IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2017-CP-00700-COA

BRIAN BRITT **APPELLANT**

v.

CRAIG BRADLEY ORRISON AND THE SHED, INC. **APPELLEES**

DATE OF JUDGMENT:	04/13/2017
TRIAL JUDGE:	HON. D. NEIL HARRIS SR.
COURT FROM WHICH APPEALED:	JACKSON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	BRIAN BRITT (PRO SE)
ATTORNEYS FOR APPELLEES:	NATHAN LAMAR PRESCOTT ZACHARY GLENN BARLOW
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	REVERSED AND RENDERED IN PART; REVERSED AND REMANDED IN PART - 06/29/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE BARNES, C.J., McDONALD, McCARTY AND EMFINGER, JJ.

McDONALD, J., FOR THE COURT:

¶1. This appeal arises from the Jackson County Chancery Court's denial of Brian Britt's claim for specific performance and award of damages against Craig Bradley Orrison and The Shed Inc.[1] (collectively, Orrison) regarding the sale of a log house. Earlier in the litigation, Britt, acting pro se, and Orrison's attorney announced a settlement in court and signed an agreed order. When Orrison did not comply with the provisions of the order, Britt filed a motion for contempt. In response, Orrison filed a motion to set aside the agreed order due

[1] Orrison is the sole shareholder of The Shed Inc.

to Britt's alleged misrepresentation of the log house's condition. The chancery court granted Orrison's motion on January 29, 2013, after which Orrison filed a counterclaim against Britt for damages and attorney's fees. The court heard testimony on Britt's specific performance claim and denied it. Thereafter, the court entered a default judgment on Orrison's counterclaim and, after a hearing, awarded Orrison damages and attorney's fees. Between 2015 and 2017, Britt unsuccessfully filed numerous motions, which were either stricken or denied.

¶2. Britt filed his motion for a new trial on January 27, 2017, which the chancery court denied on April 13, 2017. Britt now appeals the denial of the motion, raising twenty-one issues. This Court will address the following dispositive issues: (1) whether the chancery court erred in granting Orrison's motion to set aside the agreed order; (2) whether the chancery court erred in refusing to hear Britt's motion for contempt; and (3) whether the chancery court erred in entering a default judgment on Orrison's counterclaim. Finding error we reverse the chancery court's grant of Orrison's motion to set aside the agreed order and reinstate the agreed order. We also reverse the chancery court's default judgment in favor of Orrison's counterclaim. Additionally, we remand Britt's motion for contempt for further proceedings.

Statement of the Facts and Procedural History

¶3. In 2011, Britt and his longtime friend Orrison began negotiating a deal whereby Orrison would purchase Britt's two-story log house known as "The Wilson House Inn Bed

& Breakfast" (The Wilson House) for additional space for Orrison's restaurant, The Shed. Britt and Orrison signed a written contract ("Contract to Sale and Exchange") finalizing the sale on January 21, 2012. The contract provided that Orrison would pay Britt $21,000 in cash and transfer to him two and a half acres of real property Orrison owned in exchange for the log house. Orrison agreed to move the log house at his expense because Britt had sold the real property on which the log house sat to Bienville Orthopedics, which planned to build a medical center on the premises. The contract also stated that Orrison would pay $1,000 when the contract was signed and the remaining amount of $20,000 within ninety days. Orrison paid the $1,000 deposit through his company, The Shed. Orrison agreed to convey the two and a half acre parcel to Britt by warranty deed within ninety days of the date of the execution of the contract.

¶4. Britt also ultimately gave Orrison an additional room that he had added to the log house. John Bean, who was a friend of Britt and Orrison, assisted Britt in loading the room onto Orrison's truck and heavy-duty equipment trailer that was used to transport the back-room attachment.

¶5. Orrison's restaurant burned down on February 12, 2012, and he slowly began to rebuild. But between March and May, Orrison took no action to move the log house. On June 29, 2012, Orrison called Britt, telling him that he was coming to move the log house, but he never appeared.

¶6. On the weekend of July 13, 2012, Britt claimed that Orrison unscrewed the upstairs

bathroom water line in the log house, which caused the entire house to flood.[2] Orrison called Britt on July 17, 2012, informing Britt that the log house had flooded "from the upstairs level." After looking at the property, Britt told Orrison that there was no structural damage. About a week later, on July 24, 2012, Orrison told Britt that he was "backing out of the deal" because of the flooding. However, by his own admission at the hearing that resulted in the agreed order, Orrison had not inspected or even entered the log house to determine its condition at this time.

