IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPP

NO. 93-CA-01280 COA

CATHIE FRANKLIN TWINER, DOYLE BRATTON AND NORMA JEAN GIBBS

APPELLANTS

v.

NORMAN GILLIS, JR.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. B. REEVES

COURT FROM WHICH APPEALED: PIKE COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANTS:

JAMES H. HERRING

JOHN H. WHITE, JR.

ATTORNEY FOR APPELLEES:

F. DOUGLAS MONTAGUE III

NATURE OF THE CASE: CONTRACT

TRIAL COURT DISPOSITION: JUDGMENT FOR DEFENDANTS, PLAINTIFFS NOT ALLOWED TO RESCIND THE CONTRACT

BEFORE FRAISER, C.J., COLEMAN, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

This case comes before the Court as an appeal from a judgment rendered in favor of the defendants in an action originally brought in the Chancery Court of Pike County. Plaintiffs sought rescission of a contract for the purchase of two related business enterprises. In addition to the return of the purchase price, the plaintiffs sought additional damages alleged to have arisen out of the business transaction. Insofar as this Court can discern the theory of the plaintiffs' cause of action, it seems to have been based upon the proposition that (a) the attorney who prepared the contract of sale had an attorney-client relationship with certain of the plaintiffs arising out of representation in other unrelated matters; (b) that he also had a personal interest in the consummation of the transaction; and (c) that he violated his fiduciary duty to his clients by both improperly using his influence to induce them to enter into the transaction and by failing to fully inform them of certain material considerations that they contend would have affected their decision to enter into the contract.

The chancellor, after a lengthy trial, concluded that a fiduciary relationship and its attendant duties did, in fact, exist, but that there had been no violation of any fiduciary duty by the attorney. He, therefore, rendered judgment in favor of the defendants, and this appeal ensued. Based upon the limited scope of review vouchsafed to this Court on appeal, we are unpersuaded that the chancellor committed reversible error, and we affirm.

I.

Facts

There are a number of people and legal entities involved in this proceeding, some of which have overlapping roles and some of which have similar names. For sake of clarity, therefore, it would seem that we would do well to identify the participants in this matter. The plaintiffs are Kathy Twiner, Norma Jean Gibbs, and Doyle Bratton. Though they are technically now appellants before this Court, we will continue to refer to them collectively as "the Plaintiffs" as more properly indicating their posture in this litigation. The Ice House is the commonly accepted name for an improved parcel of real property located in McComb and owned by a limited partnership, the general partner of which is the appellee, Norman Gillis, Jr. Gillis is a practicing attorney and the individual accused of impropriety by the plaintiffs. The limited partnership is named "The Ice House Complex, Ltd." To avoid confusion, any references hereafter to "the Ice House" shall be deemed reference to the property itself, and the limited partnership shall be identified as "the Limited Partnership." During the operative times involved in this case, there were two businesses operated on the Ice House property. The businesses shared the same building and their activities were somewhat interrelated. One was a restaurant operated by Bret Baxter and Mark Westmoreland. There was some dispute during the course of the trial as to whether the parties thought the business to be a corporation or a partnership. Finding this question to have little significance in resolving the issues presented to us, we will simply refer to it as "B & W Restaurant." The lounge business was operated by a corporation owned by Bret Baxter and Dan Jones, which we will refer to as "SME Lounge." Thus, Baxter was a principal in both businesses, but with a different associate in each. SME Lounge was licensed by the Mississippi Alcoholic Beverage Control Commission to dispense alcoholic beverages on the premises. B & W Restaurant was not so licensed. Alcoholic be verages were dispensed throughout the property, both in the lounge portion and the restaurant portion, ostensibly under the control of SME Lounge. SME

Lounge and B & W Restaurant operated under a contract entitled "Contract to Provide Food Service," which permitted B & W Restaurant to operate the restaurant facility and provided that B & W Restaurant would receive the net profit from all alcoholic beverage sales made in the restaurant portion of the premises.

SME Lounge was the principal lessee of the property, with the Limited Partnership being the lessor. Under the food service contract, B & W Restaurant committed to a portion of the monthly rent due to the Limited Partnership.

