **to exercise his legal right to file a lawsuit**. (R. 457).

The law is clear that **these allegations are not a valid basis for duress**. Further, the evidence establishes that Mayer and Angus amicably worked out an agreement once Mr. Leddy became the sole investor. (R. 457). Mayer and Angus had gone to breakfast and "worked on the terms" of the Letter Agreement. (R. 457). They then went back to Mr. Sheehan's office "to memorialize that." (R. 457; 852). Mayer, Angus and Mr. Leddy were in Mr. Sheehan's office from approximately 6:00 a.m. until noon. (R. 851).

Mayer's claim of duress fails as a matter of law. Mayer has repeatedly admitted that he **read, understood, signed and agreed to the terms** of both agreements, and that he actually negotiated them and participated in establishing their terms. Angus was not a "dominant party" thereto; Mayer and Angus were both experienced businessmen. (R. 457). Further, Mayer's own testimony regarding the alleged "duress" is fatal to his position. The alleged "duress" was nothing other than Angus voicing his good-faith intent to pursue a legal remedy. Summary judgment was appropriate, and should be affirmed.

3. There are no Genuine Issues of Material Fact to Support Mayer's Claim for Specific Performance.

Third, Mayer alleged that the Chancery Court should have ordered and directed Angus to convey his interest in Ocean Beach to Mayer per the terms of the Letter

Agreement. Mayer alleged that he properly exercised his option to buy Angus' share, and that Angus committed anticipatory repudiation of such agreement. (R. 458).

Mayer failed to present triable issues of fact regarding these claims, and the Chancery Court ruled that Angus was entitled to summary judgment thereon. (R. 459). In the present appeal, Mayer contends that genuine issues of fact exist to support his claim that Angus be ordered to specifically perform. Nevertheless, the undisputed evidence clearly established that Mayer did not exercise his rights under the Letter Agreement, and therefore Angus is not required to perform.

"**One party cannot maintain an action for specific performance against the other without showing performance or a tender of performance on his part.**" *Point South Land Trust v. Gutierrez*, 997 So.2d 967, 979 (Miss. Ct. App. 2008) (internal quotations and citations omitted) (emphasis added). Further, as Mayer pointed out in his own brief, it is well-settled that "[b]efore a court can order specific performance, the court must be able to look at the instrument and determine what performance is required." *Duke v. Whatley*, 580 So.2d 1267, 1274 (Miss. 1991)(citing *Crocker v. Farmers & Merchants Bank*, 293 So.2d 438, 442 (Miss.1974)). For specific performance to be ordered, "the contract must be specific and distinct in its terms, plain and definite in its meaning, and must show with certainty that the minds of the parties had met and mutually agreed as to all details upon the offer made upon the one hand and accepted upon the other." *Id.* (citing *Welsh v. Williams*, 37 So. 561, 561 (1904)).

This Court can easily look at the parties' written agreements to determine that Mayer did not satisfy the required conditions which would warrant specific performance. It is

undisputed that Mayer did not make the initial payment of $50,000 to Angus. (R. 459). It is also undisputed that Mayer never made the final payment of $120,000 to Angus. (R. 459). The terms of the Letter Agreement, **which Mayer negotiated, clearly required him to do both of these things in a specified time**. (R. 458). He failed to do either in the specified time frame, and has **not even done so to this day**. As such, summary judgment on this issue was appropriate, and should be affirmed.

4. There are no Genuine Issues of Material Fact to Support Mayer's Claim of Unjust Enrichment.

Fourth, Mayer alleged that Angus was unjustly enriched as he "contributed nothing" to the Project, and it would be unjust for him to retain any interest in Ocean Beach. (R. 459). No genuine issues of material fact showed such unjust enrichment, and the Chancery Court ruled that Angus was entitled to summary judgment thereon. (R. 459). In the present appeal, Mayer contends that sufficient issues of fact exist to support his claim for unjust enrichment.

"Unjust enrichment **only applies to situations where there is no legal contract** and 'the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another.'" *Powell v. Campbell*, 912 So.2d 978, 982 (Miss. 2005) (emphasis added). To collect under an unjust enrichment or quasicontract theory, a plaintiff must show there is no legal contact. *Johnston v. Palmer*, 963 So.2d 586, 596 (Miss. Ct. App. 2007). The obligation is created by law in the absence of any agreement. *1704 21st Avenue, Ltd. v. City of Gulfport*, 988 So.2d 412, 416 (Miss. Ct. App. 2008).

