2010-CA-02076 RT

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ARGUMENT

A. APPELLEES' ARGUMENT THAT A MUTUAL MISTAKE OF FACT EXISTED IS NOT RIPE FOR APPEAL, AS THE LOWER COURT NEVER RULED ON THIS ARGUMENT

In their brief, Appellees (hereinafter referred to as "the Urbaneks") argue that, should this Honorable Court find that there is a question of material and triable fact present in this case, thus disallowing, under Mississippi law, a grant of summary judgment, Appellant's (hereinafter referred to as "Quarter") claim must be dismissed because the parties were operating under a mutual mistake of material fact.[1] However, the lower court never issued a ruling on this question. Indeed, there is no mention whatsoever in the Court's Opinion and Order of a mutual mistake of material fact.[2] This issue simply was not considered by the Court in making its determination. The Court limited the scope of its decision to grant summary judgment when it did so on the basis that Quarter could not have conveyed title during the term of the contract. Summary judgment was not granted because of any finding that the parties were operating under a mutual mistake of operative fact. Therefore, because this issue was not part of the lower court's ruling, it is not ripe for appeal.

Should this Honorable Court find differently, that is, if this Court determines that this issue may be appealed, Quarter contends that there was no mutual mistake of material fact present. In the case of *White v. Cooke*[3] this Court clearly states that a mutual mistake of material fact is present, particularly in the realm of real estate contracts, when the following is true: "Such a mistake may apply to the nature of the contract, the identity of the person with whom it

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[1] Appellees' Brief at Page 12.
[2] R. 179-82; R.E. 2.
[3] 4 So. 3d 330 (Miss. 2009).

is made, or the identity or existence of the subject matter..."[4] The language of the *White* case is clear. The parties must be mistaken about either: (1) the nature of the contract; (2) the identity of the parties to the contract; or (3) the identity or existence of the subject matter. There was clearly no mistake about any of these three elements. It was clear that the nature of this contract was one for the sale of real estate. Also clear were the parties to this contract: the Buyers were the Urbaneks and the Seller was to be Quarter. Finally, there was absolutely no question as to the identity or existence of the subject matter. All parties agreed on the particular parcel of land to be sold. Additionally, no one disputes that this parcel of land existed. Therefore, under the guidance of *White*, there was never a mutual mistake of material fact present and the Urbaneks' argument concerning this must fail.

B. A TRIABLE AND GENUINE ISSUE OF MATERIAL FACT IS PRESENT AND THUS, ANY GRANT OF SUMMARY JUDGMENT IS IMPROPER.

It is well settled in Mississippi jurisprudence that, if a triable issue of fact exists, summary judgment is improper.[5] Summary judgment is proper only where there is no genuine issue as to any material or triable fact. A material fact is one which "tends to resolve any of the issues properly raised by the parties in an outcome determinative sense."[6] There is a triable and genuine issue of material fact present in this matter. The triable issue certainly is material, as it concerns title and the ability to convey--the very essence of a real estate contract in general, and specifically the contract in issue. Because there was a triable and genuine issue of material fact present in this matter, summary judgment was not proper and the matter should be remanded for a complete and final adjudication on its merits.

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[4] *Id.* at 334 (citing *Greer v. Heggins*, 338 So. 2d 1233 (Miss. 1976)).
[5] *Croke v. Southgate Sewer Dist.*, 857 So. 2d 774, 777 (Miss. 2003) (citing *Hancock v. Mid Am. Servs. Inc.*, 836 So. 2d. 762, 764 (Miss. 2003)).
[6] *Wallace v. Town of Raleigh*, 815 So. 2d 1203, 1208 (Miss. 2002); *see also Armisted v. Minor*, 815 So. 2d 1189, 1192 (Miss. 2002).

I. APPELLEES' ARGUMENT THAT NEITHER PARTY ATTEMPTED TO CLOSE ON THIS CONTRACT, CAUSING THE CONTRACT TO EXPIRE AND THUS BE UNENFORCEABLE, WOULD PERVERT THE SPIRIT OF REAL ESTATE CONTRACTS, ALLOWING SELLERS TO FREELY BREACH WITHOUT PENALTY BY REFUSING TO SET A CLOSING DATE

The Urbaneks argue that the contract for the sale of real estate in question is not enforceable because the contract had expired prior to the attempt to enforce its terms by Quarter. They contend that, because a closing date was never set, the contract had expired and its terms no longer bound the parties. This logic undermines the protections to be afforded and contemplated by contracts for the sale of real estate in general. A contract for the sale of real estate is entered into for the mutual protection of both the buyer and of the seller. The buyer is protected because the seller is no longer able to offer the property for sale to any other person or entity during the term of the contract. The seller is protected because he or she is given assurances that the sale to the buyer with whom they have contracted will be completed as contemplated.

The Urbaneks argue that, because no date certain for closing was ever agreed upon by the parties, the contract expired by its own terms and was no longer enforceable against either party. To agree with this position would be to nullify the protections afforded to sellers in all real estate contracts, causing them to be worthless and of no benefit (to sellers, anyway). Buyers would essentially have sellers at the mercy of their whims. If one was experiencing buyer's remorse or any other reservation about closing a valid contract, they could simply refuse to set a closing date or come to the closing table. If buyers are excused from real estate contracts because no certain closing date is agreed upon, there is essentially no protection afforded to sellers at all; the contracts are unilaterally beneficial to buyers, providing no remedy for a buyer's breach.

