

**IN THE COURT OF APPEALS 01/30/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00367 COA**

**WILLIAM D. MANN AND JOHN W. LOWERY**

**APPELLANTS**

**v.**

**LOWRY-FAIRCHILD CONTRACTORS, A MISSISSIPPI PARTNERSHIP; AND RODNEY FAIRCHILD, INDIVIDUALLY AND AS GENERAL PARTNER OF LOWRY-FAIRCHILD CONTRACTORS**

**APPELLEES**

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

TRIAL JUDGE: HON. KENNETH BARKLEY ROBERTSON

COURT FROM WHICH APPEALED: JACKSON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

ROBERT G. GERMANY

PITTMAN, GERMANY, ROBERTS & WELCH

ATTORNEYS FOR APPELLEES:

LAWRENCE C. GUNN, JR.

J. ELMO LANG

NATURE OF THE CASE: CIVIL-CONTRACT FOR SALE OF PROPERTY

TRIAL COURT DISPOSITION: COMPLAINT DISMISSED WITH PREJUDICE; COUNTER-CLAIM GRANTED SUCH THAT APPELLEES NOT OBLIGATED TO SELL PROPERTY

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

William D. Mann and John W. Lowery filed a complaint for specific performance of an Agreement of Purchase and Sale of two apartment complexes against Lowry Fairchild Contractors, a Mississippi partnership, and Rodney Fairchild, individually and as general partner of Lowry Fairchild Contractors (Fairchild), in the Chancery Court of Jackson County. Mann and Lowery were the buyers, and the Fairchilds were the sellers. The Fairchilds filed an answer in which they incorporated a counterclaim against Mann and Lowery. The chancellor conducted a hearing on the complaint and Fairchild's counterclaim, after which he entered a Final Judgment which dismissed Mann's and Lowery's complaint and granted Fairchild's counterclaim. We affirm the final judgment.

### **I. Facts**

On April 30, 1992, Mann and Lowery signed an instrument entitled "Agreement of Purchase & Sale" (Agreement). Two apartment complexes, Granada Apartments and Westwood Apartments, both with a Pascagoula address, were the subject of this Agreement. One the partners, Lowry-Fairchild Contractors, owner of the apartments, signed the Agreement eight days later, on May 8, 1992. All parties signed this agreement. Mann and Lowery noted April 30, 1992 as the date on the contract, while Rodney Fairchild on behalf of Lowry-Fairchild noted May 8, 1992 as the date he executed his signature. Thereafter Mann and Lowery tendered \$10,000.00 earnest money to Joe West, a Gulf Coast realtor. West signed the Agreement three days later on May 11, 1992, to acknowledge his receipt of the earnest money from the buyers, Mann and Lowery. West had ealier advised Lowery that the Grenada and Westwood Apartment Complexes were for sale. The purchase price for the apartments was \$900,000.

Among the provisions in the Agreement were the following:

#### 2. PURCHASE PRICE -- EARNEST MONEY -- PAYMENTS:

....

C. Closing is contingent upon Purchaser's ability to obtain financing of the principle sum of \$900,000.00. Purchaser agrees to exercise his best effort to secure financing as soon as possible and to enable closing on or within 60 days of the execution of this contract.

#### 3. CLOSING AND TITLE:

A. This transaction shall be closed at a mutually agreeable time and place after

the satisfaction of all conditions set forth in this contract but in no event more than 90 (ninety) days following the execution hereof by both parties.

B. At closing, Seller shall deliver to Purchaser a valid and properly executed Special Warranty Deed conveying to Purchaser good and marketable fee simple title . . . .

Within ten (10) days following execution of this agreement by the last party, Purchaser shall examine title to Property and provide a certificate of title to counsel for Seller.

### 3. CLOSING AND TITLE:

A. This transaction shall be closed at a mutually agreeable time and place after the satisfaction of all conditions set forth in this contract but in no event more than 90 (ninety) days following the execution hereof by both parties.

