

IN THE COURT OF APPEALS 03/12/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00068 COA

WILLIAM E. PRINGLE, FRANK E. PRINGLE, AND REED PRINGLE

APPELLANTS

v.

BRAD CANAAN AND EARL FAYARD

APPELLEES

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

TRIAL JUDGE: HON. WILLIAM L. STEWART

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

MICHAEL P. COLLINS

ATTORNEYS FOR APPELLEE:

FLOYD J. LOGAN

WALTER L. NIXON, JR.

NATURE OF THE CASE: REAL ESTATE CONTRACT

TRIAL COURT DISPOSITION: JUDGMENT FOR BUYERS - SPECIFIC PERFORMANCE
ORDERED

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This case concerns a real estate sales contract and involves a complex assortment of facts, dates, letters, meetings, offers, and counteroffers. However, basic contract law controls the outcome. The property buyers filed suit against the sellers for specific performance of the alleged real estate sale. The Harrison County Chancery Court found for the buyers and ordered specific performance in its opinion and final decree. The sellers now claim on appeal that the trial court erred in its opinion and final decree and in its dismissal of their slander of title counterclaim for damages. We find that the chancellor was manifestly in error in requiring specific performance and reverse. However, we affirm the chancellor's dismissal of the sellers' counterclaim for damages.

FACTS

William, Frank, and Reed Pringle own a certain tract of real estate in Biloxi. On March 25, 1992, the Pringles listed their property for sale through Magnolia Realty. The "Authorization to Sell Real Estate" agreement gave Magnolia the exclusive right to market the property at a price of \$175,000.00 for 180 days and thereafter until withdrawn by the sellers with 30 days written notice. It specified terms of the sale to be cash or such terms as may be acceptable to the sellers. Brad Canaan is the secretary/treasurer of West Freezing, Inc., which is located next to the Pringle's property. Canaan contacted Gray Slay, a realtor with Magnolia, and told him of his interest, in conjunction with Earl Fayard, in buying the property. On July 28, 1992, Canaan executed a "Deposit Receipt and Sales Contract" with Donn Mitchell, Slay's boss at Magnolia. This offer was open for acceptance up to and including July 30, 1992. Fayard had given Canaan \$500.00, which Canaan matched in a \$1,000.00 check that he gave to Mitchell for the earnest deposit. Fayard did not sign this contract/offer, and Mitchell never deposited the \$1,000.00 earnest money.

Mitchell sent the offer to Frank Pringle. The Pringles modified the offer, signed it, and sent the package back to Mitchell. This package included several modifications, additions, and an addendum. The modifications are summarized as follows: (1) no assignment without prior approval of the seller; (2) if the offer is accepted by both parties, then a closing would take place in no more than forty-five days from such acceptance and no later than September 15, 1992; (3) if the purchaser fails to pay the balance of the purchase price or to complete said purchase, amounts paid shall be retained as liquidated and agreed damages; (4) the contract shall be in force for forty-five days from the date of acceptance by all parties and no later than September 15, 1992; (5) to be valid, the contract must be properly executed in all parts by all parties; and (6) the sale is subject to the addendum attached and made part of the contract.

The provisions of the addendum are summarized as follows: (1) the contract must be signed by each party to the contract; (2) the contract is not assignable without specific written approval of the sellers; (3) the pre-payment penalty is based on the outstanding unpaid principal loan balance; (4) the purchasers are to provide current, signed financial statements, and proof of the financial ability and creditworthiness to warrant a loan, together with demonstrated ability to repay the obligation under the loan terms; (5) the property is to be purchased "as is" and all costs of the sale will be borne by the purchasers, except the cost of a warranty deed to be provided by the sellers; and (6) the loan is subject to terms and conditions included in the brief submitted to Judge Lawrence Semski, who has been requested to provide legal services and advice to the sellers, and/or other terms and/or

conditions recommended by counsel. None of the parties ever signed the addendum, although the Pringles did sign their counteroffer that incorporated the addendum by reference.

The Pringles sent the modified offer package to Semski, who forwarded a smaller unopened envelope containing the counteroffer to Mitchell. This package included the brief referred to in the addendum and papers related to the sale of the property. The brief listed twelve items that a promissory note and mortgage should provide, but did not instruct Semski to prepare any documents. Mitchell discussed the modified offer with Canaan, who neither accepted nor rejected it. However, neither the Pringle modification or the addendum were ever signed or executed by Canaan or Fayard. Neither the parties nor the realtors ever contacted Semski regarding preparation of any documents.