If the Urbaneks' contentions are correct, Quarter was subject to their acting in good faith.[7] Quarter was, at all times, ready to set a closing date. The Urbaneks, acting in bad faith, refused to set such a date, all the while knowing that they had not attempted to secure the appropriate financing, as was required of them under the terms of the contract. If this Court finds that the contract expired by its terms and was no longer enforceable, the Urbaneks would be profiting from their bad faith and blatant refusal to abide by the terms of the contract for which they bargained pursuant to Mississippi law.

II. APPELLEES' ARGUMENT THAT TITLE COULD NOT HAVE BEEN CONVEYED DOES NOT CONSIDER THE VERY PURPOSE BEHIND WARRANTY DEEDS

The Urbaneks contend that the contract for sale is unenforceable because no warranty deed could have been conveyed. This is simply incorrect. A warranty deed could have, and would have, been conveyed by Quarter at any time set for closing, had the Urbaneks come to the closing table. Quarter presented evidence of this fact to the trial court.[8] The Urbaneks' contentions that a warranty deed could not have been provided are misguided and do not consider the characteristics and guarantees of warranty deeds themselves.

Warranty deeds provided by the seller do just that--they warrant. The seller warrants for the buyer that any title defects discovered after closing will be cured within a reasonable time after discovery. They guarantee that the property is being conveyed free and clear of any *known* defects in title.

In this case, no matter what the Urbaneks contend, a warranty deed could have and would have been conveyed had they not refused in bad faith to come to the closing table, as they had

[7] As it turned out, the Urbaneks showed that, indeed, they would not act in good faith.
[8] *See* Affidavit of George Haymans, R. 149-51; R.E. 7; *see also* Motion for Reconsideration, R. 183-86; R.E. 5.

promised to do under the terms of the contract. They would have been given title to the subject property.

Precedent and fair dealing principles realize that a time must be allowed for a seller to cure defects *of which he was not aware* at the time of sale. Thus, the birth and existence of the warranty deed. To agree with the Urbaneks' contentions would be the death knell for warranty deeds in Mississippi.

But, in reality, the Urbaneks miss the mark again. The issue is not whether there was a mutual mistake of fact or whether either party attempted to close or whether Quarter could have conveyed the property. The issue is whether the trial court resolved an issue of fact and improperly granted summary judgment. Indeed, the trial court did grant summary judgment improperly by resolving a genuine and triable issue of material fact. There was evidence presented at the hearing on the motions for summary judgment and that same evidence would have been presented to the trier of fact at the trial of this matter that Quarter could have closed.[9]

III. THE URBANEKS HOLD OWNERSHIP OF THE FAILURE OF THIS CONTRACT TO CLOSE AND SHOULD NOT BE ALLOWED TO PROFIT FROM THEIR NEGLIGENCE AND/OR BAD FAITH

No matter how the facts of this matter are spun, the truth remains that the Urbaneks refused to come to the closing table at any point during the term of the contract. They refused to complete the sale for which they contracted pursuant to the terms of the sales agreement. They refused to attempt to secure financing. Put simply, this contract did not close solely because of the inaction and bad faith of the Urbaneks.

To allow them to wrongfully attempt to cloak themselves with the protections of Mississippi law would be to allow the party in breach of a valid contract to go unthwarted and

[9] *See* Affidavit of George Haymans, R. 149-51; R.E. 7.

unpunished. If the Urbaneks are not required to comply with the terms of the contract for which they bargained, they have been allowed to freely breach a valid contract. This is most assuredly a slippery slope which would allow buyers throughout our great state to bind sellers to contracts for the sale of real estate, only to freely breach the same if something better comes along, or if they experience buyer's remorse. This outcome is in violation to the principles of equity and justice upon which our court system is founded.

CONCLUSION

The lower court's grant of summary judgment in this matter was improper. There was absolutely a genuine and triable issue of material fact present in this matter. One needs only look at the length of the brief offered by the Urbaneks. They have much to say because much is at issue and there are many questions of fact that must be resolved. Evidence has been presented that Quarter could have closed. To hold that there is no triable issue of material fact present prohibits this case from being determined on its merits--something this Court does not favor. What's more, to affirm the grant of summary judgment would set a dangerous precedent of allowing trial courts to resolve issues of fact if needed to permit the grant or denial of motions for summary judgment. Because of all of the above-mentioned reasons, the contract for the sale of real estate in this matter should be enforced by this Honorable Court and the grant of summary judgment in favor of the Urbaneks should be reversed.

Respectfully submitted, this the 10th day of August, 2011.

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CERTIFICATE OF SERVICE

I, the undersigned, one of the attorneys of record in this matter, do hereby certify that I have this day mailed four copies of the *Reply Brief of Appellant, Quarter Development* to the Mississippi Supreme Court Clerk at PO Box 249, Jackson, Mississippi 39205-0249. I certify that I deposited said documents for delivery with the United States Postal Service on August 10, 2011. I certify that I have also mailed a true and correct copy of the above *Reply Brief of Appellant, Quarter Development* to the following:

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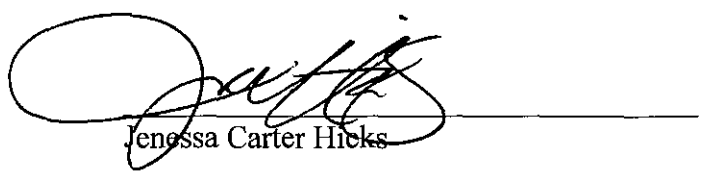
This the 10th day of August, 2011.



Jenessa Carter Hicks