August 7, 1992 was the 91st day after May 8, 1992, the date that the Fairchilds signed the Agreement. On that date, Mann and Lowery faxed to Fairchild a letter dated August 7, 1992, in which they notified Fairchild that they were ready to close and would "deliver the purchase price upon receipt of an approved Special Warranty Deed." They concluded this letter with the request that Fairchild have its attorney contact their attorney, Tom Starling, "to coordinate closing."

On August 12, five days later, Fairchild filed a complaint against Mann and Lowery in the Forrest County Circuit Court to obtain a declaratory judgment that the Agreement had expired by its own terms. Fairchild stated in its complaint that Mann and Lowery had notified it of their intent to enforce the Agreement. Mann and Lowery were served with process the next day, August 13. They filed their complaint in the case *sub judice* the same day they were served with process from the Forrest County Circuit Court. In its answer to the complaint filed in the case *sub judice*, Fairchild included as its first defense that this case should be dismissed, or, alternatively, held in abeyance, because of its filing the complaint for declaratory judgment in the Forrest County Circuit Court. Its seventh defense was "[b]y way of counterclaim, should this matter not be dismissed or held in abeyance by the court, the defendants assert all claims stated in the circuit court action pending against [Fairchild] in Forrest County. This was the counterclaim to which the chancellor referred in his Final Judgment from which Mann and Lowery have appealed. The Forrest County Circuit Court ultimately transferred Fairchild's claim for declaratory judgment to the Jackson County Chancery Court, where the two cases were consolidated and tried.

After the trial the chancellor rendered the Opinion of the Court in which he made the following findings:

This is a case wherein twenty-four little hours makes all of the difference. At stake is the purchase of real property for some \$900,000.00.

The contract between the parties was signed on May 8, 1992 (Exhibit Nos. 1 and 18) and it provided that the transaction be closed "in no more than (90) days following the execution" of same by both parties. The date would have been August 6, 1992.

On August 6, 1992, the Plaintiff's attorney tried to communicate with the Defendant's attorney to determine whether or not the closing date could be extended or should he drive to Hattiesburg to tender the funds required. While the testimony was in conflict as to whether or not the trip would be necessary, no extension was agreed upon because the Defendants' attorney could not reach his clients. The money was not tendered until August 7, 1992.

....

From the facts here presented, the Court must find that the Plaintiffs failed in that there was neither compliance nor substantial compliance with the terms of the contract to allow its enforcement.

The Plaintiffs' Complaint should be dismissed with prejudice and at the Plaintiffs cost.

These findings are relevant to the issues which both Mann and Lowery have presented in this appeal for our resolution.

## **II. Consideration of the Issues**

We quote from Mann and Lowery's brief to state the three issues with which they confront this Court for its resolution:

A. Whether the lower court erred when it found that Mann and Lowery failed to prove performance or substantial performance of agreement of purchase and sale so as to allow its enforcement?

B. Whether the lower court erred when it did not find that the defendants/appellees were

estopped to deny that an extension had been granted to Mann and Lowery to close the transaction?

C. Alternatively, assuming Mann and Lowery were not entitled to purchase the apartment complexes, whether the lower court erred in not awarding Mann and Lowery a refund of their earnest money and out-of-pocket expenses, plus accrued interest thereon?

Fairchild in its brief restates these three issues in a different fashion; but their definition of these three issues is so similar to Mann and Lowery's statement of them that we shall consider the issues as Mann and Lowery have propounded them.

The standard of review in matters involving a chancellor's findings is:

[W]here the chancellor was the trier of facts, his findings of fact on conflicting evidence cannot be disturbed by this court on appeal unless we can say with reasonable certainty that these findings were manifestly wrong and against the overwhelming weight of the evidence. Even if this Court disagreed with the lower court on the finding of fact and might have come to a different conclusion, we are still bound by the chancellor's findings unless manifestly wrong, as stated above.

*Travis v. Hartford Accident & Indem. Co.*, 630 So. 2d 337, 338 (Miss. 1993) (citations omitted).

### **First Issue:**

A. Whether the lower court erred when it found that Mann and Lowery failed to prove performance or substantial performance of agreement of purchase and sale so as to allow its enforcement?