¶7. Meanwhile, Bienville Orthopedics told Britt that they would serve him eviction papers if the log house remained on the property. Britt immediately contacted Fauver House Movers to make temporary arrangements to remove the house from the property. On August 5, 2012, the moving company transported the Wilson House to an adjoining property that Britt owned, but it had to remain on the house mover's steel beams per an order from the City of Gautier. Britt paid approximately $20,300 to move the Wilson House.

A. Britt's Complaint Against Orrison and The Shed Inc.

¶8. On August 22, 2012, Britt filed a complaint pro se in the Jackson County Chancery Court against Orrison and The Shed Inc. for specific performance, temporary injunction, and other relief for Orrison's breach of contract. Britt sought an injunction to require Orrison to move the log house elsewhere. Further, Britt argued that Orrison owed him $20,300 because

[2] Although Britt has alleged that Orrison caused the flooding, he produced no evidence to support his allegation, nor is there any other evidence to show what caused the flooding.

Britt unexpectedly had to hire a moving company to move the Wilson House and that he would incur continuing damages of $1,500 per month for the house-moving equipment as long as the Wilson House remained on the steel beams at the temporary location.

¶9. On August 23, 2012, Britt accompanied his process server to serve the summons to Orrison as Orrison was boarding a bus to leave town. During this interaction, Orrison told Britt that he believed that the contract was voided because the Wilson House had been damaged due to the flooding. According to Orrison, Britt told him that the Wilson House had no water damage or mold. Again, Orrison had not verified if there was in fact any damage to the Wilson House nor did he inspect the property at this time. Britt informed Orrison that there may have been "a mess" from the flooding but there was "no structural damage."[3]

B. Agreed Order

¶10. A hearing regarding Britt's complaint, originally set for August 24, 2012, was reset to September 4, 2012. During this time, Hurricane Isaac struck the Mississippi Gulf Coast on August 28, 2012. Consequently, Orrison later claimed that he did not have an opportunity to inspect the property but relied on Britt's representation that the flooding at the Wilson House did not cause any damage. Orrison stated that he instructed his attorney to agree to a settlement, which adopted many of the terms of the original contract.

¶11. On September 4, 2012, Britt and Orrison's attorney met with the chancery court and

[3] Britt described the "mess" as ruined furniture and paintings.

announced that they had reached a settlement. Orrison's attorney outlined the terms of the settlement for the court and record. The court asked both parties if they agreed to the terms, to which Britt and Orrison's attorney both answered affirmatively. Orrison's counsel drafted the written agreed order.

¶12. Prior to the entry of the agreed order, on September 17, 2012, Orrison's counsel emailed Britt stating that the movers told Orrison that Britt's belongings were still inside the Wilson House and that there was extensive damage and mold issues. Orrison's counsel told Britt that he could either correct the water and mold issues or Orrison would move the log house "as is" and take possession of Britt's belongings.

¶13. The written agreed order was entered on September 19, 2012. The order included the following language:

> 1. Craig Bradely [sic] Orrison ("Orrison") and/or The Shed, Inc. ("The Shed") shall pay Plaintiff a total of $15,150.00 as compensation for moving expenses Plaintiff paid to Fauver House Movers for the move of the two story log house structure commonly referred to as the Wilson House (the "Wilson House");
>
> 2. Orrison and/or The Shed shall assume the contract dated August 5, 2012 between Plaintiff and Fauver House Movers;
>
> 3. Orrison and/or The Shed shall deed two and one half acres of property located approximately one half mile east of 6312 Allen Road, Gautier, Mississippi to Plaintiff;
>
> 4. Orrison and/or The Shed shall pay Plaintiff a total $20,000.00 within 90 days of the day of this Order;
>
> 5. Plaintiff shall deliver good, marketable and clear title of the Wilson House to Defendants within 28 days of the date of this Order;

6. Orrison and/or The Shed shall have the Wilson House moved from its present location to a location of their choosing within 28 days of the date of this Order; and,

7. Upon satisfaction of all considerations outlined herein, Plaintiff will execute a full and final release of all claims against Defendants which in any way relate to the Wilson House or any contracts pertaining thereto and this action and shall be dismissed with prejudice.

The chancery court also retained jurisdiction until all conditions outlined in the agreed order had been satisfied. That same day, Orrison paid Britt $15,150 in partial satisfaction of the agreed order. Britt signed a bill of sale on October 17, 2012, conveying and transferring ownership of the Wilson House to Orrison. At this point, Britt had met his obligations under the agreed order.

