

NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

JUNE 2020

2019-2020 REAL PROPERTY SECTION OFFICERS

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CHAIR'S MESSAGE

In life, the one constant that we can all look forward to is change. Day to day, week to week and month to month, we witness and are met with change. Our looks change, our perceptions change and along the way the world as we know it changes. For those of you that enjoyed the television show Mad Men, Don Draper once said, "change is neither good or bad, it simply is." While it's not always easy to embrace change, change happens whether we like it or not. Our biggest challenge is identifying and making the decisions necessary to push us forward. Often, our reaction to change is more important than change itself.

To that end, I'd like to take this opportunity to introduce you to yet another change on the horizon. House Bill 1156, which would create the Revised Mississippi Law on Notarial Acts, has passed and been enrolled in both the House and Senate. It was approved by Governor Reeves on June 25, 2020 and becomes effective July 1, 2021. This legislation was introduced at the request of the Land Title Association of Mississippi by Rep. Aguirre and Sen. Tyler McCaughn. It was based on the draft introduced in 2019 by then Secretary of State Hosemann.

While HB 1156 represents a much-needed move toward modernizing Mississippi's notarial law, the bill does not authorize remote ink-signed notarization ("RIN") or remote online notarization ("RON"). Instead, the new law only authorizes traditional wet-ink notarization ("TWIN") and in-person electronic notarization ("IPEN"). The person signing a document to be notarized would still need to physically appear in person before the notary.

HB 1156 also incorporates short-form acknowledgments and conforms portions of Chapter 89 to the new e-notary law. In addition to the notary changes, there are three statutory changes included in HB 1156. First, it clarifies that for a document to be recorded, it must contain an

original signature. Second, it codifies two exceptions to the spousal joinder requirement and provides that an affidavit may be recorded. See Title Examination Standard 15.02. The exceptions are for (a) separated spouses, living apart, and (b) voluntary abandonment. Finally, it provides that after July 1, 2021, an affidavit recorded under Miss. Code Ann. § 89-5-8 must include a description of the real property covered by the affidavit. In addition, HB 1156 provides forms of jurats for verification on oaths.

The Land Title Association of Mississippi worked very closely with Secretary Watson's staff on a proposed amendment to HB 1156. The amendment would have authorized both RIN and RON. It would have also created a "paper-out procedure," which would have allowed for the recording of an electronic document in a county that does not currently have the capability of accepting e-recordings. That procedure would have allowed the notary or attorney to print the original electronic document and attach a certificate to it and record the printed electronic document and certificate as a paper document for recording. There are currently around 60 counties that do not have e-recording capability. Unfortunately, the amendment did not make it out of committee. I understand that the Land Title Association of Mississippi will continue to work toward amending the Revised Mississippi Law on Notarial Acts to add RIN and RON, as well as a paper-out procedure.

I realize that recent changes to Bar rules have made it difficult for our section to pursue, support, or even comment on pending legislation. However, I encourage each of you to continue to participate in the process of change. Whether that is through service on the Executive Committee, or through the Land Title Association of Mississippi, it does not matter. What matters is that you participate.

I would like to thank Rod Clement and Lindy Brown of Bradley for continuing to donate their time and energy to prepare this newsletter. If any of you have any questions or suggestions, please contact me, Ken Farmer, at First American Title Insurance Company, 2001 Airport Road, Suite 301, Flowood, MS 39232, 601-863-1021, or by email at kfarmer@firstam.com.

NEW CO-EDITOR

The Newsletter has been upgraded by the addition of Lindy Brown as co-editor.

NEW LEGISLATION

HB 444 makes amendments to Miss. Code Ann. § 21-19-11, which authorizes municipalities to enter upon and clean land that "is in such a state of uncleanness as to be a menace to the public health, safety and welfare of the community,..." and to file a lien against the land for the cost. The changes include providing that the notice of hearing to determine if the property is a menace does not need to be sent to the property if the property is apparently vacant; that if the property is owned by the state, the notification process is not necessary if the Secretary of State authorizes the municipality to clean the property; that the municipality may re-enter the property to clean for up to two years; and that the notice of lien for costs incurred by the

municipality must be filed in the chancery clerk's office as other liens and encumbrances are rather than in the circuit clerk's office as a judgment. This act becomes effective on July 1, 2020.

