IN THE SUPREME COURT OF MISSISSIPPI
NO: 2010-CA-02076

QUARTER DEVELOPMENT, LLC — APPELLANT

VS.

SHERRY HOLLOWELL — APPELLEE

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.

1. Appellant, Quarter Development, LLC. Quarter Development, LLC is a duly licensed limited liability corporation having its principal place of business in Mississippi.

2. Mike Harris. Mr. Harris is the principal owner of Quarter Development, LLC.

3. Counsel for Appellant, Quarter Development, LLC:

   David E. Rozier, Jr., Esq.
   Jenessa Carter Hicks, Esq.

4. Appellee, The Estate of Jim Urbanek.

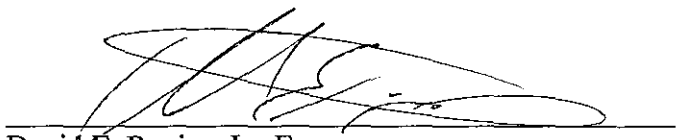
5. Appellee, Bonnie Urbanek Scott

6. Appellee, Sherry Hollowell.

7. Counsel for Appellee:

   Timothy M. Peeples, Esq.
   Amanda Urbanek, Esq. (Former Counsel for Appellees)

8. George Haymans, IV, Esq. Mr. Haymans was the attorney who closed the real estate transaction in question.



David E. Rozier, Jr., Esq.
Attorney for Appellee

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STATEMENT OF THE ISSUE

1. Whether or not the lower court properly granted Summary Judgment in favor of the Appellees when a material fact was in dispute between the parties.

STATEMENT OF THE CASE

This case involves the sale of a sliver of land in Oxford, Mississippi. A contract for the sale of this land was entered into between the Appellant (hereinafter "Quarter Development") and the Appellees (hereinafter "the Urbaneks"). This contract was signed on behalf of the Urbaneks by the late Mr. Jim Urbanek. Pursuant to the language of the contract, the sale was to be completed on or before April 30, 2009. However, an extension was requested by the Urbaneks and was granted by Quarter Development, which extended the closing deadline by a period of forty-five (45) days, creating a new closing date of June 14, 2009. This closing date came and passed, with the Urbaneks never attempting to close on the sale. Aggrieved, Quarter Development filed the underlying action to enforce the contract, requesting relief in either the form of monetary damages or specific performance.

Procedurally, both Quarter Development and the Urbaneks filed various Motions for Summary Judgment and Memoranda of Law in support of these Motions.[1] The Urbaneks' Motion for Summary Judgment asserted that summary judgment should be granted, alleging that Quarter Development did not have title to the property in issue on the date set for closing and, thus, could not have completed the sale.[2] Quarter Development filed its Response to this Motion for Summary Judgment wherein it asserted that the sale could have and indeed would have closed on any of the dates previously set for closing.[3] Quarter Development argued that there is evidence it had marketable title to the property in question. This matter was set for hearing before the Honorable Robert Elliott on April 20, 2010. After hearing the oral arguments of the

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[1] Quarter Development will only discuss the Motions for Summary Judgment and Memoranda of Law by which it is aggrieved and is seeking the relief of this Court, omitting a discussion of the irrelevant documents.

[2] (R. 71-104; R.E. 3)

[3] (R. 107-126; R.E. 4)

parties, the trial judge issued his Opinion and Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Counter-Motion for Summary Judgment on June 7, 2010.[4] Specifically, the Court found that there was no disputed issue of material fact between the parties.[5] Upon receipt of the Opinion and Order, aggrieved particularly by the language that there was no dispute of material fact between the parties, Quarter Development filed its Motion for Reconsideration, or In the Alternative, for Amendment to Opinion and Order on June 16, 2010, wherein it requested that the Court either reverse its grant of summary judgment or modify the Order to include language that facts were indeed disputed.[6] On December 1, 2010, the trial court issued its ruling wherein it declined to reconsider its previous ruling or amend its order.[7] Upon receipt of this Order, Quarter Development timely filed its Notice of Appeal with this Court on December 16, 2010.