C. Orrison's Inspection, Britt's Motion for Contempt, and Orrison's Motion to Set Aside the Agreed Order

¶14. On October 18, 2012, Orrison and several friends went to the Wilson House. When they arrived at the house, they saw that some of Britt's personal belongings were still inside and that the property had extensive water and mold damage as previously acknowledged in the September 17, 2012 email. Orrison hired Ricky Authement of Home Inspection Building Specialist LLC to perform an inspection of the Wilson House. In a report, Authement confirmed that the property had "unusual mold conditions" with six types of mold present. Authement discovered that there was an excessive amount of cleaning chemicals used prior to his inspection, but he could still smell a faint, musty smell in several locations of the house.

¶15. Britt filed a motion for contempt against Orrison on October 24, 2012, after Orrison failed to relocate the Wilson House within the twenty-eight day deadline as required in their agreed order. Claiming that Britt misrepresented the house's condition, Orrison filed a motion to set aside the agreed order on December 7, 2012. According to Orrison, the only reason that he entered the agreed order was because Britt had represented that the Wilson House did not have any water damage and/or mold. Therefore, under Rule 60(b) of the Mississippi Rules of Civil Procedure,[4] Orrison sought relief from the agreed order.

¶16. The chancery court held a hearing on Britt's motion for contempt and Orrison's motion to set aside the agreed order on December 13, 2012, and January 18, 2013. Regarding the motion to set aside the agreed order, Orrison testified that he found out about the potential water damage in July but Britt told him that there was no damage. Orrison's attorney testified that after the October inspection, he himself spoke to Britt about the damage. Britt told him that there was no structural damage. There was no expert testimony regarding the mold and water damage, although Orrison did attach Authement's report to his pleading.

¶17. Britt testified that Orrison called him about the flooding in July. Orrison told Britt that a pipe had burst upstairs. But after inspecting the house, Britt found no broken pipes. Britt reiterated that there was no structural damage to the house. At the end of Britt's testimony, the chancellor stated that he would not hear Britt's motion for contempt because

[4] A party can receive relief from a judgment or order based on mistakes, inadvertence, newly discovered evidence, and/or fraud. M.R.C.P. 60(b).

Britt had failed to issue a Rule 81 summons. The court stated that it would allow Britt time to serve Orrison and hold a hearing at a later date.

¶18. But on January 29, 2013, the chancery court granted Orrison's motion to set aside the agreed order, finding that "the parties failed to reach an agreement of such specificity to convey the property."[5] Because the chancery court set aside the agreed order, the court found Britt's motion for contempt to be moot.

D. Orrison's Counterclaim Against Britt

¶19. After the court set aside the agreed order, Orrison filed an answer to Britt's complaint as well as a counterclaim on March 1, 2013. In his answer, Orrison asked that the court deny all relief in Britt's complaint. In his counterclaim, Orrison sought the following relief against Britt: (1) the amount Orrison paid Britt in accordance with the now-voided agreed order, $15,150; (2) past and future rent in the sum of $1,000 monthly for Britt's use of Orrison's trailer; (3) Britt's immediate return of Orrison's trailer; and (4) pre- and post-judgment interest and court costs.

¶20. Britt filed a motion to strike Orrison's answer and counterclaim on April 5, 2013, on the grounds (1) that Orrison's counterclaim was untimely filed; (2) that Orrison's counsel was a witness; and (3) that Orrison had unclean hands. Orrison answered Britt's motion to strike on May 22, 2013, stating that in the September 19, 2012 order, the court retained

[5] By "property" we assume that the court meant the two and a half acre parcel that Orrison had agreed to convey to Britt along with the cash payment in exchange for the Wilson House.

jurisdiction. When the order was set aside, Orrison claimed that his counterclaim became ripe. The court held a hearing on the motion to strike on May 31, 2013, but made no ruling on the motion.

¶21. Because Britt had not answered his counterclaim, Orrison filed an application to the clerk for entry of default along with a supporting affidavit on August 9, 2013. The clerk entered the default that same day.

E. Hearing on Britt's Complaint

¶22. On November 20, 2013, the chancery court held a hearing on Britt's complaint for specific performance. Britt filed an answer to Orrison's counterclaim that same day. When the chancellor asked Britt why he filed his answer late, Britt responded that the chancellor had told him in prior hearings that he did not have to file an answer. The court agreed that it had stated this. Britt testified that he and Orrison had a binding contract, but the court focused on the provision with the description of the two and a half acre property in the contract. The court asked Britt repeatedly if the contract contained a metes and bounds description or a parcel number for the property. At the end of Britt's testimony, Orrison moved for a directed verdict, which the chancery court granted. The court found that the parties failed to accurately describe the property being conveyed to Britt with specificity and that there was an inadequate description of the land as required by the statute of frauds. During the trial, Britt repeatedly stated that he was not suing Orrison for damages but only for specific performance. Because Britt sought relief in the form of specific performance on

a contract, which the court found unenforceable, the court ruled for Orrison. Therefore, the court did not grant Britt specific performance because there was no specific description of the land. Britt filed a motion for a new trial on December 3, 2013.