HB 1156 enacts the Revised Mississippi Law on Notarial Acts. See Ken Farmer's summary above. This act becomes effective on July 1, 2021.

HB 1243 creates new Section 97-25-39 of the Mississippi Code. This section identifies certain public and private improvements as "critical infrastructure facilities" and provides anyone who impedes with the operation of a critical infrastructure facility may be fined or jailed. An organization that aids or conspires with a person impeding critical infrastructure also may be fined. This act becomes effective on July 1, 2020.

HB 1439 amends Section 9-3-82 to provide that a certified copy of a sixteenth section lease must be provided to the Secretary of State after recording. Presumably the school board has this responsibility, though the statute does not specify this. This act becomes effective on July 1, 2020.

SB 2430 enacts a new Section 15-1-83 and clarifies the statute of limitations for appraisers and brokers. The statute of limitations for an action based on a real estate appraisal is the earlier of five years after the date that the appraisal was relied upon by the intended user or three years. The statute of limitations for an action against a broker is the earlier of five years after the date of the consummation of the transaction out of which the action arose or three years. For both appraisers and brokers, the statute of limitations does not apply to an action in which the appraiser or broker fraudulently inflated the value of the real estate. This act become effective on July 1, 2020.

SB 2553 adopts the Uniform Partition of Heirs Property Act. This act will apply to most partition actions of land inherited by intestate succession. Distinctive features of a partition under this new act are that it requires a sign giving notice of the action to be posted on the property, requires an appraisal or other valuation of the property before the sale, gives the other cotenants the right to purchase the interest of the cotenant seeking the partition based on the appraised price, and requires an open-market sale by a broker rather than a partition sale by commissioners. The new act also reinforces the traditional preference for a partition in kind. A 2009 article from the ABA Journal gives some background about the concerns that led to the drafting of the Uniform Partition of Heirs Property Act: https://www.abajournal.com/magazine/article/in_the_cross-heirs. This act becomes effective on July 1, 2020.

SB 2850 makes changes to the process for having a will admitted to probate as a muniment of title only. It amends Section 91-5-35(1) to increase the limit on personal property in Mississippi from \$10,000 to \$75,000. It also amends Section 91-35(2) and (3) to expand the pool of persons who can sign the petition. This act applies to wills admitted to probate after July 1, 2020.

SB 2851 adopts portions of the Uniform Probate Code. The portions of this bill that are the most relevant to real estate lawyers are Sections 1 to -19, which adopt the Mississippi Real Property Transfer on Death Act. This Act will be codified as new Sections 91-27-1 to -19 of the Mississippi Code. The Real Property Transfer on Death Act allows the owner of land to execute a deed that provides that the land will be transferred to another person on the owner's death. The

deed has to be recorded prior to the transferor's death. A transfer-on-death deed is effective without delivery and without consideration. The transferor may revoke the deed. A will entered into by the transferor after the deed is recorded does not supersede the transfer-on-death deed, but a conveyance of the property by the transferor during his lifetime will make the transfer-on-death deed void. If the beneficiary of the transfer-on-death deed dies before the transferor, the transfer-on-death deed lapses. For purposes of priority over other interests, the recording of the transfer-on-death deed is deemed to take place at the time of the transferor's death, and the interest of the beneficiary of the transfer-on-death deed therefore will be subject to any deeds of trust, leases or other interests to which the transferor's interest at the time of his death. This act becomes effective on July 1, 2020.

SB 2874 makes a number of what appear to be technical changes to the Mississippi Guardianship and Conservatorship Act, Miss. Code Ann. 93-20-102 to -431. This act became effective from the date of its passage (note: the Governor signed this act on June 23, 2020.)