Mann and Lowery argue in their brief that "[t]heir primary responsibility was to obtain financing for the purchase price and to be prepared to close the transaction within 90 days." Mann and Lowery contend that they met both of these requirements. They rely on the testimony of Jack R. Lee, CEO of American Federated Life Insurance Company, that he had committed American Federated Life Insurance Company to loan Mann and Lowery the \$900,000 required to purchase the Grenada and Westwood Apartments. Lee described it as "a handshake deal." Lee explained that this was his customary manner of doing business with Mann and Lowery. They had bought an apartment complex the year before, "and that's the way we handled it." Lee further testified that he had "started liquidating some other investments so I could have those funds on hand prior to that date." Lee asserted that "those funds were available on demand from that point forward."

Thomas I. Starling, the closing attorney for Mann and Lowery, testified that by July 24, 1992, the financing was well enough arranged that he would be able to deliver a check drawn on his escrow account in the amount of \$900,000 to Fairchild, even if he would have to cover it later by depositing a check from American Federated Life Insurance Company in his escrow account. However, there was no evidence that American Federated Life Insurance Company had delivered the money to Mann and Lowery or their closing attorney. Neither was there any evidence that Starling had actually deposited \$900,000 in his escrow account on or before August 6, 1992.

Mann and Lowery argue that the evidence supported the second contractual obligation of being prepared to close the transaction within 90 days because Starling testified that he was prepared to travel from his office in Jackson to the office of Robin L. Roberts, Fairchild's closing attorney, in Hattiesburg to deliver the check on August 6. Roberts testified that he was unable to contact his client on that day to see if it were necessary for Starling to do so. Both Starling and Roberts established that on August 5 or 6, Starling called Roberts to inquire if his client would agree to an extension of several days to allow an orderly closing of the transaction. Roberts' recollection was that one reason for Starling's request was that a second appraisal of the two complexes had become necessary.

Fairchild counters that "Mann and Lowery had one major obligation under the contract and two obligations of lesser importance." Fairchild identifies these three obligations as:

1. The obligation to close in 60 days.
2. Examination of Title and Furnishing Title Certificate to Lowry-Fairchild.
3. Inspection of Property Within 60 days.

The first obligation, to close in 60 days, is based on the previously quoted provision in the Agreement that "[p]urchaser agrees to exercise his best effort to secure financing as soon as possible and to enable closing on or within 60 days of the execution of this contract." Fairchild contends that Mann and Lowery "did absolutely nothing to obtain financing in 60 days." This contention appears to be supported by the record because Starling testified that on July 24 he telephoned Fairchild's closing attorney to advise him that [the] financing was in place. However, this contention is hardly dispositive of this issue because another provision of the contract provided:

This transaction shall be closed at a mutually agreeable time and place after the satisfaction of all conditions set forth in this contract but in no event more than 90 (ninety) days following the execution hereof by both parties.

The second obligation which Fairchild maintains Mann and Lowery violated was their obligation to Examine the Title to both apartment complexes and to furnish a title certificate to it "[w]ithin ten (10) days following execution of th[e] agreement by the last party . . . ." Under the plain terms of this clause in the Agreement, Mann and Lowery were obligated to provide a title certificate to Fairchild no later than May 18, 1992. The title certificate which they had prepared for Westwood Apartments was dated August 4, 1992, and the title certificate for Grenada Apartments was dated August 6,

1992.

The Agreement required Fairchild to prepare the special warranty deed by which it would convey these apartments to Mann and Lowery; but it defaulted in this obligation. Fairchild contends that its closing attorney could not prepare the special warranty deed until he had the title certificates which would describe any exceptions to be included in the deed's text. Mann and Lowery retort that because a special warranty deed restricts the warranty of title to the grantor only -- in this case Fairchild -- this contention is specious. However that may be, the dates of the certificates of title, August 4 and 6, demonstrate that Mann and Lowery did not comply with this provision of the Agreement.