Around June of 1988, Twiner went to work for the lounge business and was, shortly thereafter, hired by the restaurant also. Her duties were generally of a managerial-type nature, including responsibility in the financial or accounting phase of the businesses. Bratton was identified in the record as Twiner's "boyfriend," and Gibbs was also a friend. At some point, Twiner and Gibbs apparently became interested in investing together in a business and explored the possibility of purchasing a gift shop in a local mall. They consulted Gillis as to the advisability of the purchase, and, according to them, Gillis told them that he did not advise the deal, but that he was aware of the possibility of a future opportunity to invest in a restaurant business, apparently referring to the Ice House operation. There is a conflict in testimony as to when these events occurred. Twiner and Gibbs claim October 1988, and Gillis places these particular events in the early summer of that year.

Gillis also, in his capacity as an attorney, took on the representation of both Twiner and Gibbs in separate legal matters, neither of which was related in any manner to the Ice House operation.

Gibbs, on two occasions during the summer months of 1988, made loans to SME Lounge, apparently for operating capital. The total amount of the loans was $15,000.00. There is no evidence in the record that Gillis played any part in inducing Gibbs to make these loans.

Bratton, apparently through his relationship with Twiner, had become acquainted with Jones and became interested in investing in the Ice House business operations. As a result of subsequent discussions, a tentative agreement was reached between the plaintiffs and the owners of the two Ice House businesses that would result in a realignment of ownership, such that Jones and Twiner would be equal owners of SME Lounge, and B & W Restaurant would be owned one-third each by Gibbs, Westmoreland, and Twiner. Twiner was to be the legal owner of these fractional shares; however, Bratton was intended to be the true, beneficial owner. The agreement contemplated an infusion of $30,000 of cash by Twiner, which was actually being furnished at least in part by Bratton. It is not clear why Bratton was not to become a record owner, except that apparently it was thought that disclosure of Bratton's interest in the business might adversely affect the ability of the businesses to maintain an ABC permit. Gibbs was to obtain her equity position in the restaurant by accepting repayment of her two notes totaling $15,000 out of the $30,000 cash infusion from Twiner, and then immediately reinvesting the money in the restaurant in exchange for her one-third interest.

There is no evidence in the record that would indicate that Gillis had any part in these negotiations or that he was consulted in regard thereto by anyone. After the terms were arrived at, Gillis was asked to draft a contract designed to reflect the agreement of the parties, which he did. The contract was signed on November 11, 1988, by all parties except Baxter. Subsequent negotiations were required to obtain Baxter's approval of the agreement, but that was successfully completed by a contract addendum containing the additional terms insisted upon by Baxter. Baxter had previously personally

guaranteed performance of the lease to the Limited Partnership, and a part of this transaction contemplated a release of Baxter from his personal guaranty and a substitution of Twiner (with Bratton guaranteeing her performance) as the guarantor of the lease. This provision was incorporated into the contract addendum as Item 11, which contained the additional provision that "Mr. Gillis shall sign this document for the purpose of acknowledging his approval of said item 11." After the signatures of the principal parties to the agreement, there appears the following entry on the addendum: "Joined in by Norman Gillis, Jr. reflecting his approval of item 11. as it applies to him." This separate entry is followed by Gillis's signature.

It is uncontested that the plaintiffs and Jones then began operating the businesses. Twiner, among the new owners, was primarily involved in the day-to-day management activities of the business. Bratton's involvement was more sporadic, and apparently it was never contemplated that Gibbs would devote substantial time to business operations, though she did assist from time to time. The record shows that the parties experienced management conflicts almost from the outset, primarily between Jones and the new participants, over almost every aspect of the operation. Also, Twiner became convinced that she was being overworked and complained of this fact to her associates. There were cash-flow problems requiring Twiner to contribute another $4,000 into the businesses, and there were conversations with Jones as to the necessity of further cash infusions substantially in excess of the plaintiffs' original investment. Nevertheless, the record reflects that at least one of the new owners testified that business was good after they took over and that the operation had enjoyed an extremely busy holiday season.

The difficulties came to a head in early or mid-January 1989, when the three new owners abandoned any control over the operation of the business and retained counsel to advise and represent them. On January 16, 1989, their attorney sent a letter to Gillis by certified mail complaining of the situation and demanding return of their investment with interest. The thrust of this letter is best seen from the following excerpt:

> Mrs. Gibbs and Mr. Bratton are of the opinion that by failing to present them with documentation evidencing ownership in the corporation mentioned above, Mr. Westmoreland, Mr. Jones and Mr. Baxter have breached the terms of the enclosed general agreement and my clients should immediately receive the money with they have invested, plus interest . . . .