On September 17, 1992, Canaan met with attorney Wayne Hengen, who wrote to Slay on behalf of Canaan and Fayard and offered to pay cash for the Pringle property. William Pringle received the offer and, after trying to contact Slay and Mitchell, called Hengen and told him the property had been taken off the market. The next day Hengen sent Mitchell a letter reiterating Canaan and Fayard's desire to buy the property, that their desire had properly been transmitted through Canaan's original offer within the listing agreement's 180-day time period, and that they were prepared to file suit for specific performance. On September 23, 1992, Hengen sent a second letter to Mitchell contending that the original Canaan offer was valid and, if there was no response, that they would file suit for specific performance within ten days.

Canaan and Fayard filed a complaint for specific performance and, subsequently, a lis pendens notice identifying the Pringle property. The Pringles denied that any contract existed and sought damages for slander of title. The chancery court held a trial on October 17 and 18, 1994, and took the matter under advisement. The chancery court filed a written opinion on November 30 and a final decree on December 16 requiring the sale of the property through specific performance and denying damages for slander of title. The Pringles appeal that decision.

ANALYSIS

I. DID THE TRIAL COURT ERR IN:

(1) FINDING EITHER THE EXISTENCE OF AN ACCEPTANCE OF CANAAN'S ORIGINAL OFFER TO PURCHASE THE PROPERTY OR A MEETING OF THE MINDS TO JUSTIFY A VALID CONTRACT;

(2) FINDING THAT A PARTNERSHIP OR JOINT VENTURE EXISTED BETWEEN CANAAN AND FAYARD, AND THAT MAGNOLIA REALTY COULD BIND THE PRINGLES BY ACCEPTING CANAAN'S ORIGINAL OFFER;

(3) MAKING ITS FINDINGS OF FACT BASED ON THE EVIDENCE; AND

(4) DISMISSING THE PRINGLES' COUNTERCLAIM FOR DAMAGES FOR SLANDER OF TITLE AND EXCLUDING EVIDENCE SUPPORTING THAT CLAIM?

The Pringles argue that they never accepted Canaan's original offer to buy their property, nor did Magnolia Realty have the power to accept Canaan's original offer on their behalf. They also contend that they proposed a counteroffer which was neither accepted nor rejected by Canaan, Fayard, or any partnership between the two, within the time allotted. They further argue that the chancellor's findings of fact were either not supported by trial evidence or were contradicted by trial testimony. Finally, they contend that the chancellor's dismissal of their slander of title counterclaim was in error. They argue that the chancellor excluded evidence that would have shown Canaan's malicious intent to tie up the property in litigation, and thereby prevent the Pringles from selling the property to anyone else, by his filing of a lis pendens notice unless he was granted the right to market the Pringles' property, along with his own, to a nearby gambling casino. They request damages for slander of title and for the tortious interference of their rights to contract with other buyers.

On the other hand, Canaan and Fayard argue that Canaan's original offer to buy the Pringle's property was enforceable and that the court's findings were supported by substantial evidence. They contend that, even if termed a counteroffer, they accepted the Pringle's addendum because it could not be withdrawn until at least the end of the forty-five-day closing date due to the \$1,000.00 earnest deposit. Moreover, they contend that the Pringles waived any closing deadline because the latter failed to provide them with the Semski brief and associated closing information, resulting in impracticality of performance. Finally, they argue that the chancellor was correct in dismissing the slander of title counterclaim for damages because they have a valid legal right to have their contractual claim for specific performance decided by the court. They base this contention on the fact that their filing of a lis pendens notice cannot constitute slander of title. They also believe that the chancellor correctly excluded evidence allegedly supporting a tortious interference with contractual rights because the Pringles failed to plead this cause of action in their complaint.

The Mississippi Supreme Court has stated that, on appellate review, a chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings. *Brooks v. Brooks*, 652 So. 2d 1113, 1124 (Miss. 1995) (citations omitted). The appellate scope of review is limited since the Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous, or if an erroneous legal standard was applied. *Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994) (citation omitted). Simply stated, "[t]his Court will not hesitate to reverse a chancellor when his findings are manifestly wrong or when he has applied an erroneous legal standard." *Mississippi Dep't of Human Serv. v. Marquis*, 630 So. 2d 331, 334 (Miss. 1993) (citations omitted). The word "manifest" is defined as open, clear, unmistakable, and evident. Black's Law Dictionary 962 (6th ed. 1990). Moreover, the manifest error/substantial evidence rule applies only to factual situations and not to questions of law, which require de novo review. *Holliman v. Charles L. Cherry & Assocs., Inc.*, 569 So. 2d 1139, 1145 (Miss. 1990) (citations omitted). This rule applies whether the finding is one of evidentiary fact or of ultimate fact. *Gilchrist Mach. Co. v. Ross*, 493 So. 2d 1288, 1292 (Miss. 1986) (citations omitted).