The third obligation which Fairchild argues the Agreement imposed on Mann and Lowery was to provide it as seller "with copies of all reports, surveys, documents, and studies" which they obtained pursuant to the Agreement. Among these reports were an environmental report, an appraisal, and other documentation. There was testimony from all parties about the opposing parties' failures to provide various documents and reports which the Agreement required. Fairchild's argument on this third obligation is of little persuasive value. However, the Court finds at this point in its evaluation of the evidence that in accordance with the previously cited standard of review, there was sufficient evidence of Mann and Lowery's non-compliance with the terms of the Agreement to support the chancellor's finding that Mann and Lowery "failed in that there was neither compliance nor substantial compliance with the terms of the contract to allow its enforcement."

The fact that Mann and Lowery's notification to close this transaction was delivered to Fairchild on August 7, the *ninety-first* day after Fairchild had signed the Agreement, delivers the coupe de grace to Mann and Lowery's argument on this issue. The Mississippi Supreme Court has recognized that time can be of the essence in a contract. It has held such time limitations in contracts to be valid and enforceable. *See, e. g., Frazier v. Northeast Mississippi Shopping Ctr.*, 458 So. 2d 1051, 1055 (Miss. 1984) (Mississippi Supreme Court recognized earlier case law and held time is of the essence in exercising simple option). The chancellor recognized and enforced the provision in the Agreement that:

This transaction shall be closed . . . in no event more than 90 (ninety) days following the execution hereof by both parties.

The evidence is indisputable that Mann and Lowery, who had failed to comply with some of the requirements of the Agreement as we previously discussed, did not give formal, written notice of their readiness to close the transaction until August 7, ninety one days after Fairchild had signed the Agreement on May 8. Mann and Lowery offered no evidence that they or Starling complied with the Agreement by given written notice to Fairchild before August 7 that they were prepared to close the transaction. By its own terms the Agreement expired the previous day; and the chancellor's so holding was supported by substantial evidence to which he applied the correct legal principle. We affirm the chancellor on this issue.

**Second Issue:**

B. Whether the lower court erred when it did not find that the defendants/appellees were estopped to deny that an extension had been granted to Mann and Lowery to close the transaction?

Mann and Lowery did not confront the chancellor with this issue until they included it within their Motion to Alter or Amend Judgment, or in the Alternative, for a New Trial, which they filed after the chancellor had entered the Final Judgment. The chancellor entered an Order by which he determined that "the motion is not well taken and should be denied." Estoppel is not a simple, direct concept; and Mann and Lowery have cited no cases to explain precisely how the doctrine of estoppel operates to estop Fairchild from denying "that an extension had been granted to Mann and Lowery to close the transaction." They allege in their brief that "Mississippi law is clear that an optionor, such as Lowry-Fairchild may not do any act, or omit to perform any duty, calculated to cause the optionee to delay in exercising his right." They add that "[i]f the optionor does, the optionee may be excused from exercising his option within the time stated."

Mann and Lowery cite *Callicott v. Gresham*, 249 Miss. 103, 161 So. 2d 183, 186 (1964) in which the Mississippi Supreme Court wrote:

It is a general rule that an optionor who has given the right to purchase property within a specified time may not do any act or omit to perform any duty calculated to cause the optionee to delay in exercising the right.

They next cite *Warwick v. Matheny*, 603 So. 2d 330, 337 (Miss. 1992) in which the Mississippi Supreme Court wrote:

Where a contract is performable on the occurrence of a future event, there is an implied agreement that neither party will place any obstacle in the way of the happening of such event, and where a party is himself the cause of the failure he cannot rely on such condition to defeat his liability.

Mann and Lowery conclude: (1) that Fairchild failed to provide a closing statement and special warranty deed three days before the expiration of the Agreement, (2) that Fairchild intentionally mislead their closing attorney, Starling about the possibility of an extension of time in which to close the transaction, and (3) that "[t]he proof is overwhelming in this case that Roberts told Starling that he would not need to bring a check to Hattiesburg on August 6th. They contend "[t]hat this conduct was in effect an extension agreed to by Roberts (Fairchild's closing attorney) and was binding on Lowry-Fairchild." They cite *Terrain Enterprises v. Western Casualty & Surety Co.*, 774 F.2d 1320 (5th Cir.), which applied Mississippi law to enforce a settlement agreement entered into by the attorney for Terrain Enterprises even though it had not given him its authority to make the settlement agreement. Thus, Mann and Lowery conclude that Fairchild ought to be bound by its closing attorney's representations to Starling about the possibility of an extension and that he, Starling, need

not deliver a check for \$900,000 to Roberts for Fairchild on August 6, ninety days after the date Fairchild signed the Agreement.