F. Default Judgment

¶23. Orrison filed a motion for a default judgment or, in the alternative, a motion for summary judgment on June 15, 2015. Because Orrison had already obtained an entry of default, Orrison argued that he was entitled to a default judgment. Orrison also stated that Britt never filed an answer or responsive pleading to the counterclaim. Further, Orrison argued summary judgment was proper because Britt could not dispute that Orrison was entitled to $15,150 nor could he dispute that he failed to pay the money back.

¶24. Orrison set his motion for hearing on July 17, 2015. Britt filed an objection to the unilateral setting of a motion hearing by Orrison on July 16, 2015. Britt argued that the court improperly set the motion hearing without his participation. Britt did not appear at the hearing. Orrison's counsel appeared at the hearing and stated that Britt contacted her co-counsel, saying that he would not appear at the hearing because he had meningitis. The chancery court entered an order, resetting the hearing for July 22, 2015. In the order, the court noted that it was not the first time that Britt claimed he had an ailment on the day that a hearing was set. Therefore, the court stated that "[s]hould Britt fail to appear in Court on July 22, 2015, at 1:30 pm, Defendant's Motion for Default Judgment, and in the alternative, Motion for Summary Judgment will be granted, and Plaintiff's Motion for New Trial will be

denied."

¶25. Britt emailed a motion for continuance on July 21, 2015, at 5:48 p.m., the day before the hearing was to take place. In the motion, Britt stated that he had been suffering from an illness for over sixty days, which required him to be under the care of home health services and have intravenous (IV) infusions twice daily.

¶26. The chancery court convened the hearing on Orrison's motion for a default judgment on July 22, 2015, despite the court's knowledge of Britt's motion for continuance. The court granted Orrison's motion to strike Britt's motion for a new trial and denied Britt's motion for a new trial. Because Britt failed to appear at the hearing and did not timely respond to Orrison's motion for a default judgment, the court granted Orrison a default judgment on his counterclaim and directed that a hearing on damages be set for a later date. The court entered an order reflecting this ruling on July 23, 2015. After the default judgment was entered against Britt, Orrison set a "writ of inquiry" hearing to determine the amount of damages. The hearing was originally set for September 16, 2015, but was rescheduled to January 4, 2017.[6]

¶27. The hearing on damages took place on January 4, 2017. Britt did not appear. On

[6] Britt filed a notice of appeal on August 21, 2015, regarding the chancery court's order granting Orrison's motion for a directed verdict, the court's order granting Orrison's motion to set aside the agreed order, the court's order granting Orrison's motion to strike his motion for a new trial, and the court's grant of default judgment on Orrison's counterclaim. The Mississippi Supreme Court dismissed the matter on November 5, 2015, finding that the chancery court's grant of Orrison's default judgment on the counterclaim was not final because damages needed to be assessed.

January 17, 2017, the chancery court entered a judgment against Britt, ordering him to pay Orrison $6,000 plus 2.5% interest accruing from March 2013 for the use of Orrison's heavy-duty trailer to move the additional room, $15,150 plus 2.5% interest from January 29, 2013, for monies that Orrison paid to Britt as compensation for moving expenses to remove the Wilson House from Bienville Orthopedics' property, and $10,202.16 for attorney's fees plus 2.5% interest from January 2017.

G. Britt's Second Motion for a New Trial and Appeal

¶28. Britt subsequently filed a second motion for a new trial on January 27, 2017, arguing the following issues: (1) that the chancery court did not address the contested issues in its rulings; (2) that the chancery court erred in setting aside the agreed order; (3) that the ruling of the court went against the weight of the evidence; (4) that Orrison had unclean hands; (5) that the chancery court ignored his motion for a continuance regarding the hearing of the defendant's default judgment; (6) that a "writ of inquiry" was inapplicable in this case; (7) that the chancery court erred in entering a default judgment for Orrison; and (8) that the chancery court improperly awarded Orrison damages and attorney's fees.