MORATORIA ON FORECLOSURES AND EVICTIONS

The federal housing agencies have extended their existing moratoria on foreclosures and evictions to August 31, 2020. See <https://www.hud.gov/sites/dfiles/OCHCO/documents/2020-19hsngml.pdf> (HUD); <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-Eviction-Moratorium-6172020.aspx> (Fannie Mae and Freddie Mac); https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_20_22.pdf (VA).

These moratoria only apply to single-family mortgages. They do not apply to vacant or abandoned property. They prohibit initiating foreclosures, which probably means that a lender cannot get a running start by publishing the notice of sale before August 31 and then conducting the sale on September 1.

The State of Mississippi does not have any moratorium on foreclosures or evictions. The editors are not aware of any moratoria imposed by municipal or county governments in Mississippi.

CASES

Failure to Disclose Defects in House was Misrepresentation Despite "As Is" Clause

Lewis v. Rula, 293 So. 3d 317 (Miss. Ct. App. 2020). The Lewises purchased a house in Madison County. During the time they owned the house, the Lewises paid a contractor to make numerous repairs to a parapet wall and the connection of the wall to the roof of the property. After four years, the Lewises put the house on the market. The Lewises entered into a contract to sell the property to the Rulas. In the disclosure statement required by Miss. Code Ann. Sections 89-1-501 to -523 in the sale of residential property, the Lewises left blank the portions of the disclosure statement that addressed problems with wall, leaks and the roof. The contract provided that the Rulas accepted the existing condition of the home. After the closing, the Rulas discovered the defects in

the parapet wall and roof and paid a contractor to replace the wall. The Rulas filed an action against the Lewises in the County Court of Madison County alleging intentional and negligent misrepresentation. At trial the jury awarded the Rulas damages of \$235,000. On appeal, the Court of Appeals, in a decision by Justice Westbrook, affirmed. The Lewises argued that the acceptance by the Rulas of the house “as is” relieved them from any statutory disclosure requirements and any liabilities to the buyers. Justice Westbrook wrote, “Not answering questions on the disclosure form does not equate to a lack of misrepresentation,” especially since the Lewises had actual knowledge of the defects in the parapet wall and roof.

Note 1: A case that the *Lewis* court discussed at length and relied upon was *Stribling Investments, LLC v. Mike Rozier Construction Co.*, 189 So. 2d 1216 (Miss. 2016). The property in the *Stribling* case was a Dollar General store in Gluckstadt that Rozier built and sold to Stribling. The contract of sale provided that the property was being conveyed “as is” and without any representation or warranty about the condition of the property. After the sale, the parking lot suffered cracks. Stribling brought an action against Rozier claiming that Rozier breached the common-law duty of a contractor under Mississippi law to disclose defects in fills and subsoils. Rozier argued that the “as is” clause in the contract absolved it of any duty to disclose defects in the subsoil. The Mississippi Supreme Court wrote that the contractor’s duty to disclose defects in the subsoil applied regardless of the “as is” clause in the contract. The *Lewis* court relied on the *Stribling* case in holding that the “as is” clause in the contract between the sellers and the purchasers did not relieve the sellers from their affirmative obligation to disclose the defects in the wall and roof.

Note 2: To support their argument that the “as is” clause in the contract absolved them from any responsibility for the defects, the Lewises relied on two cases in which the Mississippi Supreme has held that an “as is” clause protected the seller from a claim by the purchaser based on the condition of the property. The *Lewis* court distinguished these cases on the purchasers were told about the problems but proceeded with the purchase anyway. The *Lewis* court distinguished another case in which the disclosure statement did not identify a problem, but the seller didn’t have personal knowledge of the problem before the sale. The opinion does not identify any cases in which the Mississippi courts have enforced an “as is” clause to protect the seller when the seller knew about the problem and the purchaser was not informed about the problem before the sale.

Note 3: In the *Lewis* case the sellers breached a statutory duty to disclose in residential sales. In the *Stribling* case the seller breached a common-law duty imposed on contractors to disclose. Are there any cases in which the Mississippi courts have addressed the enforceability of an “as is” clause when no duty to disclose exists?