Mayer's claim for unjust enrichment is improper. **Mayer has already conceded that there is an Operating Agreement and a Letter Agreement reflecting the terms of the agreements between the parties**. These written contracts form the basis of the obligations between Mayer and Angus, and thus Mayer cannot claim unjust enrichment. Summary judgment on this claim was appropriate, and should be affirmed.

5. There are no Genuine Issues of Material Fact to Support Mayer's Claim of Intentional Interference with Contract.

Fifth, Mayer alleged that he had a contractual relationship with Drake Leddy and LMZ Ventures, and that Angus intentionally interfered with that contract by threatening baseless litigation upon the Project, knowing that investors would withdraw if litigation was pending, in an attempt to force Mayer to consent to Angus' participation in the Project. (R. 459). Mayer showed no genuine issues of material fact to support such a claim, and the Chancery Court ruled that Angus was entitled to summary judgment thereon. (R. 460). In the present appeal, Mayer contends that genuine issues of fact exist to show such intentional interference.

In order to prevail on a claim for intentional interference with contract, a plaintiff must establish: (1) that the acts were intentional and willful; (2) that they were calculated to cause damage to the plaintiff in his/her lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, **without right** or justifiable cause on the part of the defendant; and (4) that actual damage or loss resulted. *Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 910 So.2d 1093, 1099 (Miss. 2005). To show causation, the plaintiff must prove that the contract would have been performed but

for the alleged interference by the defendant. *Grice v. FedEx Ground Package Systems, Inc.*, 925 So.2d 907, 910 (Miss. Ct. App. 2006). Further, "[t]his tort only arises if there is interference with the contract between [the] plaintiff **and some third party**." *Nichols v. Tri-State Brick and Tile Co., Inc.*, 608 So.2d 324, 328 (Miss. 1992) (emphasis added). **A party to a contract cannot be liable for tortious interference with the same contract.** *Scruggs*, 910 So.2d at 1099, n.3.

Mayer's claim fails as a matter of law. Mayer claimed that Angus tortiously interfered with the very agreements to which Mayer and Angus were both parties. Angus cannot be held liable for tortious interference with a contract to which he was a party. Further, even if this principle did not exist and Angus could be held liable, Mayer's claim was based on nothing more than Angus' alleged threat to pursue his legal rights. Summary judgment on this claim was appropriate, and should be affirmed.

6. There are no Genuine Issues of Material Fact to Support Mayer's Claim for Breach of Contract.

Sixth, Mayer alleged that Angus breached a contract by: (1) failing to honor his agreement to procure one-half of the funds necessary to close on the property; (2) failing to honor his agreement to convey participation interest in various other projects; (3) failing to comply with the terms of the Letter Agreement; and/or (4) failing to procure bank financing for the Project. (R. 460-461). Mayer failed to present genuine issues of material fact to support his claim for breach of contract, and the Chancery Court ruled that Angus was entitled to summary judgment thereon. (R. 461). In the present appeal, Mayer contends that genuine issues of fact exist to support his claim for breach of contract.

One of the fundamental principles of contract law is that parol evidence will not be received to alter the terms of a written agreement that is intended to express the entire agreement of the parties on the subject matter at hand. *Benchmark Health Care Center, Inc. v. Cain*, 912 So.2d 175, 182 (Miss. Ct. App. 2005). **Parole evidence is only appropriate where the terms of the contract in question are ambiguous**. *Heritage Cablevision v. New Albany Elect. Power Syst.*, 646 So.2d 1305, 1313 (Miss. 1994). See also *Benchmark*, 912 So.2d at 182 (parol evidence of the contracting parties' intentions may be admitted only when the terms of the contract are ambiguous). The initial question of whether a contract is ambiguous is a matter of law. *Lamb Const. Co. v. Renova*, 573 So.2d 1378, 1383 (Miss. 1990).