[4] (R. 179-82; R.E. 2)
[5] *See id.* "Undisputed facts show ...the Plaintiff did not have marketable title to the property which it proposed to convey by warranty deed as set forth in the Contract." (R. 179-80; R.E.)
[6] (R. 183-86; R.E. 5)
[7] (R. 179; R.E. 2)

SUMMARY OF THE ARGUMENT

The very essence of the dispute between these parties is factual. More particularly, the difference of opinion concerns whether or not Quarter Development possessed marketable title at the time set for closing.[8] The trial court's grant of summary judgment is improper because a material issue of fact was indeed the very essence of the dispute between the parties.[9] Because there was a material issue of fact in dispute, according to this Honorable Court's precedential case law, summary judgment is improper. Therefore, because the grant of summary judgment was improper, the decision of the lower court should be reversed and the case remanded for further proceedings not inconsistent with that opinion.

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[8] Quarter Development did possess marketable title because it could have completed the sale by providing the Urbaneks with a warranty deed for the property. Any subsequently discovered title defect could have, and would have, been immediately cured by Quarter Development.

Quarter Development could have indeed transferred the property to the Urbaneks on either date set for closing. (*See* Affidavit of George Haymans, IV, at R.149-151; R.E.7; *see also* Quarter Development's Memorandum of Law, at R. 127-40; R.E. 8). Quarter Development could have conveyed a warranty deed to the Urbaneks at any time during the term of the contract. Because a warranty deed, by its own terms, expressly provides for the curation of any subsequently discovered title defects, such a deed could have been conveyed to the Urbaneks, had they come to the closing table as the contract provided, and any deficiencies could and would have been cured upon the discovery of the same.

[9] *See infra* notes 12, 20 and accompanying text.

ARGUMENT

"The standard of review for a trial court's grant of summary judgment is de novo."[10] Therefore, this court may review all evidence in the record presented to it and make its own determination as to the correctness of the grant of summary judgment. When any court is presented with a motion for summary judgment, it should "review the record before it and take all the evidence in the light most favorable to the nonmoving party."[11] "The trial court's decision to grant summary judgment will be affirmed if the record before the trial court shows that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law."[12]

I. *SUMMARY JUDGMENT WAS IMPROPERLY GRANTED IN FAVOR OF THE APPELLEE BECAUSE A GENUINE ISSUE OF MATERIAL FACT WAS IN DISPUTE BETWEEN THE PARTIES*

In the case at bar, Quarter Development, in no uncertain terms, has, at all times during the pleadings, put forth evidence that it could have completed the sale as provided under the contract because it held marketable title. At no time has Quarter Development ever wavered from its position that it could have completed the sale as contemplated under the contract. Any title "defects", which are typical in real estate transactions, would have been cured under the terms of the warranty deed that would have been provided to the Urbaneks.[13] None of the parties were aware of any title "defects" at any point during the term of the contract.[14]

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[10] *Guillotte ex rel Jordan v. Delta*, 5 So. 3d 393, 396 (Miss. 2009) (citing *Germany v. Denbury Onshore, LLC*, 984 So. 2d 270, 275 (Miss. 2008)).
[11] *Id.*
[12] *Id.*
[13] Indeed, the contract itself seems to allow for the curation of any defects, providing that the Seller "obligate[] himself to cure same as expeditiously as possible." (R. 8; R.E. 9)
[14] Indeed, the Urbaneks did not even discover any title defect *until after suit had been filed* by Quarter Development to enforce the contract. Upon discovery of this defect, Quarter Development immediately cured this cloud, showing any defects were easily curable, and it would have done the same during the term of the contract. The Urbaneks attempt to justify the breach of this contract with subsequently discovered issues. The facts are that they simply refused to close on the contract without justification and in violation of the terms governing sale. Put simply, the warranties conveyed in a warranty deed are

The very essence of a warranty deed is that these documents provide for, and indeed call for, the curation of subsequently discovered title defects.[15] Following this characteristic of warranty deeds, a logical conclusion is that the property would have been conveyed and the contract completed if not for the breach on the part of the Urbaneks. If this were not true, there would be no necessity for warranty deeds under modern real estate law. Warranty deeds not only exist for the protection of the seller, they exist to ensure that contracts for real estate transactions are binding as contemplated by the parties even if issues are later discovered in the chain of title, so long as such defects are cured within a reasonable time.