The existence of a contract is a question of fact that, in the case of a jury trial, should be presented to the jury. *Ham Marine, Inc. v. Dresser Indus., Inc.*, 72 F.3d 454, 458 (5th Cir. 1995). "Where one party to an action affirms and the other denies the existence of a contract, and the evidence introduced is conflicting but there is evidence from which a contract may be inferred, the jury should determine the fact of the existence or nonexistence of the contract." 75A Am. Jur. 2d *Trial* § 791 (1991). "The question of whether a contract was made has been said to be one of fact." *Id.* § 794.

Where the evidence conflicts, the question of whether a contract was accepted is usually for the jury and, therefore, is a question of fact. *Id.* § 796. The power to resolve a question of fact belongs to a chancellor where a trial is conducted without a jury. Therefore when evidence conflicts, the question surrounding the existence of the elements of a legally binding contract is a question of fact. Likewise when evidence conflicts, the issue of whether a contract was accepted is a question of fact.

Elementary contract law states that a valid contract requires at least an offer and an acceptance. *R.C. Constr. Co. v. National Office Sys.*, 622 So. 2d 1253, 1255 (Miss. 1993). After a thorough review of the record in the present case, we find that the chancellor's finding of fact that a valid contract existed between the parties was manifestly in error. In the case at bar, the parties presented a total of three separate and distinct offers over the course of about two months. Therefore, we will discuss separately each offer and its relationship to the formation of a potential contract.

A. THE ORIGINAL CANAAN OFFER TO PURCHASE THE PROPERTY

An offeree, upon receiving an offer, may choose to propose a different bargain to the offeror related to the same subject matter as the original offer. John Edward Murray, Jr., *Murray on Contracts* § 42D, at 110 (3rd ed. 1990). The offeree's reply can be a counteroffer that has the same effect as an outright rejection. *Id.* This rejection terminates the offeree's power of acceptance because it manifests the offeree's intention not to accept the offeror's original offer. *Id.* The counteroffer is itself an offer that creates a power of acceptance in the original offeror and is intended to be a continuation of negotiations. *Id.* The counteroffer may be an acceptance with qualifications--that the offeree agrees to most, but not all, of the terms and requires some modifications. *Id.* This qualified acceptance is simply a counteroffer that rejects the original offer notwithstanding language of acceptance. *Id.* While a counteroffer normally rejects the original offer, it does not necessarily need to do so: (1) the offer can state that it will remain open for a period of time regardless of earlier rejections; (2) the offeror can express an intention to continue the power of acceptance in the offeree regardless of counteroffers; and (3) the offeree can state the desire to consider the offer and also propose a counteroffer, so that the offeree's non-acceptance of the original offer and the making of a counteroffer does not reject the original offer. *Id.* at 111. In these specific situations, one or both of the parties have clearly expressed their intention that the counteroffer should not be understood as a rejection of the original offer. *Id.* However, the normal understanding of the meaning of a counteroffer is that the offeree intends to reject the original offer with the proposed counteroffer, and the offeror understands the counteroffer as having that effect. *Id.*

Canaan presented the Pringles with a valid written offer to buy their property on July 28, 1992. He provided consideration of \$1,000.00 as earnest money to Mitchell along with that offer. The Pringles made substantial modifications and additions, including an addendum, to the offer and sent it back to Mitchell for Canaan to review. The Pringles modified offer was a valid counteroffer that rejected Canaan's original offer. The counteroffer, if made while the Pringles still had the power of acceptance of Canaan's original offer, terminated the Pringles's power of acceptance because it manifested their intention not to accept Canaan's original offer. The counteroffer, if made *after* the Pringles's power of acceptance of Canaan's original offer had expired, became a new offer with the Pringles as offeror. Simply stated, the Pringles never accepted Canaan's offer, and no valid contract existed at this point in time.

