UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

TODD PHILLIPS INVESTMENTS, INC.,	**CASE NO. 06-01862-NPO**
DEBTOR.	**CHAPTER 11**

MEMORANDUM OPINION AND ORDER GRANTING TRUSTEE'S MOTION FOR AUTHORITY TO DISBURSE ESCROW FUNDS FROM HATTIESBURG USDA SALE AND DENYING GREAT RIVER'S MOTION TO DISBURSE ESCROW FUNDS TO GREAT RIVER

On May 22, 2007, there came before the Court for hearing (the "Hearing") the Motion for Authority to Disburse Escrow Funds from Hattiesburg USDA Sale (the "Trustee's Motion") (Dk. No. 560) filed by Derek A. Henderson, chapter 11 trustee (the "Trustee"), and the Response to Trustee's Motion for Authority to Disburse Escrow Funds from Hattiesburg USDA Sale and Motion to Disburse Escrow Funds to Great River Development Co., LLC ("Great River's Motion") (Dk. No. 582) filed by Great River Development Co., LLC ("Great River"). At the Hearing, the Trustee appeared on his own behalf, and Robert C. Latham appeared on behalf of Great River. The Court, having considered the pleadings, evidence presented at the Hearing, and the post-trial legal memoranda submitted by the parties, concludes for the following reasons that the Trustee's Motion is well taken and should be granted, and that Great River's Motion is not well taken and should be denied.[1]

[1] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(A), (N), and (O). Notice of the Hearing on the Trustee's Motion and Great River's Motion (the "Motions") was proper under the circumstances.

Facts

1. Prior to the filing of this chapter 11 case (the "Chapter 11"), Todd Phillips ("Phillips") engaged the assistance of United Country-Gibson Realty ("Gibson Realty") to sell certain properties. One of those properties was the Hattiesburg USDA building and related real property (the "Hattiesburg Building"). Phillips provided marketing materials to Gibson Realty which included information that the Hattiesburg Building was comprised of a commercial building located on .97 acres of real property, together with an additional five (5) acres of real property. Based on Phillips' representation, the Hattiesburg Building was posted for sale on the Gibson Realty website (the "Website") as "7,676 SF Commercial building on .97 acres +/- (+ 5 acres) with 14,000 SF concrete paving".

2. The Website contained the following disclaimer:

> Disclaimer: All information deemed reliable but not guaranteed and should be independently verified. All properties are subject to prior sale, change or withdrawal. Neither listing broker(s) nor United Country Real Estate shall be responsible for any typographical errors, misinformation, misprints and shall be held totally harmless.

(Hrg. Ex. T-4).

3. The Hattiesburg Building did not sell prior to the filing of the Chapter 11.

4. On September 8, 2006, Todd Phillips Investments, Inc. (the "Debtor") filed the Chapter 11 (Dk. No. 1), whereupon the Hattiesburg Building became property of the Debtor's bankruptcy estate. *See* 11 U.S.C. § 541.

5. On October 13, 2006, an Order Approving Appointment of Chapter 11 Trustee (Dk. No. 132) was entered, appointing the Trustee.

6. In early 2007, Gibson Realty learned that the marketing materials which Phillips had provided in regard to the Hattiesburg Building were incorrect. In fact, the Hattiesburg Building consists only of the commercial building and .97 acres.[2] However, the Website information regarding the Hattiesburg Building was not updated during the relevant time period.

7. Subsequently, on February 26, 2007, the Trustee filed a Motion for Authority to Sell Assets Free and Clear of Liens, Interests, Encumbrances and Claims - Hattiesburg USDA Building and Purvis USDA Building (the "Motion to Sell") (Dk. No. 407). In the Motion to Sell, the Trustee sought approval to sell certain properties, specifically the Hattiesburg Building and the Purvis USDA building and related real property (the "Purvis Building"), which were both part of the Debtor's estate. The Trustee disclosed in his Motion to Sell that he had received an offer from the Braswell Family Limited Partnership (the "Braswell Family") to purchase both the Hattiesburg Building and the Purvis Building for a total of $950,000. The Trustee allocated the offer into two parts: $664,050 for the Hattiesburg Building[3] and $285,950 for the Purvis Building. The Motion to Sell stated that the sale was "as is, where is." It also listed the street addresses of the Hattiesburg Building and the

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[2] The additional five (5) acres referred to by Phillips apparently is part of the Debtor's estate property located in Hazlehurst, Mississippi.