Both the Operating Agreement and the Letter Agreement, which form the basis of all agreements between Mayer and Angus, are clear and unambiguous. (R. 461). First, the Letter Agreement clearly sets forth the shares each party has in the property, as well as the manner in which Mayer could elect to purchase Angus' share therein. (R. 458). Despite the Letter Agreement's unambiguous language, Mayer sought to admit parole evidence to alter the Letter Agreement to include some unmentioned contingency for Angus' involvement. Mayer stated:

> Q. All right. I understand what you're saying, and there was -
>
> A. So it's giving him the right to stay in by performing.
>
> Q. Okay. Now you'll agree with me that the paragraph I just read doesn't anywhere state that Angus - is contingent on Angus raising the money to repay, does it?

A. No, it didn't say that, but that was the purpose of it.

(R. 869). Since the Letter Agreement is clear and unambiguous, however, Mayer cannot testify as to the "purpose" of it, or otherwise seek to alter the terms by parol evidence.

The Operating Agreement is likewise clear and unambiguous. (R. 461). In fact, Mayer conceded that the language of the Operating Agreement contained nothing on alleged conditions for Angus' involvement in the Project, stating:

> Q. If you would then sire, circle or underline with a red pen where the operating agreement ... requires Glen Angus to do anything other than make the initial capital contribution of $4,275 ... Wherever it requires him to do more than that to be entitled to his share, I'd like you to underline it in red for me, and if you can't do that, just tell me and then we can move on.
>
> A. Well, I don't know that yet. I will agree that I can't find it, but I won't say it doesn't exist.

(R. 923-924). Despite this concession, Mayer again tried to introduce parol evidence that the Operating Agreement provided a condition that Angus contribute money and/or find investors. Mayer asserted that Angus was required to pay $50,000 to capitalize the Project even though he agreed that such a condition was **not** in the Operating Agreement:

> Q. Does 6.2 say $50,000 anywhere in the paragraph? Circle it for me if it does.
>
> A. No. I'm just telling you what my answer is. .. **To answer your question, it does not specifically state that he has to put up $50,000.** It is implied. ... That's my interpretation. That's my interpretation.
>
> ***
>
> Q. Does it say anywhere that the member's share be based upon the percentage of investment capital they bring to the table? Does it say that anywhere in 6.2?

A. No, it doesn't.

(R. 925-927).

Mayer cannot be permitted to present parole evidence in an attempt to alter the terms of a clear and unambiguous Letter Agreement and/or Operating Agreement which he negotiated, agreed to, and signed. (R. 461). Because there is no evidence that Angus breached the express terms of either the Operating Agreement and/or the Letter Agreement, summary judgment on this issue was appropriate and should be affirmed.

7. There are no Genuine Issues of Material Fact to Support Mayer's Claim for Breach of Fiduciary Duty of Partner and/or Joint Venture.

Finally, Mayer alleged that he and Angus had a "de facto partnership and/or joint venture", and that Angus breached his alleged fiduciary duty in light of that relationship. Specifically, Mayer alleged that Angus made impermissible contacts with persons on projects in an attempt to circumvent Mayer, and attempted to enter into deals causing a clear conflict of interest in their relationship. (R. 461-462). Once again, there was no support for this claim, and the Chancery Court ruled that Angus was entitled to summary judgment thereon. (R. 463). In the present appeal, Mayer contends that the evidence shows that the parties entered into a joint venture through their dealings on "various projects."

A joint venture is an association of persons to carry out a single business enterprise for profit, and for which purpose the persons combine their property, money, efforts, skill and knowledge. *Roffman v. Wilson*, 914 So.2d 279, 281-82 (Miss. Ct. App. 2005). The

three main questions that are considered in determining whether parties are part of a joint venture are: (1) the intent of the parties, (2) the control question, and (3) profit sharing. *Smith v. Redd*, 593 So.2d 989, 994 (Miss. 1991). As to the first question, actual intent to form a joint venture is essential. *Hults v. Tillman*, 480 So.2d 1134, 1142 (Miss. 1985) (there must be an intent of the parties to be associated together). The ultimate question is whether the parties intended to do the acts that in law constitute a partnership. *Smith*, 593 So.2d at 994 ("It is generally accepted that the existence of a partnership depends on the intent of the purported parties.").

As to the control question, participation in the control of the business is indicative of whether a partnership exists. *Id.* And finally, an agreement (express or implied) regarding the share of profits is essential to a joint venture finding. *Hults*, 480 So.2d at 1142. In fact, profit sharing is specifically mentioned as prima facie evidence of a partnership in Section 79-12-13(4) of the Mississippi Code. See also *Smith*, 593 So.2d at 994 ("One of the main indicators of a partnership is the right of a party to share profits and losses.").