¶29. Orrison once again filed a motion to strike Britt's motion for a new trial or, in the alternative, a response to Britt's motion for a new trial on February 8, 2017, arguing that Britt was only attempting to delay a final resolution in the matter. After a hearing on March 24, 2017, the chancery court entered an order denying Britt's motion for a new trial on April 13, 2017.

¶30. From that order, Britt appealed on May 15, 2017. As stated above, we will address three dispositive issues: (1) whether the chancery court erred in granting Orrison's motion to set aside the agreed order; (2) whether the chancery court erred in refusing to hear Britt's motion for contempt; and (3) whether the chancery court erred in entering a default judgment on Orrison's counterclaim. After a thorough review of these issues, we find that the chancery court erred in granting Orrison's motion to set aside the agreed order and further find the chancery court's granting of a default judgment on Orrison's counterclaim was error. We reverse and render the court's grant of Orrison's motion to set aside the agreed order and reinstate the agreement. We also reverse and render the chancery court's grant of a default judgment on Orrison's counterclaim. Further, we remand the matter of Britt's motion for contempt for further proceedings.

Standard of Review

¶31. "When reviewing a decision of a chancellor, this Court applies a limited abuse of discretion standard of review." *Anderson v. Anderson*, 266 So. 3d 1058, 1060 (¶8) (Miss. Ct. App. 2019) (quoting *Mabus v. Mabus*, 890 So. 2d 806, 810 (¶14) (Miss. 2003)). We "will not disturb the chancellor's opinion when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong [or] clearly erroneous, or an erroneous legal standard was applied." *Farris v. Farris*, 202 So. 3d 223, 230 (¶26) (Miss. Ct. App. 2016) (quoting *Mabus*, 890 So. 2d at 819 (¶53)). For issues of law, our standard of review is de novo. *Stroh v. Stroh*, 221 So. 3d 399, 406 (¶17) (Miss. Ct. App. 2017).

¶32. Our standard of review when analyzing the trial court's denial of a motion for a new trial is an abuse of discretion. *Booker v. State*, 303 So. 3d 1133, 1140 (¶26) (Miss. Ct. App. 2020) (citing *Johnson v. State*, 904 So. 2d 162, 167 (¶11) (Miss. 2005)).

Discussion

I. Whether the chancery court erred in granting Orrison's motion to set aside the agreed order.

¶33. Orrison had argued four bases in his motion to set aside the agreed order: (1) misrepresentation; (2) misconduct; (3) unclean hands; and (4) unjust enrichment. The chancery court did not address any of these issues in its order. The chancery court set aside the agreed order, finding that Britt and Orrison had failed to specifically describe the two and a half acres of property that Orrison was to deed to Britt. The issue of the property's description was not raised by either party before the trial court.[7] After reviewing the record, we find that the chancery court erred in setting aside the agreed order.

A. Requirements to Set Aside an Agreed Order

¶34. Rule 60(b) states that a court may relieve a party from a final judgment, order, or proceeding for the following reasons:

> (1) fraud, misrepresentation, or other misconduct of an adverse party; (2) accident or mistake; (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule

[7] Although the matter of the property's description was not raised by either party, the Mississippi Supreme Court has stated that "a description is sufficient if a surveyor can locate the boundaries by following the description . . . [, and] a description may still be considered sufficient, though it contains inaccuracies, if the property could be located with some certainty." *Swartzfager v. Saul*, 213 So. 3d 55, 63 (¶22) (Miss. 2017).

> 59(b); (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the judgment.

This Court has recognized that Rule 60(b) "provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances, and neither ignorance nor carelessness on the part of an attorney will provide grounds for relief." *White v. White*, 81 So. 3d 291, 294 (¶10) (Miss. Ct. App. 2012) (quoting *Jenkins v. Jenkins*, 757 So. 2d 339, 343 (¶7) (Miss. Ct. App. 2000)).

¶35. The Mississippi Supreme Court has stated that consent decrees may be set aside when the following circumstances exist:

> (1) The facts constituting the fraud, accident, (or) mistake or surprise must have been the controlling factors in effectuation of the original decree, without which the decree would not have been made as it was made. (2) The facts justifying the relief must be clearly and positively alleged as facts and must be clearly and convincingly proved. (3) The facts must not have been known to the injured party at the time of the original decree. (4) The ignorance thereof at the time must not have been the result of the want of reasonable care and diligence.

Tel. Man Inc. v. Hinds Cnty., 791 So. 2d 208, 211 (¶12) (Miss. 2001) (quoting *Wray v. Langston*, 380 So. 2d 1262, 1263 (Miss. 1980)).