[3] The Trustee's asking price for the Hattiesburg Building was $895,000.

Purvis Building, but did not provide a land description or otherwise describe the related acreage. It further included a provision whereby any other interested purchaser could submit an offer prior to the approval of the sale by the Court.

8. Scott Campbell ("Campbell") of Gibson Realty testified that a representative of the Braswell Family had contacted Gibson Realty prior to making its offer. At that time, Campbell had informed the Braswell Family that the Hattiesburg Building included only the .97 acres. Thus, the evidence presented at the Hearing established that the Braswell Family knew that its offer for the Hattiesburg Building was based on the commercial building and .97 acres of real property.

9. Thereafter, Great River filed an Objection to Motion for Authority to Sell Assets Free and Clear of Liens, Interests, Encumbrances and Claims - Hattiesburg USDA Building and Purvis USDA Building ("Great River's Objection to Motion to Sell") (Dk. No. 433),[4] contending that $950,000 was not an adequate purchase price for the two properties and stating that it would offer $958,000 for both properties, allocated as $668,000 for the Hattiesburg Building and $290,000 for the Purvis Building. A proposed contract (the "Contract") (Hrg. Ex. T-2) to purchase the Hattiesburg Building for $668,000 was attached to Great River's Objection to Motion to Sell. Paragraph 1 of the Contract provides:

> Purchase and Sale: The undersigned buyer ("Buyer") agrees to buy and the undersigned seller ("Seller") agrees to sell all that tract or parcel of land, with such improvements as are located thereon, described as all that tract of land lying and being situated in the City of Hattiesburg, County of Forrest: USDA Building, and being known as having an address of 191 WSF Tatum Boulevard, Hattiesburg, Mississippi, together with all fixtures, landscaping, improvements, and appurtenances (all being hereinafter collectively referred to as the "Property", as

[4] Three other objections (Dk. Nos. 428, 434, 439) were filed to the Motion to Sell, all of which were resolved by the Order Granting Motion to Sell Hattiesburg Building. *See* ¶ ¶ 12, 13 herein.

> more particularly described in Exhibit "A", or if no Exhibit "A" is attached as is recorded with the Chancery Clerk of the county in which the Property is located and is made a part of this Agreement by reference.

There was no Exhibit "A" attached to the Contract.

10. On March 15, 2007, the Trustee filed a Notice of Additional Offer for Hattiesburg USDA Building (Dk. No. 444), informing all interested parties that an offer of $725,000 had been made by Walter Ray Perkins ("Perkins") solely for the Hattiesburg Building. It is undisputed that Campbell also had informed Becky English ("English"), the realtor for Perkins, that the Hattiesburg Building included only .97 acres.

11. Unlike the Braswell Family and English, Great River did not contact Gibson Realty regarding the acreage included in the sale of the Hattiesburg Building prior to the making its offer.

12. On March 20, 2007, a hearing was held on the Motion to Sell and the various objections thereto (the "March 20 Hearing"). At the March 20 Hearing, the Trustee held an auction (the "Auction") for the Hattiesburg Building. The Trustee did not make any statements regarding the amount of acreage included in the sale. Following an offer of $774,500 by the Braswell Family,[5] Great River became the successful bidder for the Hattiesburg Building at a purchase price of $775,000.

13. After the March 20 Hearing, a dispute arose between the Trustee and Great River as to the amount of real property included in the sale of the Hattiesburg Building. Great River had bid under the presumption that the Hattiesburg Building included the commercial building, the .97 acres, and an additional five (5) acres as described on the Website, while all other parties had bid on the commercial building and the .97 acres of real property. Nevertheless, both the Trustee and Great

[5] The bids were made in $500 increments.