B. THE PRINGLE COUNTEROFFER TO SELL THE PROPERTY

The Pringles's counteroffer was itself an offer that created the power of acceptance in Canaan, the original offeree. The Pringles intended it to be a continuation of negotiations to sell the property. Canaan never accepted the counteroffer because he failed to abide by the requests in the addendum: (1) to execute the document himself; (2) to have Fayard execute the document as a co-purchaser; and (3) to provide financial statements of creditworthiness and ability to repay the obligation. Moreover, Canaan failed to meet the Pringles's requirement of a closing date of forty-five days after acceptance, but no later than September 15, 1992. Canaan's argument that he and Fayard were not provided with the addendum information regarding Semski's terms and conditions of the loan prior to the closing date is inapposite. Canaan's total failure in assenting to and completing the addendum requirements makes clear the lack of the familiar "meeting of the minds." This failure cannot in any way, shape, or form, be termed a valid acceptance of the Pringles's counteroffer and a completed contract. Likewise, the lack of signatures on the addendum itself is irrelevant in light of the signed counteroffer's language that made the sale subject to the addendum and made the addendum a part of the counteroffer/contract.

Finally, testimony indicated that Canaan neither rejected nor accepted the counteroffer. A valid contract requires exercise of the power of acceptance by the offeree. Here, Canaan failed to exercise that power. We are firmly convinced that Canaan failed to accept the Pringles's counteroffer and that no valid contract existed at this point in time as well.

C. THE CANAAN CASH OFFER TO PURCHASE THE PROPERTY

Evidence exists that Canaan subsequently wished to buy the Pringles's property for cash. Canaan offered to buy the property for cash both prior to and subsequent to the Pringles's counteroffer deadline closing date of September 15, 1992. Regardless of *when* any cash offers were transmitted to either Magnolia or the Pringles themselves, the Pringles never accepted any cash offer from Canaan. Finally, Canaan and Fayard's complaint for specific performance deals, not with any cash offer, but with what they allege was an acceptance by the Pringles on July 28, 1992, of a written offer for a cash down payment and a financed sale for the remainder of the sales price. However, we find that no valid contract existed due to any cash offer from Canaan because the Pringles failed to accept any such offer.

II. COUNTERCLAIM FOR DAMAGES UNDER SLANDER OF TITLE

The Pringles contend that Canaan and Fayard have slandered the title to their property. They have counterclaimed for damages as a result. They argue that the chancellor improperly denied testimony at trial that would have shown that Canaan and Fayard used the litigation to thwart any other sale unless they were given the right to market the property, along with their own, to a casino. The Pringles believe that this evidence would have shown malicious intent. Moreover they believe that this evidence, along with Canaan and Fayard's filing of the *lis pendens* notice, would have further proven the latters' attempt to slander the Pringles's title. They also contend that the excluded evidence would have established proof of tortious interference with their right to contract with other potential buyers. We now analyze the Pringles's three slander of title contentions.

A. THE FILING OF THE LIS PENDENS NOTICE

The Mississippi Supreme Court has stated that it will not consider issues on appeal with no citation to authority. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1282 (Miss. 1993) (citations omitted); *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993) (citations omitted); *Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992) (citations omitted). Moreover, the court has held that, where a party has a valid right to assert an interest in property and a right to have his or her case adjudicated, a lis pendens notice cannot be slander of title. *Dethlefs v. Beau Maison Dev. Corp.*, 511 So. 2d 112, 117 (Miss. 1987). Here, although the Pringles fail to cite authority, we exercise our discretion to address the merits of this issue. By filing the lis pendens notice, Canaan and Fayard asserted what they believed to be an interest in the Pringles's property. They had a valid right to have their case decided by a court of law. Therefore, their lis pendens notice cannot be a valid ground for the Pringles's slander of title counterclaim.

B. EXCLUDED TRIAL EVIDENCE THAT WOULD HAVE PROVEN

SLANDER OF TITLE

The Pringles allege that the chancery court improperly excluded statements made by Canaan proving malicious intent that would have supplemented proof of slander of title.

The court has held that it will not consider issues on appeal with no citation to authority. *Armstrong*, 618 So. 2d at 1282 (citations omitted); *Estate of Mason*, 616 So. 2d at 327 (citations omitted); *Smith*, 599 So. 2d at 532 (citations omitted). Here, the Pringles have failed to cite authority to support this slander of title argument. This Court is not obligated to consider appellate issues without citation to authority.

Slander of title is defined as "[a] false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, or of some right of his causing him special damage." Black's Law Dictionary 1388 (6th ed. 1990). Alternative consideration of this claim on the merits clearly indicates that neither the Pringles's trial proffer nor their appeal brief provided any evidence that met the requirements of this claim. Furthermore, the Pringles have failed to show that any special damages ever existed. The chancellor properly excluded this trial testimony.