Borrower Not Authorized to Accept Offer for Deed in Lieu of Foreclosure

Coast Plaza LLC v. RCH Capital LLC, 281 So.3d 1125 (Miss. Ct. App. 2019). Coast Plaza, a Mississippi limited liability company, was owned equally by two members, Thompson and Gagnon. Coast Plaza’s sole asset was a strip mall in Waveland, Mississippi (the “property”). Coast Plaza entered into a promissory note secured by a deed of trust on the property. Thompson and Gagnon signed the note as personal guarantors. RCH subsequently purchased the note from the original lender. Gagnon then passed away. After Gagnon’s death, RCH issued a notice of default to Coast Plaza and then issued a notice of intent to foreclose on the property. RCH sent an email

to Thompson offering a deed in lieu of foreclosure provided there were no liens or other debts on the property. Thompson responded that he would meet with Gagnon's estate to discuss but did not anticipate any problems. Thompson sent another email that same day accepting the offer. RCH responded by email that it had ordered a title search and that if the property was clear of other liens, RCH would provide Thompson with what was needed to allow RCH to accept a deed in lieu of foreclosure. RCH's email also contained a list of other items that it would need to accept a deed in lieu, a statement that RCH has not agreed to modify or waive any of its rights, and a statement that RCH intended to move toward foreclosure until a written agreement was executed. About one week later, RCH emailed Thompson notifying him that the title search showed a title issue that would need to be cleared up before a deed in lieu could occur. RCH noted that there was "a lot to get done before a [d]eed in [l]ieu can be accepted" and provided a list of other needed items. Over the next few days, RCH sent emails to Thompson advising that it had not heard back from Gagnon's estate or received most of the requested information. Thompson responded that the estate was still collecting information. Thompson also advised that under Louisiana law, the estate had five years to open succession and that probate would take several years after succession. A few weeks later, Thompson on behalf of Coast Plaza emailed a letter to RCH objecting to foreclosure on the property. The next day, RCH responded to Thompson retracting RCH's offer to accept a deed in lieu of foreclosure. In its response, RCH stated that RCH and Coast Plaza never had a binding agreement for RCH to accept a deed in lieu, but that RCH had only emailed an offer contingent on the condition that there were no other existing liens on the property. RCH noted that the title search had identified another lien. Coast Plaza subsequently filed suit to enforce the purported agreement of RCH to accept a deed in lieu. RCH filed a motion to dismiss arguing that Coast Plaza could not have executed a deed in lieu of foreclosure in part because the Gagnan estate had not indicated its willingness to enter into an agreement with RCH to execute the deed. After a trial, the chancellor entered a final judgment finding that the parties had not reached an agreement and denying all relief sought by Coast Plaza. On appeal, the Mississippi Court of Appeals, in a decision by Justice Cory Wilson, affirmed the chancellor's finding that no settlement agreement had been reached by the parties because Coast Plaza lacked the authority to dispose of its only asset via a deed in lieu of foreclosure. The Court of Appeals relied on the Revised Mississippi Limited Liability Company Act (because Coast Plaza had no operating agreement) which requires the approval of both Thompson and Gagnon to enter into the agreement. The Court of Appeals noted that the Act also addresses the death of a LLC member and provides a procedure for obtaining the consent of that member's interest. Coast Plaza failed to obtain the vote of Gagnon's member interest under the terms of the Act. The Court found "no evidence to indicate that the LLC's members timely complied with the Act's clear requirements necessary to authorize the LLC to agree with RCH to dispose of the LLC's sole asset via a deed in lieu of foreclosure." The Court of Appeals determined that Coast Plaza could not have validly accepted RCH's offer and therefore there was no agreement. The Court of Appeals further noted that even if the parties had reached an agreement, it would have been frustrated by Coast Plaza's admission that it would not be able to timely provide RCH with a deed because of the probate process.