¶36. In this case, there was no fraud, accident, or mistake that Orrison could not have determined prior to agreeing to the settlement. Orrison claimed that he relied solely on Britt's statements made in July and August that there was no mold or water damage and that he was unaware of any damages to the Wilson House until October 2012 after an inspection.

But the record does not support this assertion. On the contrary, in his own affidavit, Orrison said he knew of the flooding and potential damage to the Wilson House in July 2012, long before the agreed order was entered, saying: "In the spring or summer of 2012, I was informed that the Wilson House may have been flooding from its upstairs level." Britt denied that there was any damage to the Wilson House due to the flooding. In his affidavit, Orrison also stated that he had concerns about the flooding: "I contacted Brian Britt to express concerns over the flooding, but Brian Britt indicated to me that no damage had occurred to the Wilson House." Orrison, however, took no action to inspect the property after knowing it had flooded.

¶37. Even after the settlement, it appears Orrison knew about the mold and damage and was still willing to take the house. On September 17, 2012, Orrison's counsel sent Britt an email in which he clearly stated that Orrison was aware of the mold and water damage to the Wilson House. Significantly, the email also stated that if the mold issues were not corrected, then Orrison would just "move the building *as is* with all the stuff in it and take possession of the stuff." (Emphasis added). The law states that for an agreed order to be set aside "[t]he facts must not have been known to the injured party at the time of the original decree." *Tel. Man Inc*., 791 So. 2d at 211 (¶12). Orrison was clearly aware of the potential damage to the Wilson House prior to the September 19, 2012 agreed order. Furthermore, to set aside an agreed order, "[t]he ignorance thereof at the time must not have been the result of the want of reasonable care and diligence." *Id*.

¶38. In *McDuff v. McDuff*, 221 So. 3d 359 (Miss. Ct. App. 2016), this Court found that no misrepresentation existed regarding an agreed order when a party failed to exercise reasonable care or diligence. *Id*. at 363 (¶13). In *McDuff*, Kenneth McDuff moved to set aside a property-settlement agreement (PSA) and divorce decree based on misrepresentation. *Id*. at 360 (¶1). During mediation, the mediator told Kenneth that his soon-to-be ex-wife Teresa McDuff was on the phone with a potential buyer who offered to purchase property they jointly owned for $2,000,000. *Id.* at 361 (¶4). Without speaking to the potential buyer or verifying the offer, Kenneth agreed to Teresa's relinquishing any interest in the property. *Id*. After the divorce decree was entered, Kenneth attempted to accept the purchaser's offer, but the purchaser denied such an offer existed and declined to purchase the property. *Id*. at (¶5). Kenneth argued that he entered into the PSA on the mistaken belief that he would be selling the property. *Id*. However, this Court found that he could have discovered his mistake had he exercised "reasonable care and diligence." *Id*. at 363 (¶12). It was undisputed that Kenneth merely assumed that he could sell the property to the potential buyer. He did not attempt to contact the potential buyer nor did he attempt to verify the offer or its details before signing the PSA and the divorce decree's being entered. *Id*. at 361 (¶4). Specifically, we stated that "Kenneth easily could have learned of the nature and terms of [the] offer had he exercised reasonable care and diligence." *Id*. at 363 (¶13). Therefore, the chancery court properly denied his motion to set aside the PSA. *Id*.

¶39. In the case at bar, Orrison was clearly aware of the potential damage to the Wilson

House prior to the September 19, 2012 agreed order. But he failed to exercise reasonable care or diligence to inspect the property despite having ample time to do so. From January to July, Orrison did not inspect or move the Wilson House as he had promised. When he found out about the July flooding, he failed to inspect the house. Like *McDuff*, without making any attempt to inspect the house, Orrison agreed to purchase it in the agreement reached in September. Orrison did not inspect the house until October 2012, after his court-ordered deadline. Orrison failed to exercise reasonable care and diligence when he failed to inspect the Wilson House for any damage for a period of over ten months. After reviewing the evidence, the circuit court did not make findings regarding Orrison's claims of misrepresentation, misconduct, unjust enrichment, or unclean hands. Even if there were some evidence to support such a finding, Orrison had knowledge of the Wilson House's condition prior to the order setting aside the agreement, yet he made no reasonable effort to determine the condition of the building himself. Accordingly, he has failed to establish all elements required to set aside a consent order.

B. Ambiguity Regarding the Agreed Order

¶40. We also find that the chancery court's reason for setting aside the agreed order was in error.

