IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00827 COA

ARDEAN SHAW APPELLANT

v.

JOHN H. BOYD APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. KEITH STARRETT

COURT FROM WHICH APPEALED: PIKE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: CHARLES E. MILLER

ATTORNEY FOR APPELLEE: EDWIN L. BEAN, JR.

NATURE OF THE CASE: CONTRACT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT IN FAVOR OF APPELLEE.

MANDATE ISSUED: 8/5/97

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

BRIDGES, C.J., FOR THE COURT:

Ardean Shaw (Shaw) sued John Boyd (Boyd) in the Circuit Court of Pike County, Mississippi for breach of contract relating to the sale of land owned by Boyd. Summary judgment was rendered in favor of Boyd, and from that judgment Shaw appeals. Shaw claims that the parties entered into an executory contract for the sale of land and that any money deposited with Boyd constituted a refundable down payment or earnest money on the land. Boyd claims that the parties' agreement was in the form of an option contract and that any money deposited with him was simply consideration for the option and, as such, was non-refundable. We find that the circuit judge was correct in his grant of summary judgment for Boyd. Accordingly, we affirm.

FACTS

The facts in this case revolve around a series of letters between Shaw and Boyd. Shaw desired to purchase real estate from Boyd, and the two formed an agreement to that effect. The letters may be summarized as follows:

LETTER 1

Date: 12/10/92

From: Shaw

To: Boyd

In this letter, Shaw included $5,000 as a "promissory note/earnest deposit." Shaw mentions in the letter that the $5,000 is refundable if the funding was not approved. Boyd later added a sentence to the letter stating that if funding is not approved within 90 days, the money would not be refundable. Boyd claims to have sent the revision to Shaw. The letter is signed by both parties.

LETTER 2

Date: 3/24/93

From: Shaw

To: Boyd

Shaw included another $9,000 with this letter as partial down payment and earnest money for the property. The remainder of the letter refers to Shaw's progress in getting financing and selling his home. There is no mention of a time limit in this letter. Boyd is asked to sign the letter if he agrees with what it says. The letter is not signed by Boyd.

LETTER 3

Date: 3/29/93

From: Boyd

To: Shaw

In this letter, Boyd acknowledges his receipt of both the $5,000 and $9,000 checks as earnest money for the purchase of the house. The last paragraph states that in return for the $9,000, the property would be held for Shaw until 6/10/93 unless both parties were to agree otherwise within 90 days of this letter. Shaw signed this letter on April 6, 1993.

LETTER 4

Date: 3/29/93

From: Boyd

To: Shaw

This appears to be a cover letter to LETTER 3. This letter also mentions the time limit. It is unsigned by Boyd.

LETTER 5

Date: 8/10/93

From: Boyd

To: Shaw

This letter informs Shaw that the option period has expired and that he intends to seek other buyers for the property.

Shaw filed a motion for summary judgment on March 24, 1994 that was not supported by depositions or affidavits. Boyd filed his cross motion for summary judgment on April 6, 1994, with the support of the letters and Boyd's affidavit. An affidavit was never received by the court from

Shaw. The trial judge considered the letters together and concluded that they collectively evidenced the existence and expiration of an option contract. This being so, the trial judge ruled that there was no genuine issue of material fact that would warrant a trial on the matter. Shaw now appeals that order.

STANDARD OF REVIEW

Our supreme court has recently articulated our standard of review of a summary judgment as follows:

We employ a de novo standard of review in analyzing a lower court's grant of a summary judgment. A motion for summary judgment lies only when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. To prevent summary judgment, the non-moving party must establish a genuine issue of material fact by means allowable under the Rule [56]. The Court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried.

Baptiste v. Jitney Jungle Stores of America, Inc., 651 So. 2d 1063, 1064 (Miss. 1995).

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER THE AGREEMENT BETWEEN APPELLANT AND APPELLEE CONSTITUTED AN EXECUTORY CONTRACT FOR SALE OR AN OPTION CONTRACT.

II. WHETHER THE $14,000.00 WAS CONSIDERATION FOR AN OPTION CONTRACT OR A DOWN PAYMENT ON AN EXECUTORY CONTRACT.

Since both of the above questions may be answered by our review of the lower court's grant of summary judgment, we shall discuss them together. In determining the intent of the parties, the above letters should be construed together. See *Management, Inc. v. Crosby*, 197 So. 2d 247 (Miss. 1967). Our review of the record in this case reveals that the parties intended to create an option contract and that the consideration for this option was the $14,000.00 paid to Boyd. This is especially supported by the content of letters 1 and 3.

An option has been described by our supreme court as follows:

An option, when supported by a valid consideration, constitutes a continuing offer to sell which is irrevocable during the period specified therein. . . . When he accepts the offer in the prescribed manner and before expiration thereof, the contract for sale is complete and binding upon both parties. It is incumbent upon the optionee to exercise the option in the manner provided in the contract and, unless such requirements are waived, his failure to do so, or his attempt to exercise it in another manner, is inoperative to form a binding contract for sale.

D.G. Robinson v. Martel Enterprises, Inc. 337 So. 2d 698, 702 (Miss. 1976). Letter 1 formed the

contract for the sale of Boyd's property. In this letter, the parties clearly contemplated that the $5,000 be non-refundable after ninety days. This contract was later amended by Letter 3 in that for additional consideration paid, $9,000.00, the period within which the deal was to close was extended. The optionee, Shaw, did not exercise the option within the period described by the option. Moreover, it is well settled in this state that when a vendor is ready and willing to perform the vendee may not recover his down payment (earnest money). *G.C. Coats v. J.F. Taylor*, 332 So. 2d 417, 419 (Miss. 1976).

Furthermore, Shaw filed his motion for summary judgment without any support in the way of depositions or affidavits. It is true that Rule 56 of the Mississippi Rules of Civil Procedure does not require that affidavits be filed in support of such a motion. M.R.C.P. 56(a). When Boyd subsequently filed his counter motion for summary judgment with the support of all the letter contracts, the complaint and answer, request for admissions, a memorandum brief, and Boyd's affidavit, Shaw was required to do more than rest on his pleadings in defense of Boyd's motion. M.R.C.P. 56(e). See also *Palmer v. Biloxi Regional Medical Center*, 564 So. 2d 1346, 1356 (Miss. 1990). The only support Shaw provided for his motion was his memorandum brief. Restraining its view to the pleadings that were before the court as dictated by Rule 56, the judge ruled that there existed no genuine issue of material fact that would warrant a trial on the merits. We agree and affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.