IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00286 COA

DENNIS SANDERS, A/K/A DENNIS ROUSSEAU SANDERS AND DEBORAH SANDERS — **APPELLANT**

v.

JOYCE SANDERS VIA — **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	01/13/96
TRIAL JUDGE:	HON. JON M. BARNWELL
COURT FROM WHICH APPEALED:	QUITMAN COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	J. FRANK HALL
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: INFORMATION OMITTED
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	LEASE AGREEMENT STRICKEN AS DEFENSE IN PARTITION SUIT
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

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

BRIDGES, C.J., FOR THE COURT:

Joyce Sanders Via and her brother Dennis Sanders inherited 640 acres of land in Quitman County, Mississippi from their father. Via and Sanders each had an undivided half interest in the land. In 1995, Via filed suit to partite the land, and Sanders presented the affirmative defense of a lease-purchase contract existing between Via and himself. The trial court found that Sanders materially breached the contract and Via had rightfully terminated it, thus striking Sanders's affirmative defense. The trial court found for Via and entered an order partiting the land. On appeal, Sanders presents the following issues:

I. DID THE TRIAL COURT ERR IN ITS RULING THAT JOYCE VIA HAD A RIGHT TO

TERMINATE HER LEASE PURCHASE CONTRACT TO SELL HER LAND TO DENNIS SANDERS?

(a). Was the breach by Dennis Sanders a material breach so as to warrant termination of the contract?

(b). Is a contracting party allowed to cure the breach under the circumstances of the contract?

(c). Did Joyce Via cause the three week delay in payment, and if she did, is the contractual provision relieving Dennis Sanders of liability under such circumstances, applicable?

(d). By Joyce Via considering that the contract was terminated on 1-23-95 and accepting on 1-27-95 a check for $1,950 from Dennis Sanders that was owed on future obligations under the contract, was Joyce Via deemed to have ratified the contract?

(e). Did the trial court err when it ruled that Joyce Via's acceptance of the $1,950 on 1-27-95 was for the payment of past due rent owed by Dennis Sanders to Joyce Via?

II. DID THE TRIAL COURT ERR BY OVERRULING DENNIS SANDERS'S MOTION FOR A NEW TRIAL, ACCOMPANIED BY A SUPPORTING AFFIDAVIT, WITHOUT THE BENEFIT OF A COUNTER AFFIDAVIT HAVING BEEN FILED BY JOYCE VIA?

Finding no error, we affirm

FACTS

Via and her brother executed a written contract on February 7, 1993. The contract allowed Sanders to rent Via's half interest in the 640 acres from 1-1-93 to 1-31-99 for $30 per acre, or $9,600 per year. Yearly rent was due Via on or before December 31 of each year. The purchase price of the property was $10,000 lump sum payment over and above the yearly rentals, due at the end of the seven year lease. The contract also stated that Via would be responsible for all taxes and liens for 1992, but Sanders would become responsible for the taxes and liens (Small Business Administration loans owing on the land) the current and future years. However, an amendment to the contract in September 1993 made both Via and Sanders responsible for the taxes and liens upon the land. Each was to pay half of the taxes and liens for 1992 and future years.

The contract gave Via the option to terminate the contract on three days written notice in the event (among other things) Sanders failed to comply with the provisions of the contract. Additionally, the contract contained the following language concerning waiver:

> The failure of either party to insist, in any one or more instances, upon a strict performance of any of the covenants of this Agreement shall not be construed as a waiver, or a relinquishment for the future of such covenants, but the same shall continue and remain in full force and effect.

Via and Sanders worked out an arrangement where Sanders would pay Via's half of the taxes and the S.B.A. loans and deduct that amount from the annual rent payment of $9600. Sanders was always

delinquent in payment of the taxes and the S.B.A. loans. Via received a notice in 1993 that payments were delinquent and confronted Sanders about what he was doing with her money. Sanders replied that he was taking care of it. However, in December 1994, Sanders still had not become current with the S.B.A. payments. Since he was deducting Via's part of the payment from the amount he owed her as rent, he was also delinquent in paying her yearly rent. December 31 came and went, and Sanders did not fulfill his contractual obligation. Via sent a termination letter on January 23, 1995, for failure to pay rent according to the terms of the contract. Sanders tendered a check to Via for $1950 on January 27, 1995. Via accepted the check as past due rent.

