IN THE SUPREME COURT OF MISSISSIPPI
No. 2011-CA-00304

GULFPORT SHOPPING CENTER, INC., ET AL **APPELLANTS**

V.

WILLIAM H. DURHAM **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Neither the May 1998 option nor the June 2000 offer gave Dr. William H. Durham any right to put shopping center rent money in his own pocket. His Brief of Appellee William H. Durham covers at lot of topics but wholly fails to address the actual language of the option and the offer.

Instead, the Durham Brief offers a litany of ways in which he claims to have been mistreated. The bottom line shows a far different picture.

The Durham Brief fails to mention that this deal made him a multimillionaire. For his investment he got not only received 24.5% of the corporation but he also received 30 acres of adjacent land on Highway 49 in Gulfport worth, by his own estimate, as much as $9 million in early 2000. CP 1:4, T. 1:215, 230; Brief of Appellants ("GSC Brief") at 5.

Nor is he deserving of sympathy because he left the June 8, 2000 board meeting in a fit of anger before the board voted to establish an escrow account to receive the $263,988.89 Bruno's rent payment when the corrected check arrived. That is his basis for claiming he "did not know" about the "receipt" of the money. Durham Brief at 10. His former lawyer, Tom Starling, stayed at the meeting and negotiated the offer terms. GSC Brief at 8. And on June 13, 2001 Durham's proxy voted to ratify everything that was done at the June 8 meeting. D-8, RE 11.

The explanation for his ratification of the Bruno's expenditures is that Durham knew in 2000 that he was not entitled to the rent money. The chancellor

failed to realize that under the terms of the June 2000 offer, receipt of the rent money would have made his purchase of the stock *more* expensive, not *less*. That in and of itself was an acknowledgment that he had no claim to the rent money. His claim for rent money is something he made up in litigation years later after the court rejected his attempt to set aside the sale of the shopping center. CP 4:508, RE2.

Because Durham had no right to the rent money, a decisive issue in this appeal, this court should reverse the chancellor and remand with instructions to enter judgment for the corporation and against Durham for the $110,000 he wrongfully withheld, plus appropriate prejudgment interest.

I. Durham had no right to receive corporate rent money.

The interpretation of a contract presents a question of law, not fact. The manifest error doctrine on which the Durham Brief solely relies does not apply to this issue. GSC Brief at 13-17.

The Durham Brief wholly depends on its claim that the option contract was breached. See Durham Brief at 17, 18, 19, 20. But it never addresses the actual language of either the May 1998 option or the June 2000 offer. Neither gave him the right to receive proceeds of corporate leases.

The prior Court of Appeals opinion held that lease rights belonged to the corporation, not to Durham. *Durham v. University of Mississippi*, 966 So.2d 832 (Miss. Ct. App. 2007). In that case Durham argued, as he does here, that his

expenditure of funds on behalf of the corporation pursuant to the option entitled him to assert rights under a corporate lease agreement. The Court of Appeals' holding that his expenditures did not give him rights under a corporate lease applies directly here. Just as he had no right to sue for breach of a lease of corporate property he had no right to collect rents paid on other leases of corporate property.

That decision provides firm guidance here because the proof in this record only bolsters its conclusion.

The terms of the option and offer confirm it. The May 1998 option did not address rent because the shopping center was empty and the option was to last for only 60 days. When he continued paying creditors after the 60-day period he could have gone to the defendants and struck a different deal, but he did not do so. He got the full benefit of the deal he struck. He gambled for another big payoff on the shopping center and lost.

The June 8, 2000 offer expressly addressed the Bruno's rent payment. It required Durham to compensate the defendants if he accepted the offer after the corporation received that payment. That term of that offer is completely inconsistent with his present claim that he was personally entitled to receive the rent. If the rent had belong to him, he would not have had to compensate others in order to benefit from it.

Other evidence points in the same direction. As noted above, in 2001 Durham's proxy voted to ratify the corporation's June 8 decision to spend the Bruno's rent for corporate purposes. Durham's complaint filed in 2001 admitted that the corporation had the right to the Bruno's rent if it was spent for corporate purposes, which it was. CP 1:9. He did not answer the corporation's rent counterclaim and did not testify that he had been promised rent money or that anyone ever approved giving him rent money. GSC Brief at 15-16.

To this, Durham offers virtually no answer. In a footnote he claims that the prior case is distinguishable because it merely held that he lacked standing to enforce the proposed lease with the University of Mississippi. Durham Brief at 11, n.3. But if he lacked "standing" to enforce corporate leases then he also lacked "standing" to collect corporate rents.

It does not matter to this issue whether he is suing a third party or suing other shareholders. His lack of capacity to assert rights to corporate property leases is the same no matter who he is suing. The prior decision did not resolve all of the claims that were originally in this suit, such as his challenge to the ultimate sale of the shopping center to Williams. But it did hold that he had no right to personal benefit from a lease of corporate property.