This Court thinks that Mann and Lowery are actually arguing more from the evidence in the record than they are arguing from the law in the books. Indeed, Fairchild responds to their argument by quoting extensively from the record to emphasize that: (1) Roberts testified that he had no authority from Fairchild to extend the contract, (2) that Starling testified that Roberts told him that he would have to check with Fairchild before he could authorize an extension, and (3) that Mann and Lowery's letter dated August 7, 1992, was addressed to and faxed to Fairchild, and not his client.

On these issues the Chancellor found:

On August 6, 1992, the Plaintiff's attorney tried to communicate with the Defendant's attorney to determine whether or not the closing date could be extended or should he drive to Hattiesburg to tender the funds required. While the testimony was in conflict as to whether or not the trip would be necessary, no extension was agreed upon because the Defendants' attorney could not reach his clients.

For us to find merit in Mann and Lowery's argument on this issue, we must violate the applicable standard of review by finding that the previously quoted finding of the chancellor on this issue was "manifestly wrong and against the overwhelming weight of the evidence." In the midst of conflicting evidence, the chancellor's determination of what evidence was more credible must prevail. We find no error in this issue.

### **Third Issue:**

C. Alternatively, assuming Mann and Lowery were not entitled to purchase the apartment complexes, whether the lower court erred in not awarding Mann and Lowery a refund of their earnest money and out-of-pocket expenses, plus accrued interest thereon?

As with the second issue, Mann and Lowery did not present this issue to the chancellor for his decision until they included it in their Motion to Alter or Amend Judgment, or in the Alternative, for a New Trial, which they filed after the chancellor had entered the Final Judgment. They cite but one case in support of their stand on this issue, *Dorsey Mississippi Sales, Inc. v. Newell*, 251 Miss. 77, 168 So. 2d 645, 651 (1964), in which the Mississippi Supreme Court wrote:

In an action for money had and received, the Plaintiff need only allege and show that the Defendant holds money which in equity and good conscience belongs to the Plaintiff.

The Agreement contained the following provision:

Upon default by purchaser other than termination as allowed, earnest money and interest shall be paid to the seller.

The chancellor found that the Agreement had expired under its own terms the day before Mann and Lowery gave written notice of their being prepared to proceed with closing the transaction. We have affirmed that finding, which is equivalent to default by Mann and Lowery as purchaser. We agree with Fairchild's assertion that no "extensive citation of legal authority is necessary for the proposition that earnest money is forfeited under contractual provisions such as the one in issue, where a purchaser has defaulted in the terms of a purchase agreement." Because we affirm the chancellor's finding that Mann and Lowery defaulted by giving notice to Fairchild one day after the Agreement had expired, we disagree that Fairchild "holds money which in equity and good conscience belongs to" Mann and Lowery. Under the previously quoted provision of the Agreement, "earnest money and interest shall be paid to the seller." We decide this third issue against Mann and Lowery.

### **III. CONCLUSION**

The application of the appropriate standard of review to the issues in this case results in our conclusion that the chancellor's findings of fact, on which he denied specific performance to Mann and Lowery, were supported by substantial evidence. We further find that he applied appropriate legal principles based upon his findings of fact to resolve the issues which the litigants presented to him. We accordingly affirm the Final Judgment rendered in this case.

**THE JUDGMENT OF THE CHANCERY COURT OF JACKSON COUNTY IS AFFIRMED.  
APPELLANTS ARE TAXED WITH ALL COSTS.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, McMILLIN,  
PAYNE, AND SOUTHWICK, JJ., CONCUR.**