IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01165 COA

PATRICK CHAPMAN

APPELLANT

v.

COASTAL TRUCKING, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. JASON H. FLOYD, JR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

FRANK P. WITTMANN III

ATTORNEY FOR APPELLEE:

J. HENRY ROS

NATURE OF THE CASE: CONTRACT

TRIAL COURT DISPOSITION: TITLE TO THE BUILDING REVESTED IN COASTAL; CHAPMAN WAS REIMBURSED WHAT HE PAID FOR THE BUILDING MINUS VALUE OF THE CONDENSER UNIT REMOVED FROM THE AIR CONDITIONER.

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

FRAISER, C.J., FOR THE COURT:

In this case, the purchaser at an auction breached one of the sale terms requiring removal of his purchase within a prescribed time. The court held that the breach terminated the entire sales contract with the result that the sale was rescinded, purchaser's title was divested, and the original owner revested with title. We conclude that the trial court erred in divesting the purchaser's title and remand for applicable remedies flowing from the breach.

Coastal Trucking, Inc. (Coastal) owned realty in Harrison county with prefabricated metal buildings and items of personalty located thereon. Coastal contracted with Henderson International (Henderson), an auctioneer, to sell the personalty and metal buildings at a public auction. The metal buildings were considered personalty for the purposes of sale. Henderson prepared a brochure for potential bidders listing the property to be sold at auction. On February 10, 1993, Henderson held and conducted the auction on Coastal's premises in Biloxi, Mississippi. Henderson posted signs at the registration table clearly stating the terms and conditions of sales. The signs as well as the announcement to the bidders over the loud speaker stated that all purchases were to be removed within thirty to forty-five days after the auction. Patrick Chapman (Chapman) attended and purchased several items, including the prefabricated metal building constituting the basis of the controversy in the present case.

The building was listed as number 38 in the bidders' brochure and sold for $4,800.00. Chapman received a claim ticket which listed his purchase. Although Chapman was aware of the time limit to remove the metal building from the auction premises and did remove the outside condenser unit from the air conditioner, he made no attempt to remove the building within the designated limitation period or even the next six months. Chapman also made no attempt to contact Henderson or Coastal to discuss expansion of the removal period or continued use of Coastal's property occupied by the structure.

In August, 1993, Coastal leased Tindall Concrete Georgia, Inc. between ten and fifteen acres of its land and a concrete bed for $10,000.00 a month. The metal building left by Chapman was not on the leased land, but Coastal gave Tindall permission to use the building which was located on Coastal's adjoining property. Chapman learned of Tindall's use of the building in October 1993, and instituted eviction proceedings against Tindall in Harrison County Justice Court. Coastal, Tindall's lessor, appeared at the hearing, but Chapman never showed up. The justice court judge dismissed the case. Chapman then instituted the present action against Coastal and Tindall requesting injunctive relief. In addition to requesting an injunction prohibiting further use of his building, Chapman's complaint alleged unjust enrichment and requested the total sum of rents Coastal had received from Tindall. A hearing was set for January 1994. Coastal's answer claimed that Chapman was barred from invoking equitable relief under the "clean hands" doctrine. Coastal also alleged that Chapman had not only abandoned the property but had breached the auction's sale condition for removal of the metal building, and therefore the sale was rendered null and void. Upon receiving notice of the hearing, Coastal contacted Henderson requesting confirmation of the terms and conditions at the auction. By letter dated January 20, 1994, Henderson confirmed that a thirty to forty-five day time period for removal of items was announced at the auction and that any extension would have to have been approved by the owner. At the close of the chancery court hearing, the chancellor dismissed Tindall as a party. By order dated September 30, 1994, the chancellor found that Chapman had breached the terms and conditions of the auction when he had failed to remove the metal building from Coastal's

premises within a reasonable period of time and therefore title to the building had reverted to and revested in Coastal. However, the chancellor found that Chapman was entitled to reimbursement for the $4,800.00 paid for the building minus twenty-five percent for the value of items removed and expenses incurred. Judgment for Chapman in the amount of $3,600.00 was entered. Chapman appeals presenting the following issue:

I. WHETHER THE CHANCELLOR ERRED IN HOLDING THAT TITLE TO THE METAL BUILDING REVERTED TO COASTAL.

DISCUSSION OF THE ISSUE

The owner of property to be sold at auction has the right to prescribe the manner, terms and conditions of sale within reasonable limits. 7 Am. Jur. 2D *Auctions & Auctioneers* § 14 (1980). The auctioneer will usually announce these terms and conditions at the auction. These terms and conditions are deemed to supersede all others and bind the purchaser even if the purchaser did not hear the announcement or was not made personally aware of the terms. *Id.* Chapman, in both a sworn affidavit and testimony, acknowledged that he was aware of the time limitation for removal of his auction purchases from Coastal's property. The reason he gave for failing to remove the metal building was the unavailability of on-hand money. Chapman testified that although he wouldn't say that he couldn't have afforded to move the metal building, he simply did not have the cash on hand to do so. He also testified that it was easier for him to sell the building on Coastal's site rather than moving it. Yet Chapman never asked permission to leave the structure on Coastal's property and never made any storage arrangements for the purchased building to remain on Coastal's land after the expiration of the removal period. Moreover, Chapman testified that he owned property in Pass Christian, Mississippi, upon which he could have stored the building. Clearly, Chapman was aware of the terms of the contract requiring him to remove the metal building within the prescribed time. However, he elected to leave the unattended structure on Coastal's property without its permission or consent for more than six months before taking any action to assert ownership.