¶41. The chancery court ruled that the agreed order was ambiguous as to the description of the property that Orrison was to convey to Britt. We disagree. Although the pertinent provision of the agreed order did not give a legal description of the property, the intent of the

parties was clear: Orrison agreed to convey a two and a half acre parcel to Britt. "In determining whether a contract is ambiguous, courts should consider the contract as a whole, and extrinsic evidence should only be considered upon a finding that the contract is ambiguous." *Hicks v. N. Am. Co. for Life & Health Ins.*, 47 So. 3d 181, 189 (¶29) (Miss. Ct. App. 2010) (citing *Henry v. Moore*, 9 So. 3d 1146, 1152-53 (¶¶16-17) (Miss. Ct. App. 2008)).

¶42. In this case, the chancery court had the original contract and testimony before it that cleared any ambiguity in the property-identification provision. The contract clearly stated the following:

> Brad Orrison agrees to purchase same and as partial consideration agrees to convey 2½ acres of real property, the exact dimensions yet to be determined, currently owned by Brad Orrison and located approximately one half mile east of 6312 Allen Road on the north side of Allen Road and with the approximate street address of 5701 Allen Road . . . .

During the hearing, Orrison never disputed that he was required to convey a two and a half acre parcel to Britt nor did he claim to be uncertain about what property he was to convey. Orrison's attorney drafted the agreed order, which would convey the property. Furthermore, the matter of ambiguity was not an issue raised by either party in the trial court. Thus, the chancery court erred in setting aside the agreed order based on ambiguity.

¶43. Moreover, even if one provision of the agreed order were vague and ambiguous, the other provisions were clearly valid. This Court has stated that a contract is severable when it "includes two or more promises, each of which can be enforced separately, so that failure

to perform one of the promises does not put the promisor in breach of the entire contract." *Jackson Motor Speedway Inc. v. Ford*, 914 So. 2d 779, 784 (¶14) (Miss. Ct. App. 2005). "Whether a contract is severable is a question of intention, to be determined from the language which the parties have used, and the subject matter of the agreement." *Id*. (citing *Mariana v. Hennington*, 229 Miss. 212, 90 So. 2d 356, 364 (1956)). In this case, the chancery court found only one out of seven provisions of the agreed order to be ambiguous, the provision regarding Orrison's conveyance of a two and a half acre parcel. By law, the chancery court could have severed the provision instead of finding the agreed order in its entirety unenforceable.

C. Statute of Frauds

¶44. Furthermore, the agreed order did not violate the statute of frauds. Contracts that convey land in the future are subject to the statute of frauds.[8] For example, in *Lowe v. Hodges*, 726 So. 2d 1289 (Miss. Ct. App. 1998), this Court stated that contracts for the conveyance of land must be in writing, but contracts employing a broker to sell it need not be. *Id.* at 1291 (¶9). Here, Britt and Orrison signed an agreed order whereby Orrison would convey two and a half acres of land in exchange for the log house. Like *Lowe*, the agreed order itself was not a conveyance of the property. It merely established Orrison's obligation

[8] The statute of frauds includes the following: "(1) A promise to answer for the debt or default of another person (suretyship); (2) An agreement made upon consideration of marriage; (3) A contract for the sale of land, or for a lease of land for longer than one year; (4) An agreement not to be performed within 15 months; or (5) A promise by an executor or administrator to answer any debt out of his or her own estate." 3A Jeffrey Jackson & Mary Miller, *Encyclopedia of Mississippi Law* § 21:40 (2020).

to do so in the future. Therefore, the agreed order met the statute of frauds.

II. Whether the chancery court erred in refusing to hear Britt's motion for contempt.

¶45. We also find that the chancery court erred in failing to hear Britt's motion for contempt during the January 18, 2013 hearing.

¶46. "To commence a proceeding for contempt, a party must obtain and serve a Rule 81 summons . . . ." *Wallace v. Wallace*, 309 So. 3d 104, 113 (¶40) (Miss. Ct. App. 2020) (citing *Hanshaw v. Hanshaw*, 55 So. 3d 143, 146 (¶9) (Miss. 2011)). But a party "may waive the requirements of Rule 81 by appearing at a hearing on the issue of contempt and defending the charge on its merits without raising any objection related to service of process." *Id*. (citing *Isom v. Jernigan*, 840 So. 2d 104, 107 (¶¶9-11) (Miss. 2003); *Dennis v. Dennis*, 824 So. 2d 604, 610-11 (¶¶16-18) (Miss. 2002)).