Shortly thereafter, this litigation was commenced, naming as defendants those persons mentioned in the January 16 letter along with Westmoreland, Gillis, and SME Lounge corporation. The plaintiffs claimed a right of rescission of the contract, entitling them to the return of their invested capital with interest, together with punitive damages of $500,000.

For cause of action against Gillis personally, the plaintiffs alleged in their complaint that Gillis "encouraged [them] to enter into the contract." They further charged that, due to his interest in the matter as general partner of the lessor of the premises and because of his fiduciary duty to Twiner and Gibbs arising out of his legal representation of them in other matters, "he had a material conflict of interest and must be held accountable to plaintiffs to the same extent as the other defendants named herein." A subsequent amendment to the complaint alleged that Gillis was a party to the

contract, by virtue of his signing the addendum consenting to the substitution of guarantors on the lease agreement.

Due to a number of circumstances, none of which are pertinent to our considerations in this appeal, the sole remaining defendant actively defending the plaintiffs' claim at the conclusion of the trial was Gillis. The lounge corporation was still technically a party, but it was not actively represented by counsel after Jones ceased active participation in the defense upon an announcement of his imminent intention to file a proceeding in the United States Bankruptcy Court.

At the conclusion of the proof, the chancellor found in favor of Gillis as to any personal liability based upon a violation of his fiduciary relationship to Gibbs and Twiner, and denied any relief against him on these allegations. It is solely from this aspect of the chancellor's final judgment that this appeal was taken.

II.

Discussion

Because the issue was not specifically raised at the trial level nor on appeal, and because the result we reach upon a review of the chancellor's findings of fact and conclusions of law is the same, we will decline to sua sponte investigate the doubtful proposition of whether the plaintiffs' decision to pursue the remedy of rescission entitled them to any monetary relief against Gillis. Gillis was not a party to the contract in the ordinary sense in which that term is understood. *See Campbell v. Westdahl*, 715 P. 2d 288, 295 (Ariz. Ct. App. 1985). He executed the contract for the very limited purpose of consenting to a substitution of guarantors under the lease. Perhaps if the remedy of rescission would lie against the principal parties to the contract, Gillis would be a necessary party to a rescission action since fully restoring the parties to their status immediately prior to contract execution would require a release of the substituted personal guarantors on the lease. Nevertheless, the fact still remains that, even should the plaintiffs prevail in an action based upon rescission, the plaintiffs would have no claim against Gillis for the return of monies paid, since he did not contract for nor receive any portion of the purchase price. The record shows a part of the plaintiffs' capital infusion may have been used to cure a rent delinquency; however, this fact no more makes Gillis accountable for the money than would be the local utility company if a part of the money had been used to pay delinquent utility bills.

Through a liberal construction of the pleadings, we will conduct our analysis on the basis that the plaintiffs' theory of recovery as to Gillis was in reality a claim for damages arising out of Gillis's alleged violation of the fiduciary duties he owed Gibbs and Twiner. Reviewing the judgment of the chancellor in this light, we face a two-step process. We must first consider the relevant findings of fact and second, the application of the law to those facts. As to the contested issues of fact, we do not review the record de novo. We may reverse the trial court's findings only upon a conclusion that the court was manifestly in error. *Denson v. George*, 642 So. 2d 909, 913 (Miss. 1994); *Bowers Window & Door Co. v. Dearman*, 549 So. 2d 1309, 1312 (Miss. 1989). As to alleged errors of law, our review is de novo. *Ford v. Holly Springs Sch. Dist.*, 665 So. 2d 840, 843 (Miss. 1995); *Mississippi State Tax Comm'n v. Medical Devices, Inc.*, 624 So. 2d 987, 989 (Miss. 1993).

The chancellor found as a matter of fact that Gillis, by his representation of Twiner and Gibbs on other legal matters, enjoyed a fiduciary relationship with them that affected his obligations to them in

this transaction, although he was not specifically retained by them to represent their interests in the purchase of the businesses. This finding is not contested on appeal and requires no further analysis.

The chancellor further found as a fact that Twiner, Gibbs, and Bratton neither relied upon Gillis's advice, nor were they influenced by Gillis to enter into the business purchase arrangement. The chancellor concluded that Gillis was unaware that negotiations leading to an agreement were even underway until the matter was presented to him as a *fait accompli* when he was asked to reduce the agreement to writing. We cannot find this finding to be manifestly in error. There were only two items of evidence that could arguably suggest Gillis's involvement in inducing or encouraging the plaintiffs to become involved in the business. There was some testimony that he had, in the past, indicated that such an investment opportunity might arise in the future and that it would be a good business opportunity. There was also testimony that Gillis had discouraged a possible investment by Twiner and Gibbs in a local gift shop. This evidence is not sufficient to support an inference of active involvement by Gillis in inducing the plaintiffs to invest in the businesses. There is no basis for this Court to disturb the chancellor's finding of fact on this issue.