Note 1: While the Court of Appeals based its decision on the lack of authority of Coast Plaza to accept RCH's offer, the Court noted that an issue existed about whether a valid offer was made. In a footnote, the Mississippi Court of Appeals recognized that "RCH's initial emails with Thompson contain contingencies and caveats that belie a firm contractual offer, and our review of the record raises questions about whether the parties ever satisfied the conditions precedent to forming an enforceable contract." Therefore, even if the Court of Appeals had determined that

Coast Plaza had the authority to accept the agreement, it is still unlikely that the Court would have found an enforceable contract.

Note 2: In questioning whether RCH ever made a valid offer to accept a deed in lieu, the chancellor stated that “to me you have a whole host of blanks that haven’t been filled in.” In the editors’ experience, if a lender is willing to accept a deed in lieu, the lender usually requires a written agreement with the borrower in which the lender agrees to accept a deed in lieu only if a list of conditions is met, including clear title, an inspection by the lender of the condition of the property for deferred maintenance and needed repairs, an updated Phase 1 environmental inspection, a waiver of any claims by the borrower against the lender, and the borrower’s agreement to pay the lender’s costs, and further contains a prominent reservation of rights and remedies.

Note 3: One lesson from this case is the need for a basic operating agreement for limited liability companies with real estate assets that allows the company to continue to function if a member dies. Once the borrower inserted the black hole of Louisiana succession and probate law into the picture, the prospect of a deed in lieu was eliminated as a practical matter. As stated by the chancellor, “That ends it. There’s nothing else to talk about.”

Claims for Construction Defects Not Conveyed in Foreclosure Sale

Henderson v. Copper Ridge Homes, LLC, 273 So.3d 750 (Miss. 2019). The Hendersons and Copper Ridge entered into a home construction contract. The Hendersons also contracted with First Bank to finance the construction. The Hendersons filed suit against Copper Ridge in the Circuit Court of Pike County after a dispute arose over the price. They also sued First Bank claiming that the bank had improperly disbursed funds to Copper Ridge for the construction. The Hendersons alleged breach of contract and tort claims against both parties. After filing suit, the Hendersons defaulted on their loan with First Bank. First Bank filed a counterclaim for judicial foreclosure. The Hendersons subsequently sought leave to amend their complaint to add claims for wrongful foreclosure, fraud and breach of the duty of good faith and fair dealing. The trial court denied the Hendersons’ request to add a claim for wrongful foreclosure (because foreclosure had not yet occurred) but allowed them to add claims for fraud and breach of the duty of good faith and fair dealing. The circuit court subsequently granted First Bank’s motion for an order of judicial foreclosure. After foreclosure, the Hendersons again requested leave to amend their complaint to add a claim for wrongful foreclosure, which the trial court denied. Copper Ridge and First Bank both moved for summary judgment on all of the Hendersons’ claims arguing that the judicial foreclosure extinguished the Hendersons’ right to pursue claims related to alleged damage to their home. In response, the Hendersons argued that their claims were personal and did not belong to the real property. The circuit court granted Copper Ridge’s and First Bank’s motions finding that the Hendersons’ claims arising from alleged construction defects traveled with the title to the property. The circuit court found that the Hendersons lost their right to seek damages when they lost their interest in the property. On appeal by the Hendersons, the Mississippi Supreme Court affirmed the judicial foreclosure and reversed the circuit court’s grant of the contractor and bank’s motion for summary judgment. The Supreme Court found that the Hendersons’ claims did not travel with the title to the property upon foreclosure. In reaching its decision, the Supreme Court relied on the language of the deed of trust which only conveyed real property. The Supreme Court noted that the deed of trust did not convey any contractual rights or common-law rights. The Supreme Court further found that the circuit court had not erred in allowing First Bank to foreclose

before the Hendersons' contract-based claims had been decided although it may have been more practical for the trial court to delay granting the foreclosure until after the Hendersons' contractual claims had been resolved.