The chancellor properly found that Chapman breached the terms of the auction contract. Our examination of applicable authorities, however, tells us the chancellor was without authority to revest Coastal with title to the metal building. Without doubt, Chapman became vested with title to the building when the auctioneer's hammer fell, and he announced that Chapman was the highest bidder. "A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner." Miss. Code Ann. § 75-2-328 (2) (1972). Chapman bid on the building; his bid was accepted; he paid for the purchased item; he obtained a receipt declaring his purchase. While the terms of the auction stated that items sold had to be picked up within thirty to forty-five days of

the auction, it was not a condition which would render the sale null and void if not fulfilled. "Williston distinguishes between a condition and a promise and the respective consequences of their breach. A condition creates no right or duty of and in itself, but is merely a limiting or modifying factor. If it is breached or does not occur, the promisee acquires no right to enforce the promise. A promise raises a duty to perform and its breach subjects the promisor to liability and damages, but does not necessarily excuse performance by the other party." *United States v. Schaeffer*, 319 F.2d 907, 911 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964). It is apparent from the case and Chapman's testimony that he breached the terms of the auction sale. However, such a breach in itself did not divest Chapman of the title he acquired. It did subject him to liability for damages arising out of that breach. It is not every breach of a contract that entitles the other party to rescind. Rescission is not permitted for a breach which is collateral to the real undertaking of the contract. 17A Am Jur 2d *Contracts* § 577 (1980). The Mississippi Supreme Court expounded on breach of contract in the c ase of *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.*, 525 So. 2d 746, 756 (Miss. 1987):

> The termination of a contract is an 'extreme' remedy that should be 'sparsely granted.' Termination is permitted only for a material breach. 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,' 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.'"

The trial court did not determine, and the proof is not clear as to what damages Coastal sustained as a result of Chapman's breach. *See* 17A Am Jur 2d *Contracts* § 724 (1991) ("the law arms a party with a remedy for a breach of contract by another party; a cause of action for damages, and at least for nominal damages, arises upon the breach of contract.")

The primary problem in this case is the failure of the trial court to appropriately frame the remedies flowing from its decision. While Chapman's actions in unreasonably disregarding the removal terms of the auction sale support the trial court's refusal to grant the injunctive relief and damages he requested, the chancellor's action in divesting Chapman of title to his property and revesting Coastal with the title was outside discretionary boundaries. Such action under the adduced facts was tantamount to declaring a forfeiture of Chapman's title, contrary to established case law. *See Maxey v. Glindmeyer*, 379 So. 2d 297, 300-01 (Miss. 1980) ("Courts of equity are not friendly to forfeitures. Equity abhors a forfeiture."); *Southwest Gas Producing Co .v. Seale*, 191 So. 2d 115, 122 (Miss. 1966) ("[I]t is consistent with the traditional decisions of this Court not favoring forfeitures."); *Monsanto Co. v. Cochran*, 254 Miss. 399, 412, 180 So. 2d 624, 630 (1965) ("Equity abhors a forfeiture and is disposed to seize on slight circumstances to avoid a forfeiture."). This is not the first occasion when an auction purchaser has failed to remove his property within the time limited by the terms of the auction. In most cases however, the owner or auctioneer invoked the power and guidance of the Court for this purpose or the terms provided by the auction sale specifically set forth the penalty for failure to remove purchased property from the auction premises. Cases factually similar to the one at bar are sparse. In *Schoff v. Xenelis Construction Co.*, No. CV93-67689 S., 1995 WL 230976, at *1 (Conn. Super. Ct. April 12, 1995), the Connecticut Superior Court addressed and

applied what it considered appropriate legal principles in a factually similar case. The facts and findings in *Schoff* are recited in the court's opinion as follows:

> By writ summons and complaint, dated November 26, 1992, the plaintiff instituted this action of conversion against the defendant.
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> After a full trial, the court, on a preponderance of the credible, relevant and legally admissible evidence, finds, determines and rules as follows:
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> On or about November 27, 1990, the plaintiff, Michael Schoff, at an auction, purchased approximately 100,000 masonry blocks for $2,750.00. The auction was conducted on behalf of a bank which had seized the assets of a failed concrete block manufacturer. The terms of the auction, as set forth in the auction catalog, required the plaintiff to remove the blocks on or before December 4, 1990. This time limit was impossible to meet. Accordingly, the plaintiff was required to remove the blocks within a reasonable time.
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> The defendant, Xenelis Construction Co., Inc., at a subsequent auction, purchased the land on which the blocks were located and took title to the premises on July 25, 1991. At that time the defendant purchased the land, he was unaware that the plaintiff claimed ownership of the remaining blocks. The plaintiff had removed approximately 75% of the blocks before the land purchase. After the claim of ownership by the plaintiff, the defendant agreed to allow the plaintiff to remove the remainder of the blocks provided he supply the defendant with a certificate of insurance and remove the blocks during day time hours. When the plaintiff failed to adhere to said conditions, the defendant revoked his license to enter the property and remove the blocks. This lawsuit followed.
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> The court expressly finds:
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> The plaintiff had a reasonable time within which to remove the blocks he purchased at auction. The plaintiff has no right to store any blocks on the land now owned by the defendant's [sic]. The plaintiff's failure to remove the blocks within a reasonable time resulted in the plaintiff's use of the defendant's land for storage of his personal property.
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> . . . .
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> *The plaintiff's actions in failing to remove his property from the premises was unreasonable because such failure interfered with the defendant's ability to utilize its own land for its own purpose in violation of its inherent rights of ownership.*
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> . . . .
>
> Further, the plaintiff is ordered to remove all of his masonry blocks from the premises of the plaintiff [sic] on or before June 12, 1995. If the defendant [sic] fails to remove said blocks before said date, the blocks shall be deemed abandoned and may be disposed of by

> the defendant in any manner it sees fit.

Id. at *1 (emphasis added). The remedy fashioned by the Connecticut court avoids forfeiture of title and invokes the power of the court to enforce the parties' agreement. While the trial court in the present case properly refused to apply the abandonment theory proposed by Coastal in its answer to Chapman's complaint, it failed to draw from its arsenal of remedies appropriate relief. *See Southern Bell Tel.& Tel.Co. v. City of Meridian*, 241 Miss. 678, 703, 131 So. 2d 666, 675 (1961) ("Where abandonment or waiver of a vested property right is claimed, the intention to abandon or waive it must be shown by 'full and clear' evidence."); *Columbus & G. Ry. Co. v. Dunn*, 185 So. 583, 586 (Miss. 1939) ("[T]o justify the conclusion that there has been an abandonment, there must be some clear and unmistakable affirmative act or series of acts indicating a purpose to repudiate ownership."); *Hicks v. Steigleman*, 49 Miss. 377, 377 (1873) ("An intention to abandon property, for which the party has paid a valuable consideration, will not be presumed."). Although forfeiture of title was not an appropriate remedy, the court has the power to order removal of Chapman's property from Coastal's premises under penalty of contempt for refusal. The trial court also has the power to award damages to Coastal for Chapman's interference with its "ability to utilize its own land for its own purpose in violation of its inherent rights of ownership," and such other damages that it considers properly flowing from Chapman's unreasonable actions, and to impress an equitable lien on the property to secure payment of the damages. The Mississippi Supreme Court quoted with approval section 161 of the Restatement of Restitution which states:

> [W]here property of one person can by a proceeding in equity b[e] reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises.

Dudley v. Light, 586 So. 2d 155, 159 (Miss. 1991); *Neyland v. Neyland*, 482 So. 2d 228, 230 (Miss. 1986). The language in American Jurisprudence explains creation of an equitable lien:

> An equitable lien may exist without agreement therefor between the parties to the transaction and without title or possession in the lienholder. It is firmly established that in the absence of an express contract, a lien based upon the fundamental maxims of equity may be implied and declared by a court of equity out of general considerations of right and justice where, as applied to the relationship of the parties and the circumstances of their dealing, there is some obligation or duty to be enforced.

51 Am Jur 2d *Liens* § 30 (1980).

We affirm the trial court's action in denying Chapman injunctive relief and damages but reverse that portion of the judgment divesting Chapman of his title to the purchased property. We remand this cause to the trial court for the following: (a) determination and award of the damages, sustained by Coastal, as a result of Chapman's failure and refusal to remove his property pursuant to the auction

terms; (b) placement of an equitable lien on Chapman's building to secure payment of the damages awarded Coastal; and (c) rendition of a judgment ordering Chapman to pay the damages awarded Coastal and requiring Chapman to remove his building from Coastal's premises within a prescribed reasonable time period. If Chapman defaults, then the court shall order that the equitable lien be enforced by sale of the property, the proceeds of which first to pay the cost of the sale, second, to pay the court costs, and, third, to pay the damages awarded Coastal and any interest accrued since assessment with any sums remaining after payment of the foregoing to be paid to Chapman.

THE JUDGMENT OF THE HARRISON COUNTY CHANCERY COURT DENYING INJUNCTIVE RELIEF AND DAMAGES IS AFFIRMED. THE JUDGMENT REVESTING TITLE IN COASTAL IS REVERSED AND SUCH CAUSE REMANDED FOR ACTION CONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED TO APPELLEE.

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