The chancellor also made a finding of fact which is not contested on appeal, and to which there can be little doubt. He found that Gillis had a personal interest in the continuing vitality of the businesses operated on the Ice House property. Though he had no direct ownership in the businesses, Gillis, in his capacity as general partner of the Limited Partnership, had a personal interest in the transaction which could conflict with the interests of the plaintiffs. This potentially conflicting interest requires this Court to review Gillis's actions in regard to the transaction in a light different from that which would otherwise apply. Accepting the chancellor's finding of an on-going fiduciary relationship between Gillis and the plaintiffs, Gillis's role in the transaction must receive close scrutiny.

> The relationship of attorney and client is one of special trust and confidence. The law requires that all dealings between them shall be characterized by the utmost fairness and good faith on the part of the attorney. So strict is this rule that dealings between an attorney and his client are held as against the attorney to be prima facie fraudulent and the attorney, in order to sustain such a transaction which is advantageous to him, has the burden of showing, not only that he used no undue influence, but that he gave his client all of the information and advice, which it would have been his duty to give if he, himself, had not been interested . . . . The law not only carefully watches over all transactions between attorney and client, to see that no advantage is taken of the client by his attorney, but it often goes further, and holds such transactions void, which between other persons would be held valid.

Gwin v. Fountain, 159 Miss. 619, 126 So. 18, 22 (1930).

Certainly Gillis was not contracting directly with the plaintiffs in this case, so that *Gwin* would not have direct application. Yet we conclude that, in view of the substantial stake Gillis had in the transaction, indirect though it may have been, the principles announced in *Gwin* properly articulate the considerations of law that must be addressed in resolving this appeal.

The considerations necessary to overcome a presumption of undue influence which arises by the proof of a fiduciary relationship were set out in *Murray v. Laird* as being three-fold. With slight modification to conform to the facts of this case, they were (1) good faith on the part of the fiduciary; (2) full knowledge and deliberation by the remaining parties as to their actions and the consequences of their actions; and (3) independent competent advice. *Murray v. Laird*, 446 So. 2d 575, 579 (Miss. 1984). The third requirement was subsequently found to pose "impossible evidentiary encumbrances, " and was redefined to require only proof that the remaining parties "exhibited independent consent and action." *Mullins v. Ratcliff*, 515 So. 2d 1183, 1193 (Miss. 1987). These elements must be proved by clear and convincing evidence. *Murray*, 446 So. 2d at 578.

The chancellor found, in effect, that the plaintiffs in this case were all independent, competent and self-reliant individuals who relied upon their own experience and their own judgment in arriving at the decision to enter into the contract. The facts support the proposition that Gillis's preliminary consultation on the advisability of entering into the deal was simply not sought by the plaintiffs. Even after Gillis became involved when asked to draft the contract, there was no indication that any of the plaintiffs undertook to seek out Gillis's advice or that Gillis exerted any influence over any of the plaintiffs to consent to any particular aspect of the transaction. Counsel for the plaintiffs points to nothing in the record that would support a finding that Gillis was acting in anything other than good faith in assisting all of the parties in consummating a deal that, in all of its material particulars, had already been struck when he first became involved. We can discover in this transaction no exercise of undue influence that is prohibited by such cases as *Mullins*, and *Murray*.

It is important to keep in mind that it takes something more than proof of the existence of a fiduciary duty to create a right of recovery. There must be proved a *breach* of that duty. Having concluded that the chancellor was not manifestly in error in finding no affirmative exercise of undue influence by Gillis to persuade the plaintiffs to enter into the deal, we come to consideration of the second aspect of *Gwin*. We must consider whether Gillis "gave his client all of the information and advice, which it would have been his duty to give if he, himself, had not been interested." *Gwin*, 126 So. at 22.