Sanders makes several claims on appeal. First, he claims that Via caused the delay in payment when she asked Sanders not to make the S.B.A. payment, but instead give her money to keep her house from being foreclosed. Via claimed at trial that no such thing ever happened. Additionally, Sanders claims that when Via accepted the check on January 27, 1995, Sanders had cured any breach that may have occurred. Sanders claims that if the contract is allowed to be terminated, then it will be unjust enrichment on Via's part, and he will have lost large amounts of money. The trial court found that Sanders did not lose any money by making the yearly rental payments. Sanders was paying rent on the land and enjoying the benefit of rental payments from hunters and farmers. The trial court found that Sanders materially breached the contract by failing to pay the annual rent by the date specified in the contract. Sanders affirmative defense of a valid contract failed, and the trial court partitioned the land per Via's petition.

DISCUSSION

I(a). Was the breach by Dennis Sanders a material breach so as to warrant termination of the contract?

Sanders claims that his failure to pay rent by the date specified in the contract does not amount to a material breach, and that equity abhors a forfeiture. The contract clearly states that annual rent must be paid by December 31 of each year. Additionally, the contract gives Via the right to terminate the contract in the event Sanders fails to comply with such provision.

The Mississippi Supreme Court has stated that termination of a contract is a severe remedy that should only be granted in the face of a material breach. ***UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc.*, 525 So. 2d 746, 756 (Miss. 1987).** "A breach is material when there 'is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially defeats its purpose,' ***Gulf South Capital Corp. v. Brown*, 183 So. 2d 802, 805 (Miss. 1966)**, or when 'the breach of the contract is such that upon a reasonable construction of the contract, it is shown that the parties considered the breach as vital to the existence of the contract,' ***Matheney v. McClain*, 248 Miss. 842, 849, 161 So. 2d 516, 520 (1964)." *UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc.*, 525 So. 2d 746, 756 (Miss. 1987).** Additionally, the determination of materiality is a question of fact, "albeit one of ultimate fact, not evidentiary fact." ***Id.*** "The standard for determining materiality must necessarily be both 'imprecise and flexible' to 'further the purpose of securing for each party his expectation of an exchange of performances.'" ***Id.*** (quoting Restatement (Second) of Contracts § 241 cmt. a (1981)).

In interpreting contracts to determine the meaning of the contracting parties, the first rule is "to give

effect to the intent of the parties." ***UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc.,* 525 So. 2d at 754** (citation omitted). "More correctly stated, our concern is not nearly so much what the parties may have intended as it is with what they said, for the words employed are by far the best resource for ascertaining intent and assigning meaning with fairness and accuracy." ***Id.*** In Sanders's and Via's contract, the language specifically states that rent is due on the thirty-first day of December each year, and that failure to comply with such terms gives Via the right to terminate the contract. It strikes us that such language makes the payment of rent by a certain date a material condition of the contract. A breach of such condition results in the right to terminate the contract, thus making the breach in this instance a material one. While this result may appear harsh to Sanders, forfeiture "will be enforced when mandated by a legally valid contract." ***Columbus Hotel Co. v. Pierce,* 629 So. 2d 605, 608 (Miss. 1993).** In *Columbus Hotel,* the Mississippi Supreme Court quoted with approval an opinion by the Kentucky Court of Appeals which stated, "a court 'cannot make for the parties a different contract than they have made for themselves.'" ***Id.* at 609** (quoting *Blue Ridge Coal Co. v. Hurst,* 196 Ky. 432, 244 S.W. 892, 893 (1922)). While Sanders no longer has the contractual right to purchase Via's half of the property, he has not lost anything for which he has not received some benefit. While paying rent on Via's land, Sanders collected rent on the entire parcel from farmers and hunters.

The trial court found that the breach was material and that Via was correct in terminating the contract. Our standard of review of a trial judge's findings is familiar: "[T]he findings of fact of a trial court should and must be accepted unless they are manifestly wrong." ***UHS-Qualicare v. Gulf Coast Community Hospital, Inc.,* 525 So. 2d 746, 753 (Miss. 1987)** (citations omitted).

I(b). Is a contracting party allowed to cure the breach under the circumstances of the contract?