The chancellor erroneously relied on a good faith and fair dealing theory. That duty promotes enforcement of the terms of a contract and by definition cannot change the terms of a contract. See GSC Brief at 13-14, *citing Baldwin v. Laurel*

Ford Lincoln-Mercury, Inc., 32 F. Supp. 2d 894, 898 (S.D. Miss. 1998). The good faith and fair dealing duty says that one party cannot act to prevent another party's performance of a contract. *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992). There is no claim here that the shareholders prevented Durham from performing under the option. In fact the chancellor found that Durham's alleged ignorance of the Bruno's payment was not the reason he declined the June 2008 offer. CP 5:615, RE 3.

Because the deals Durham struck with the board did not give him a right to pocket corporate rents, the chancellor's judgment against the other shareholders should be reversed. This court should remand for entry of a judgment in favor of the corporation for $110,000. The sum at issue is a liquidated sum, D-62, and so on remand the chancellor should be allowed to add appropriate prejudgment interest.

II. In addition, Durham was not "responsible for corporate expenses" when the Bruno's money was received.

The chancellor's belief that Durham was "responsible for corporate expenses" when the Bruno's money was received was manifestly erroneous. The Durham Brief is replete with obstinate factual error which has no support in the record. The record supports what the appellants have said about the critical dates. But even under Durham's fictional scenario, Durham was no longer paying corporate expenses when the Bruno's money was received.

Durham admitted he quit paying expenses after Blackwell's April 19, 2000 letter terminated the option. In fact it is undisputed that Durham did not in fact pay any corporate debts after March 2000. See GSC Brief at 6; Durham Brief at 12. *Durham, supra*, 966 So.2d at 836 n.4 (no payments after March 10).

But in any event April 19 is the date on the letter terminating the option. D-18. Durham corrected his counsel when he got the date wrong when asking a question. Durham said he considered his obligations to pay ended when he got that April 19 letter. GSC Brief at 18-19. In addition, Durham had stopped paying a loan from the city in mid-1999, had not paid real estate taxes due in January 2000, and had let the letters of credit lapse well before that date. D-17, T. 1:232, 238.

The corrected check was received June 12,2000. D-25. The check dated May 25 on its face references a different project and so was defective. D-21. GSC Brief at 19-20. The check received on June 12 was immediately used to pay corporate debts that were overdue because Durham had stopped paying months before.

The chancellor wrongly thought that the terms of the June 2000 offer falsely suggested that there might be no Bruno's payment. CP 5:614, RE 3. The minutes of the June 8 meeting fully attended by Durham's counsel are to the contrary. His presence is enough to rebut any claim of collusion against Durham. The minutes show that the board fully expected payment. D-5, RE 9. What was uncertain was

whether the corrected check would be received within the 15-day offer period, not whether a check would be received at all.

There is no support in the record for the claim in the Durham Brief that the April 19 letter was really dated May 19, nor is there any evidence to show actual receipt of money on May 25. The Durham Brief does not dispute the evidence cited in the GSC brief and does not point to any contrary evidence. There is none.

But even if the dates Durham uses were correct, they would not help Durham's case. If Durham stopped paying on May 19, and the option was formally terminated on May 22, those dates still preceded the May 25 date on which Durham argues that the money was received. So even under that scenario, Durham had no obligation to pay when the Bruno's rent money came to the corporation.

It should be noted that Durham, by his own admission, had nothing to do with obtaining the rent money from the Bruno's bankruptcy estate. It was money Bruno's owed under its lease which Durham did not negotiate. D-20. Corporate president John M. Hill took steps to collect it. T. 1:176. Durham did nothing. T. 1:172-75. Durham's complaint admits the company was entitled to spend it for corporate purposes. CP 1:9 (Count 3). He did not even claim it belonged to him until after his other claims in this litigation were rejected in 2008.

Because the facts simply do not support recovery for Durham even if the chancellor's reasoning, that Durham should get money that came in while he had

responsibility for corporate obligations, were correct, this court should reverse and render the judgment in Durham's favor and rule that he is not entitled to recover the amount of the Bruno's rent payment from either the corporation or the other shareholders.

III. If reached, the shareholder defendants did not breach any duty to Durham.

The most bizarre result the chancellor reached was to award Durham a judgment against the other shareholders personally for the amount of the Bruno's rent money. The chancellor did not explain his reasoning. The GSC Brief at 20-22 establishes that there is no basis here for piercing the corporate veil. Durham offered no proof that any of the expenditures from the Blackwell escrow account, D-9, were ultra vires. The directors had a duty to pay corporate creditors, which is what they did with the money. They did not receive any of it individually. GSC Brief at 20-23.

Durham's only factual argument is that some of the money was used to pay Blackwell and White, who defended this lawsuit from April 10, 2001 when it was filed until Feb. 11, 2005 when that firm withdrew. CP 1:1, 1:63. That expense was fully justified, however. Durham sued the corporation as well as the other shareholders. CP 1:1. The corporation had every right to defend itself. And the escrow accounting shows that, of the $263,988.89 rent money, only $8,874.35 was paid to Blackwell and White during that time period.