Gillis's alleged failure in this regard must be measured by events occurring on or before the date the plaintiffs elected to abandon the businesses and seek contract rescission. In that framework, we can find nothing that would lead us to conclude that the chancellor was manifestly in error in denying any relief to the plaintiffs. The evidence is uncontradicted -- in fact, it was supplied by the plaintiffs themselves -- that, after they assumed their ownership role in November, the businesses performed well. Their sole apparent complaint deemed by their counsel worthy of note in the January 16 letter was that they had not received the documentary evidence of their ownership in the businesses (apparently having reference to the lack of issued stock certificates), and the fact that the restaurant business had not been incorporated at the time of sale when there was some indication in the contract that it was a corporation.

We have little trouble in determining that the failure to timely issue stock certificates, standing alone, is not ground for rescission of a contract. More particularly in this case, this failure certainly entitles the plaintiffs to no relief against Gillis in the form of monetary damages. We find nothing in the record that indicates that Gillis at any time affirmatively undertook the duty of seeing that stock certificates were prepared and distributed. Even had he assumed that responsibility, his unexplained failure to do so might constitute a basis to change lawyers to one prepared to carry out these largely

ministerial duties, but it certainly does not suggest the propriety of a rescission of the contract.

As to the fact that the restaurant business was not incorporated, the record shows unequivocally that the plaintiffs suffered no damage from that fact. The contract prepared by Gillis on its face is equivocal as to whether the restaurant business was being operated as a corporation or as a partnership, and it is uncontradicted that Gillis at the time of drafting did not know for certain. Nevertheless, the contract itself contemplated the formation of a new corporation to operate the restaurant business so that it was of no moment what business form the restaurant operation had been conducted under prior to the time of contract. At trial, counsel for the plaintiffs belabored at length Gillis's failure to make an independent inquiry with the secretary of state's office to determine whether or not the business was incorporated. What is not clear is what harm his clients suffered as a result. There is nothing in the record to suggest, and it is not logical to assume, that had the plaintiffs known beyond question that the restaurant business was operating as an unincorporated partnership, that they would have had reason to shy away from the deal.

At the trial, plaintiffs attempted to show some lack of diligence in the pursuit of the transfer of the ABC license to the new businesses. They also presented evidence that would suggest that the manner in which the businesses handled the sale of alcoholic beverages in the restaurant portion of the premises may have constituted a violation of existing ABC regulations.

As to the first complaint, the evidence appears inconclusive at best that Gillis had assumed any duty or obligation to the plaintiffs to see to the transfer of the license. In fact, the record demonstrates fairly clearly that the owners themselves were undertaking to handle the matter directly with the commission. However, any alleged lack of diligence on Gillis's part in pursuing such duties, even were they established beyond question, might constitute a separate claim against Gillis for legal malpractice, but would not relate back to the original decision to enter into the contract to support an action for rescission.

As to the second issue, plaintiffs seem to contend that Gillis had a duty to inform them that there were potential problems in the method of operation by which only the lounge was licensed to dispense alcoholic beverages. The record is clear on the point that, as of January 1989, when the plaintiffs attempted to rescind the contract, there had been no regulatory problems with the Alcoholic Beverage Commission. The subsequent potential problems that surfaced as a result of a phoned-in tip by a person formerly associated in the Ice House operation arose well after the plaintiffs had abandoned their interests in the businesses on other grounds. It is impossible to determine how the regulatory problems discovered by the subsequent ABC investigation would have resolved themselves had the business still been operating under the form begun in November 1988. It is entirely possible that, had the new owners pursued the license transfer with more diligence, the commission's investigation in connection with the transfer would have uncovered any possible problems that could have then been easily resolved. It may have been that certain changes in the business operation would have been required, or possibly even that both the restaurant and the lounge would have had to apply for separate ABC permits. Neither possibility would seem to pose such insurmountable problems that would suggest that Gillis's failure to point out this possibility would constitute grounds to simply walk away from the deal. More to the point, on the facts before this Court, it is impossible to conclude that these unforeseen potential problems constituted a legal basis to abandon the business in January 1989.

The chancellor found as a matter of fact that internal disputes among the owners on a number of issues, all arising after consummation of the transaction, along with cash flow problems, were the driving factors that led the plaintiffs to abandon these viable businesses. We cannot, based upon our review of the evidence, conclude that this was manifestly in error. The sole issue before this Court on appeal is the matter of any alleged violation by Gillis of his fiduciary obligations to the plaintiffs resulting in their damage. The chancellor found no such violation, and we agree. This judgment must be affirmed.

THE JUDGMENT OF THE CHANCERY COURT OF PIKE COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, AND KING, JJ., CONCUR. PAYNE AND SOUTHWICK, JJ., NOT PARTICIPATING.