C. EXCLUDED TRIAL EVIDENCE THAT WOULD HAVE PROVEN

TORTIOUS INTERFERENCE

The Pringles allege that the same excluded evidence of statements made by Canaan proving malicious intent would have proven tortious interference with their contractual rights to deal with other buyers.

The Mississippi Supreme Court will not consider issues on appeal with no citation to authority. *Armstrong*, 618 So. 2d at 1282 (citations omitted); *Estate of Mason*, 616 So. 2d at 327 (citations omitted); *Smith*, 599 So. 2d at 532 (citations omitted). In addition, the Mississippi Rules of Civil Procedure state:

A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain

- (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and,
- (2) a demand for judgment for the relief to which he deems himself entitled. . . .

M.R.C.P. 8(a).

The Pringles's argument fails for two reasons. First, we are not obligated to consider this proposition because the Pringles cite no authority on appeal that this excluded evidence could form the basis of a tortious interference claim. Second, the Pringles failed to plead this cause of action in their counterclaim and cannot now argue it on appeal.

CONCLUSION

We believe the chancellor's attempt to mold an equitable result, given the convoluted facts of this case, was admirable. However, a chancellor cannot form a contract, or the terms thereof, where no acceptance ever existed. The terms of specific performance within the chancellor's opinion and final decree effectively force the Pringles to sell their property to Canaan and Fayard, for the most part, according to the Pringles's counteroffer, which we have said Canaan and Fayard never accepted. The Pringles cannot be forced to accept debtors whose creditworthiness has yet to be determined. The chancellor is precluded from forming a contract where the law prevents one's existence. Here, no contract was ever formed between the parties; as a result, no specific performance can be mandated. The opinion and final decree ordering specific performance of the sale of the property is therefore reversed. However, we affirm the chancellor's denial of damages to the Pringles for slander of title.

THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY REQUIRING SPECIFIC PERFORMANCE OF THE CONTRACT FOR THE SALE OF REAL ESTATE IS REVERSED.

THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY OF DISMISSAL OF THE COUNTERCLAIM FOR DAMAGES FOR SLANDER OF TITLE IS AFFIRMED. THREE-FOURTHS OF THE COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEES, AND ONE-FOURTH OF THE COSTS OF THIS APPEAL IS TAXED TO THE APPELLANTS.

BRIDGES, P.J., BARBER, COLEMAN, DIAZ, AND KING, JJ., CONCUR. SOUTHWICK, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY MCMILLIN, J. FRAISER, C.J., CONCURS IN RESULT ONLY. THOMAS, P.J., NOT PARTICIPATING.

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SOUTHWICK, J., concurring

I agree with the general principles cited in the majority opinion. I believe the majority relies too strictly in its statement of the law on "hornbook authority" that suggests every detail of a sale must be agreed to before there is a contract. Some matters are incidentals that would not constitute a counteroffer. None of the financing questions in this case would fall into the de minimis category. Where I part company with the majority concerns the agreement by the would-be buyers to pay cash, an agreement allegedly made before the listing with Magnolia Realty expired.

The majority states that no valid contract existed at that time because Pringle did not "accept any such offer." I believe that if the buyers agreed to pay cash, that was not an offer that had to be accepted by the Pringles, but instead was an acceptance of the Pringles' pre-existing offer. There was nothing further the Pringles had to do. Their listing with Magnolia was an authorization to the realty company to sell the property for \$175,000 in cash "or such terms as may be acceptable to the sellers." The law relating to offers and counteroffers discussed in the majority opinion is applicable to the uncertainties regarding the financed sale. If in fact the buyers agreed to pay cash, then there was nothing for the Pringles to do for they were bound.

However, in my review of the record there never was an agreement by the buyers to pay cash. Near the time that the listing agreement was to terminate, a tentative oral proposal to pay cash was communicated by Canaan to the realtor. A letter was subsequently sent by the buyers' attorney agreeing to a cash purchase, provided that enough time was permitted to obtain financing from a third-party lender. The buyers do not rely on the possible cash sale option in their complaint. The

chancellor did not hold there had been an agreement by the buyers to pay cash. I would hold that there was insufficient evidence to permit a finding that the buyers had unequivocally agreed to pay cash. Had they done so, however, and absent other factors such as the expiration of the offer to sell the property, there was no need for the Pringles to accept before a contract was formed.

McMILLIN, J., JOINS THIS SEPARATE OPINION.