¶47. The Mississippi Supreme Court found that service of process is waived when there is a failure to raise an objection. *Dennis*, 824 So. 2d at 611 (¶18). In *Dennis*, David Dennis raised the issue of whether his due-process rights were violated when Gretchen Dennis failed to serve the motion for contempt in accordance with Rule 81 of the Mississippi Rules of Civil Procedure. *Id*. at 609 (¶12). During trial, the defense counsel announced "ready" at the beginning of the hearing and proceeded to defend David, never objecting to the defective service. *Id*. at 611 (¶18). Therefore, because David allowed the chancellor to adjudicate his rights, he subsequently waived the defective service issue. *Id*.

¶48. Here, like *Dennis*, Orrison's counsel appeared in court and announced that he was

ready to proceed in defending Orrison against Britt's motion for contempt. Orrison never raised or objected to Britt's failure to serve a Rule 81 summons. Furthermore, although no definite hearing date was listed, Orrison received notice about a hearing for Britt's motion for contempt on October 24, 2012. Therefore, we find that Orrison waived any service of process defects and that the chancery court erred in not hearing Britt's motion for contempt.

III. Whether the chancery court erred in entering a default judgment on Orrison's counterclaim.

¶49. Because the chancery court erred in setting aside the agreed order, the court subsequently erred in entering a default judgment on Orrison's counterclaim.

¶50. It should first be noted that throughout the course of the proceedings, the chancery court stated that Britt did not need to file an answer to Orrison's counterclaim and that the court would not grant a default judgment on the matter. On May 31, 2013, the chancery court advised Britt that he did not have to answer Orrison's counterclaim:

> MR. BRITT: Am I supposed to answer his counterclaim?
>
> THE COURT: You don't have to, but I would if I were you. If you want to deny it, just – you can deny it. Neither admit nor deny but demand strict proof. There are all kinds of ways you can do it. I mean, you know how to do it. You can write all you want to on that. I know you like to write and you write well. So just, you know . . . now, get this discovery answered. Okay?

The chancery court advised the defense that it would not grant a default judgment regarding Orrison's counterclaim on August 12, 2013:

> [DEFENSE COUNSEL]: No, Your Honor. Just a – on the record, just for

Mr. Britt's acknowledgment, I have filed a counterclaim. That counterclaim has not been answered. I didn't get a clerk's entry of default. I haven't moved the Court for it yet is what I'll say.

THE COURT: Don't waste your time because **I'm not going to grant a default on a counterclaim.** We're going to hear the whole thing. He's pro se, he's not a lawyer. I mean he was a lawyer at one time. I'm going to hear it all.

On November 20, 2013, the chancery court once again advised Britt that he did not have to answer Orrison's counterclaim and that the court was not going to grant a default judgment on the matter:

THE COURT: Assume I disregard his complete argument. What do you say about filing your answer late? Assume I disregard his argument completely, I strike it from my mind which I have the ability to do, why did you file it today?

MR. BRITT: Your Honor, I heard you say last time we were here you were not going to require me to file an answer. And I also heard you say –

THE COURT: Well, you don't have to file one.

MR. BRITT: I also heard you say you were not going to grant the default. That –

THE COURT: I'm not going to grant –

MR. BRITT: – [Defense Counsel] said he was going to file for it and you said well, you can file it but I'm not going to grant it. I'm going to hear this case and I'm not going to require him to file an answer.

THE COURT: That's right.

The chancery court clearly stated (1) that Britt did not need to file an answer to Orrison's counterclaim and (2) that it would not enter a default judgment on the matter. The chancery court then proceeded to enter a default judgment on Orrison's counterclaim, stating that Britt failed to timely respond to Orrison's motion.

¶51. Notwithstanding these issues, because we find that the chancery court erred in granting Orrison's motion to set aside the agreed order, Orrison had no basis for a counterclaim. Subsequently, Orrison's counterclaim is now moot. Therefore, the chancery court erred in entering a default judgment for the counterclaim and erred in awarding Orrison any relief on the basis of the default judgment.

Conclusion

¶52. Finding that the chancery court erred in setting aside the agreed order, erred in refusing to hear Britt's motion for contempt, and erred in entering a default judgment for Orrison, we reverse and render the court's grant of Orrison's motion to set aside the agreed order and reinstate the agreement. We also reverse and render the chancery court's grant of a default judgment on Orrison's counterclaim. Further, the matter of Britt's motion for contempt is remanded for further proceedings.

¶53. **REVERSED AND RENDERED IN PART; REVERSED AND REMANDED IN PART.**

BARNES, C.J., CARLTON, P.J., GREENLEE, WESTBROOKS, McCARTY, SMITH AND EMFINGER, JJ., CONCUR. WILSON, P.J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. LAWRENCE, J., NOT PARTICIPATING.