Note 1: It is important to keep in mind that the Hendersons had three different claims: a claim against the contractor for construction defects, a claim against the bank for breach of the loan agreement arising out the bank's disbursement of the loan proceeds, and another claim against the bank for wrongful foreclosure. The interesting question raised by this case is whether the claim for construction defects is appurtenant to the real estate that was subject to the deed of trust; it seems apparent that the claims against the bank for breach of the loan agreement and for wrongful foreclosure are not part of the real estate. The Supreme Court determined in this case that the claim for construction defects was not part of the real estate and was not conveyed to the purchaser at the foreclosure sale.

Note 2: By extension, it appears that the bank in this case will not have a claim against the builder for construction defects. As an aside, in commercial construction loans, the lender usually requires the borrower to collateral assign the construction contract so that the lender has the right to bring an action for construction defects if the lender has to take over the project.

Note 3: In this case the deed of trust, by its terms, only conveyed to the bank real property interests, which the Supreme Court held did not include the claim against the builder for construction defects. The opinion suggests that the language of the deed of trust could have been broadened to include the grantors' claim against the builder for construction defects, and that in that case, the foreclosure would have cut off this claim. But is it really so simple? If the claim for construction defects is personal property rather than real property, how would a bank get and perfect a security interest in this personal property? Would such a claim be subject to the Uniform Commercial Code that the bank would need to perfect and enforce under the terms of the UCC? Section 9-201(d)(12) of the UCC provides that the UCC is inapplicable to an assignment of a claim arising in tort, but claims for construction defects and breach of loan agreement would be claims for breach of contract.

Note 4: In its opinion, the Supreme Court distinguished two prior Mississippi Supreme Court cases: *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So.2d 1004, 1014 (Miss. 2006) and *Maranatha Faith Center, Inc. v. Colonial Trust Co.*, 904 So.2d 1004 (Miss. 2004). First Bank cited these cases as authority for its argument that it acquired all of the Hendersons' claims when it purchased the property at the foreclosure sale. In each of those cases, however, the lender purchased claims to satisfy a debt. The Supreme Court thus determined that the lender in those cases could be substituted as the party in interest in a pending lender-liability case. In this case, First Bank did not purchase the Hendersons' claims to satisfy a debt. Rather, First Bank argued that the Hendersons' lost their claims simply by virtue of the foreclosure.

Post-judgment Proceedings Did Not Reset Statute of Limitations on Foreign Judgement

White v. Taylor, 281 So.3d 1188 (Miss. Ct. App. 2019). In January 2002, a Florida court entered a final judgment dissolving the marriage of White and Taylor who were both residents of Florida. The court ordered White to pay Taylor \$7,000. In July 2014, Taylor filed a supplemental petition for modification and other relief in the Florida court because he had not been paid. A month later, the court found White in contempt and that the amount owed by White, including interest, would

continue to accrue until paid. White owned property in Lowndes County, Mississippi. In February 2017, Taylor filed a notice of the final judgment in Lowndes County Circuit Court. Taylor also filed a petition for writ of execution. In response, White filed a motion to set aside the foreign judgment claiming the action was barred by the statute of limitations under Miss. Code Ann. § 15-1-45, because more than seven years had passed since the original January 2002 judgment was entered. Miss. Code Ann. § 15-1-45 provides that an action based on a foreign judgment must be commenced within seven years after it was rendered (or within three years if the person against whom the judgment was rendered is a Mississippi resident). The Lowndes County Circuit Court denied White's motion to set aside the foreign judgment. The Circuit Court found that the 2014 judgment was a renewed or separate judgment which reset the limitation period. On appeal, the Mississippi Court of Appeals reversed and remanded finding that the statute of limitations had run. The Court of Appeals, in an opinion by Justice Westbrook, held that the 2014 judgment was only a continuation of the 2002 proceeding and had not been enrolled within the seven-year limitation period. In reaching its decision, the Court distinguished between an "action on the judgment" and a "post-judgment proceeding." The Court explained that an action on the judgment is a renewal or separate judgment which resets the statute of limitations, while a post-judgment proceeding is a continuation of the original judgment which does not reset the limitation period. The Court found that the 2014 judgment was a continuation of the original judgment since it had the same cause number as the 2002 judgment and only calculated interest. The Court of Appeals reversed the Circuit Court's decision and rendered judgment for White.