Sanders's entire argument on this point is two sentences long. He simply states that Mississippi recognizes the common law doctrine of cure. In support of his argument, Sanders refers us to ***Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith,* 523 So. 2d 324, 328 n. 1 (Miss. 1988)**. Note one of that case deals with the availability of cure for breach of warranty of merchantability, not breach of contract. We are not dealing with sales or the UCC in the present case. Sanders's argument is non-existent and unsupported by authority. When one fails to make a clear argument or cite meaningful authority, this Court need not consider his issue. ***Coleman v. State,* 697 So.2d 777,787 (Miss. 1997).**

I(c). Did Joyce Via cause the three week delay in payment, and if she did, is the contractual provision relieving Dennis Sanders of liability under such circumstances, applicable?

Sanders claims that he had the money to pay the S.B.A. loans and the rent by December 31,1994. However, Sanders claims, Via told him she needed some money to keep her house out of foreclosure. Sanders states in his brief that the entire story is set out in his affidavit attached to his motion for new trial, which was overruled by the trial court. At trial, the court heard Sanders's testimony that he sent part of the S.B.A. payment to Via because she needed it for her house. However, Via testified that when she learned that Sanders had not paid the S.B.A., she requested that he send her part of the payment back instead of holding on to it. Again, Sanders's argument is as brief as it is unsupported. He fails not only to show how Via caused him to be so late in his payment, he fails to support his argument with any case authority.

I(d). By Joyce Via considering that the contract was terminated on 1-23-95 and accepting on 1-27-95 a check for $1,950 from Dennis Sanders that was owed on future obligations under the contract, was Joyce Via deemed to have ratified the contract?

I(e). Did the trial court err when it ruled that Joyce Via's acceptance of the $1,950 on 1-27-95 was for the payment of past due rent owed by Dennis Sanders to Joyce Via?

Sanders combines these two arguments in his appellate brief. He claims that Via's deception was so complete that the trial court was tricked into believing that the $1950 that Via received in January 1995 from her brother was past due rent. Sanders claims that it was payment on 1995 obligations yet to come due. However, the discourse between the trial court and Sanders's counsel at trial shows otherwise. This case is extremely confusing because of the perpetual tardiness of S.B.A. payments and taxes, and the rent deductions Sanders used to pay Via's part of the loans and taxes. The trial court was confused after having so many figures thrown at him during trial, and asked Sanders's counsel to go through the 1994 payments with him. By the end of 1994, Via should have been paid a total of $9, 600. The total payments made to Via or on her behalf by December 31, 1994 totaled $5,385 according to Sanders's counsel. Sanders's counsel stated to the judge,"Yeah. Well, we admit we've got a deficiency there, Your Honor." The trial court found that Sanders did not fulfill his obligations under the contract by the specified time, and that the $1950 check in January 1995 was for past due rent.

II. DID THE TRIAL COURT ERR BY OVERRULING DENNIS SANDERS'S MOTION FOR A NEW TRIAL, ACCOMPANIED BY A SUPPORTING AFFIDAVIT, WITHOUT THE BENEFIT OF A COUNTER AFFIDAVIT HAVING BEEN FILED BY JOYCE VIA?

Sanders filed a motion for new trial with an affidavit attached. Via responded without filing a counter affidavit. The trial judge, in his discretion, overruled the motion for new trial. Sanders claims that it was error for the trial court to overrule his motion for new trial without the benefit of a counter affidavit. However, Sanders recites no Mississippi law to support his argument. Via argues on appeal that Sanders did not bring to light any new facts or issues that had not already been presented to the trial court. Even if some of the facts presented by Sanders were true, they could have been fully explored during the trial. Additionally, argues Via, the granting of a new trial is entirely up to the trial court's discretion. **Mississippi Rule of Civil Procedure 59(c)** states:

> When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

Sanders has failed to present us any authority requiring Via to file counter-affidavits in response to his motion for new trial. Sanders's affidavit accompanying his motion for new trial simply rehashed testimony given at trial regarding the parties' payment schedule. Sanders also stated again that it was Via's fault that he was late making the rent payment. The affidavit did not relate anything new or worthy of consideration. The granting of a motion for new trial rests with the trial judge. "While a motion for judgment notwithstanding the verdict presents to the Court a pure question of law, the

motion for a new trial is addressed to the trial court's sound discretion." ***Jesco, Inc. v. Whitehead,* 451 So. 2d 706, 714 (Miss. 1984)**. Sanders has failed to persuade us that the trial court abused its discretion in overruling his motion for new trial. As with Sanders's other issues, this one is meritless.

THE JUDGMENT OF THE QUITMAN COUNTY CHANCERY COURT IS AFFIRMED. COSTS OF THIS APPEAL ASSESSED AGAINST APPELLANTS.

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