The appeal in this matter is compact in its purview. The *only* issue presented is whether or not the grant of summary judgment was proper. Regardless of the ultimate determination in this matter, that is, whether the sale could have ultimately been completed, summary judgment was wholly improper at the time it was granted. This is because, at all times, Quarter Development presented evidence that it could have sold the property in issue to the Urbaneks, had they come to the closing table as was required of them under the terms of the contract.[16] What's more, Quarter Development bolsters this contention with a supporting affidavit from a practicing real estate attorney.[17] This attesting attorney testified by way of affidavit that Quarter Development has, at all times, been able to close this contract for sale. Therefore, the issue of title, an issue of material fact, is placed squarely in the epicenter of the dispute between the parties.

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deemed broken when they are made, i.e., at the time title is delivered. Since the Urbaneks breached the contract by failing to close, any breach occurred on their part first, because Quarter Development never delivered any title, committing no breach. *See Howard v. Clanton,* 481 So. 2d 272 (Miss. 1985).

[15] In Mississippi, warranty deeds warrant "that the title conveyed is without defect, i.e., clear and marketable." *Ferrara v. Walters*, 919 So. 2d 876, 883 (Miss. 2005). "The word 'warrant' without restrictive words in a conveyance shall have the effect of embracing all five covenants known to the common law, to wit: seizin, power to sell, freedom from encumbrances, quiet enjoyment, and warranty of title." *Id.* (citing Miss. Code Ann. § 89-1-33 (2010).

[16] *See supra* notes 13-14 and accompanying text.

[17] (R. 149-51; R.E. 7); *see also supra* note 8 and accompanying text.

The Opinion and Order of the lower court, which granted the Urbanek's Motion for Summary Judgment states, "Undisputed facts show that...[a]t the close of business on June 14, 2009, the Plaintiff did not have marketable title to the property which it proposed to convey by warranty deed as set forth in the Contract..."[18] Because all evidence must be viewed in the light most favorable to the non-moving party,[19] and because the evidence as set forth by Quarter Development shows that it did possess marketable title--a warranty deed could have and would have been provided to the Urbaneks at closing. Put more succinctly, the sale could have been closed. Whether or not Quarter Development held marketable title is not only a material fact but is a material fact that is in dispute as a result of the Urbaneks' factual contentions.[20] The lower court's determination that there was no dispute of this fact was erroneous.

Quarter Development immediately filed its request with the lower court that the grant of summary judgment be reversed, or, that the Order be modified to show the true state of the pleadings--that is, that the very heart of the dispute between Quarter Development and the Urbaneks was whether marketable title was possessed at the time set for closing. In this case, whether or not marketable title was held by Quarter Development is not a determination which can be made by summary judgment without the resolution of a genuine issue of material fact in favor of the Urbaneks. That is what wrongly happened in this case. Not only was this decision erroneous, it must be reversed by this Honorable Court.

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[18] (R. 179-80; R.E. 2 at i,-ii)

[19] *See supra* note 11 and accompanying text.

[20] Contrary to the language in the order, the possession of marketable title was always, and remains a disputed fact.

CONCLUSION

Summary judgment is proper only when there are no disputed issues of material fact.[21] In the case at bar, the very heart of the dispute was an issue of material fact--whether Quarter Development held marketable title. The facts as set forth by each party are diametrically opposed--one party presents evidence that the sale could have been completed, while the other presents evidence that it could not. Because the parties' views concerning marketable title are polarized, a material issue of fact certainly exists and the grant of summary judgment by the lower court should be reversed and the case remanded for further proceedings.

Respectfully submitted, this the 27th day of May, 2011.

QUARTER DEVELOPMENT, LLC

APPELLANT

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[21] *See supra* note 12 and accompanying text.

CERTIFICATE OF SERVICE

I, the undersigned, one of the attorneys of record in this matter, do hereby certify that I have this day mailed a true and correct copy of the above *Brief of Appellant, Quarter Development* to the following:

Honorable Robert Elliott
Lafayette County Circuit Court
102 N. Main St., Ste. F
Ripley, MS 38663

Timothy M. Peeples, Esq.
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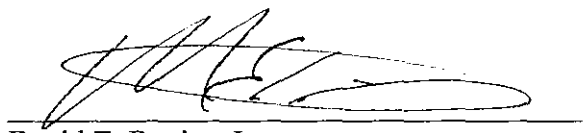
This the 27th day of May, 2011.



David E. Rozier, Jr.