Note: This case is a cautionary tale for parties seeking to enforce a foreign judgment in Mississippi. Don't wait to enforce a foreign judgment and assume that the foreign judgment will remain viable simply because the foreign court has modified the judgment. A subsequent ruling in the foreign court will not automatically reset the limitation period.

Failure to Get Financing Was Not Grounds For Refund of Earnest Money

Franklin Land Associates, LLC v. Sethi, 281 So.3d 119 (Miss. Ct. App. 2019). In 2010, buyer and seller entered into a real estate purchase agreement for land in Madison, Mississippi. The agreement required the buyer to deposit earnest money with the seller's attorney as escrow agent. The agreement provided that the earnest money was non-refundable, except that the buyer would be entitled to a return of the escrow funds if buyer terminated the agreement because "Buyer has not received all necessary on-site and off-site governmental approvals reasonably deemed necessary by Buyer for Buyer's intended development of the Property, as determined in Buyer's sole discretion." The project was a shopping center. Buyer subsequently terminated the agreement, as permitted by the agreement, and claimed that it was entitled to a return of the earnest money because it did not receive the necessary governmental approvals. The escrow agent filed an interpleader complaint in the Chancery Court of Leflore County requesting a ruling about who was entitled to the earnest money. The evidence showed that buyer withdrew its application for the governmental approvals because of problems obtaining tax increment financing ("TIF"). City officials testified that the city would have approved all of the permits needed for the project, and that the buyer withdrew its application only because the negotiations regarding the TIF were not successful. The chancery court found that buyer had not shown that the termination was due to its failure to receive the necessary governmental approvals, but rather that the buyer terminated the agreement because of its failure obtain the TIF. The Mississippi Court of Appeals, in an opinion by Justice Barnes, affirmed the chancery court's holding, finding that the trial testimony presented

substantial evidence that buyer prevented the attainment of the governmental approvals by withdrawing its applications for permits because of the inability to obtain the TIF. The Court of Appeals explained that under the “doctrine of prevention,” a contractual party who causes the failure of performance cannot take advantage of that failure.

Note 1: This case reminds contracting parties that they cannot manufacture a failure of pre-conditions to avoid performance. The contract terms will control which pre-conditions must be met to require performance. However, the courts may consider evidence on why pre-conditions are not met when deciding whether a party is excused from performance.

Note 2: This case also provides a hard lesson about drafting agreements to purchase. The seller probably considered obtaining approval for TIF as a necessary governmental approval to complete its project, but the agreement only allowed the buyer to a refund of the earnest money if the buyer did not receive on-site and off-site approvals necessary for development of the property. The opinion does not include any discussion of whether approval of TIF was a necessary governmental approval. If the seller had specified in the agreement that approval of TIF was a necessary governmental approval, the seller should have been entitled to a refund of the earnest money.

Note 3: According to the opinion, the Mayor of Madison “conditioned the financing on her ‘full and unconditional and absolute ability to approve or deny any and all tenants in the planned shopping center.’”

DISCLAIMER

This Newsletter is a publication of the Real Property Section of The Mississippi Bar for the benefit of Section’s members. Members are welcomed and encouraged to send their corrections, comments, articles and news to the editors, Rod Clement, at rclement@bradley.com, and Lindy Brown, lbrown@bradley.com. Although an earnest effort has been made to ensure the accuracy of the matters contained herein, no representation or warranty is made that the contents are comprehensive or without error. Summaries of cases and statutes are intended only to bring current issues to the attention of the Section’s members for their further study and are not intended to and should not be relied upon by readers as authority for their own or their clients’ legal matters; rather, readers should review the cases and statutes and draw their own conclusions. All commentary reflects only the personal opinions of the editors, which is subject to change, and does not reflect a position of the Real Property Section, The Mississippi Bar or the editors’ law firm.