In the Durham Brief, he conjures up another erroneous liability theory not mentioned in his complaint and different from both his trial court "bleeding" theory and the chancellor's "good faith and fair dealing" hypothesis. Now he says he should recover because the other shareholders owed him a "fiduciary duty."

It is too late for Durham to make this argument. This litigation has now lasted more than 10 years. It is too late for Durham to argue a theory of liability not found in his pleadings or argued to the trial court during the 10 years this case has been pending. See CP 1:1-13 (2001 complaint); 4:527-29 (2008 Supplemental complaint). A party cannot raise on appeal a legal theory he never pled or proved in the trial court. In fact, that is what the Court of Appeals said when it rejected a new theory Durham attempted to raise for the first time in his 2007 appeal against the University of Mississippi. *See Durham, supra*, 966 So.2d at 837.

In addition, Durham advances no plausible reason why the other shareholders owed him a duty to pay him the Bruno's money instead of paying it to the creditors, including Guardian Life, the City of Gulfport, and others, whom Durham had stopped paying. Debts to third party creditors take precedence. *See* GSC Brief at 21.

None of the cases Durham now cites bear any resemblance to this one. They are not cases like this one where corporate money was spent for corporate purposes and so benefitted the interest of all shareholders alike.

In Durham's cases the defendants took away the plaintiff's stock rights and the courts ordered the defendants to compensate the plaintiff for those rights. *See Bluewater Logistic, LLC v. Williford*, 55 So.3d 148 (Miss. 2011)(unlawful squeeze out required remaining shareholders to pay plaintiff for his interest in company); *Fought v. Morris*, 543 So.2d 167 (Miss. 1989) (recovery pursuant to stock redemption agreement). No one here has frozen Durham out. Durham today retains his full 24.5% interest in the corporation. [1]

Durham wrongly claims the other shareholders breached a duty to tell him the "truth" about the Bruno's money. But it is undisputed that the only reason he did not know every detail about that transaction is that he left the June 8 meeting in a temper tantrum. If he had stayed, he would have known everything there was to know. D-5, RE 9. And, of course, it is undisputed that his attorney at the time, Tom Starling, did stay at the meeting to negotiate the terms of the offer to Durham. See p. 1, *supra*.

And, what is even more important, the chancellor found that Durham's alleged ignorance of the timing of the payment was *not* the reason Durham rejected the June 8 offer. *See* CP 5:615, RE 3 ("the Court cannot find those funds would have effectively changed the outcome of Plaintiff's attempt to acquire the

[1] None of the accounting cases Durham cites have anything to do with shareholder disputes. *See Miller v. Henry*, 139 Miss. 651, 103 So. 203 (Miss. 1925) (state suit against Insurance Commissioner); *Union National Life Ins. Co. v. Crosby*, 870 So.2d 1175 (Miss. 2004) (policyholder suit against insurance company); *University Nursing Associates, PLLC v. Phillips*, 842 So.2d 1270 (Miss. 2003) (faculty member suit against university).

corporate stock..."). The payment would have *increased* what he had to pay to get the stock. Having suffered no harm, he can claim no foul.

For all these reasons, even if there had been potential corporate liability the judgment against the individual shareholders should be reversed and rendered.

CONCLUSION

Dr. Durham and his brief are well-matched. Both plead for sympathy in arrant disregard of what the May 1998 option and the June 2000 offer actually say.

Both adopt an artificial air of moral indignation. His brief shakes its finger at the appellants for allegedly not providing a copy of the second page of the May 1998 option which says John Hill acted for the stockholders, Durham Brief at 7, n.1. But the cited deposition exhibit never had a second page and, in any event, another copy of the May 1998 option in the Appellants' Record Excerpts, Ex. B to the May 22, 2000 board minutes, D-4, RE 8, has both pages. And it is also true that the second page adds nothing because the first page contains what Durham says is the critical phrase, "Stockholders, by and through John M. Hill."

In short, Durham's claim that the appellants withheld information from this court is on a par with his assertion that he was not told about the Bruno's payment when his lawyer stayed at the meeting in which it was discussed. Neither one has a scintilla of merit.

And then there is the question of his expenses. His complaint said they were $680,000. CP 1:6, 4:508, RE 2. His trial exhibit showed they were $648,251.

P-31. But in his brief he steadfastly claims he "paid" $912,239.96, on the apparent hypothesis that, if he had been given the Bruno's money after the option terminated, he might hypothetically have voluntarily given it back so the corporation could use it to pay expenses. Durham Brief at 8, n.2. Given his penchant for this kind of arithmetic, it is no wonder that the chancellor was, at points, confused.

This court now has the opportunity to examine the record as it is, not as Durham might wish that it were. It should reverse the judgment below, remand for entry of judgment in favor of the corporation for $110,000 on the counterclaim together with prejudgment interest, or grant such other relief as the court deems just.

This the 19th day of December, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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