Joint venture must be pled and must be clearly and convincingly proved by either direct or circumstantial evidence. *Crowe v. Beard*, 394 So.2d 899, 902 (Miss. 1981). There is no evidence in the record that Mayer and Angus did anything other than **discuss the possibility** of going into business together. (R. 462). There is no evidence that the parties **intended** there to be a partnership or a joint venture, nor is there evidence that Mayer participated in any of the ventures he claimed to have an interest in, or that there was profit sharing in any of the alleged ventures. (R. 462). Mayer simply alleged that

he was entitled to interest in "other deals" in which Angus was involved. (R. 462; 888). His sole basis for claiming an interest in "other deals" was his allegation that he introduced Angus to two investors, Mr. Stacker and Mr. Milton. (R. 462; 894). When pressed to define "other deals," however, Mayer testified that "[y]ou can ask about the Empire State Building. If Angus did something with that," yes, he was claiming an interest. (R. 891). When asked about specific projects to which he felt he was entitled to an interest, Mayer pointed only to "the one with Milton and Stacker, I believe I have some remuneration coming of some sort." (R. 889).

Further, when asked what kind of agreement he and Angus had regarding the "one with Milton and Stacker," Mayer conceded that there was no agreement:

> Q. ... Did y'all have an agreement that you would have an interest in these other deals that you're claiming?
>
> A. Nothing written.
>
> Q. All right. Well, did you have any oral deals as to what was - what you -
>
> A. Well, he kept bringing me deals and saying if we did them - if we could do them, then we would get something. I don't know what he figured his share would be or mine, but I think that was all left to the dust settling.

(R. 888-889).

In fact, Mayer readily agreed that there was nothing more than his "general understanding" that they would "work together", which was based upon his allegation that he was first in contact with Mr. Stacker:

> Q. And is it based upon the fact that you contend that you were the first contact with Mr. Stacker, the investor? That would be your basis for a claim on any of that?

A. Yes.

(R. 891).

Then, realizing that there was no agreement and no partnership/joint venture formed, Mayer fell back on "industry standard" as a basis for claiming any proceeds from any deal Angus entered into with Mr. Stacker and/or Mr. Milton:

> Q. You claim an interest in any deal that Mr. Angus had with them within a year to two years after you introduced them. Is that your position?
>
> A. That's industry standard.
>
> Q. Is that your position?
>
> A. Yes.
>
> Q. And when you say "industry standard," what standard can you point me to that I can go look up that says that's the standard?
>
> A. Every broker that's out here that deals in a deal, every finder, every whatever, you know, they all say - generally, they have you sign a noncircumvention agreement when they introduce you to a deal or to a person to do a deal.
>
> Q. Did you or Glen Angus sign any such agreement when you introduced him to Don Milton or Mr. Stacker?
>
> A. Unfortunately, I didn't think it was necessary then.
>
> Q. So there's no signed agreement to that effect?
>
> A. No.

(R. 462; 892-893).

Angus, on the other hand, agreed that he and Mayer had "discussed" doing projects together, but that it was on a "case by case basis" and he had a lot of other partners besides Mayer. (R. 462; 629-630). As for a "joint venture" or "partnership" Angus testified:

> At one time, we talked about that and entering into some kind of an agreement on that. But it was never agreed to finally - finally. And I wasn't going to do any further business with Michael at that time. He hadn't performed on one thing at the - you know, I wasn't going to give him any more.

(R. 789).

In sum, Mayer failed to establish any sort of joint venture or partnership which would form the basis of a fiduciary duty. In order to show breach of fiduciary duty, obviously a fiduciary duty must be shown to exist. For this reason, summary judgment on this claim was proper and should be affirmed.

CONCLUSION

For the reasons set forth above, this Court should affirm the Chancery Court's summary judgment ruling. There are no genuine issues of material fact to support any of Mayer's claims, and summary judgment is appropriate as a matter of law.

RESPECTFULLY SUBMITTED, this the 3rd day of June, 2011.

GLEN ANGUS, Appellee

BY: _____

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CERTIFICATE OF SERVICE

I, undersigned counsel, do hereby certify that I have on this 3rd day of June, 2011, filed an original and three copies of the Brief of Appellee by U. S. mail, postage prepaid, and addressed to the Clerk as follows:

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