River desired to close the sale so they executed the necessary documents and agreed to escrow $45,000[6] of the $775,000 until the dispute over the amount of real property included in the sale could be resolved. An Order Granting Motion for Authority to Sell Assets Free and Clear of Liens, Interests, Encumbrances and Claims - Hattiesburg USDA Building ("Order Granting Motion to Sell Hattiesburg Building") (Dk. No. 531), which memorialized the escrow agreement, was entered on May 1, 2007, together with a Final Judgment as to Hattiesburg USDA Building (Dk. No. 532).

14. Subsequently, the Trustee and Great River filed the Motions which are currently before the Court.

15. At the Hearing, the Trustee took the position that the Contract with Great River is valid, enforceable, and binding, and that the Debtor's estate is entitled to the $45,000 in escrow. Great River, on the other hand, contended that the Contract should be reformed[7] as to the five (5) acres because there was no meeting of the minds between Great River and the Trustee as to the sale of that portion of the property. Great River thus maintains that it is entitled to recover the $45,000.

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[6] The $45,000 dollar amount was determined by the Trustee and Great River.

[7] Great River, in its post-trial legal memoranda, argues that it has the right to "cancel" the Contract. While aware that a contract may be rescinded for a party's unilateral mistake, *see* Crosby-Mississippi Res., Ltd. v. Pursue Energy Corp., 974 F.2d 612, 620 (5th Cir. 1992), the Court interprets Great River's position to be that the Contract should be reformed to adjust the purchase price for the value of the five (5) acres, not that the entire Contract should be rescinded. *See also* Estate of DeLoach v. DeLoach, 873 So.2d 146, 150 (Miss. Ct. App. 2004) (reformation is for purpose of correcting error arising from mistake).

Discussion

How Should the Court Interpret the Contract?

The Trustee and Great River do not dispute that they entered into the Contract.[8] The only issue before the Court is whether the Contract should be reformed as to the sale of the five (5) acres by adjusting the purchase price in the amount of $45,000. As stated in Martin v. Fly Timber Co., Inc., 825 So.2d 691, 696 (Miss. Ct. App. 2002):

> Our supreme court has set out a three-tier approach to contract interpretation. Pursue Energy Corp. v. Perkins, 558 So.2d 349 (Miss. 1999). First, the "four corners" test is applied, wherein the reviewing court looks to the language that the parties used in expressing their agreement. Pfisterer v. Noble, 320 So.2d 383, 384 (Miss. 1975). If the language used in the contract is clear and unambiguous, the intent of the contract must be realized. Id. On the other hand, if the contract is unclear or ambiguous, the court should attempt to "harmonize the provisions in accord with the parties' apparent intent." Pursue Energy Corp., 558 So.2d at 352. If the court is unable to translate a clear understanding of the parties' intent, the court should apply the discretionary "canons" of contract construction. Id. However, if the contract continues to evade clarity as to the parties' intent, the court should consider extrinsic or parol evidence. Id. It is only when the review of a contract reaches this point that prior negotiations, agreements and conversations might be considered in determining the parties' intentions in the construction of the contract.

Martin v. Fly Timber Co., Inc., 825 So. 2d at 696. Accordingly, the Court must first look to the four corners of the Contract to determine whether the language used was clear and unambiguous.

A. Is the Contract Unambiguous Under the "Four Corners" Test?

"Under Mississippi law, where the contract is not ambiguous, the intention of the contracting

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[8] "[I]n order to establish a contract, there need only be an offer, acceptance, and consideration." Gatlin v. Methodist Medical Ctr, Inc., 772 So.2d 1023, 1029 n.3 (Miss. 2000); *see also* Bert Allen Toyota, Inc. v. Grasz, 909 So.2d 763, 768 (Miss. Ct. App. 2005) (elements of a valid contract under Mississippi law are (1) two or more contracting parties; (2) consideration; (3) an agreement that is sufficiently definite; (4) parties with the legal capacity to make a contract; (5) mutual assent; and (6) no legal prohibition precluding contract formation); Palmer v. Security Life Ins. Co. of America, 189 F.Supp.2d 584, 589 (S.D. Miss. 2001).

parties should be gleaned solely from the wording of the contract." Union Planters Nat. Bank, N.A. v. Jetton, 856 So.2d 674, 678 (Miss. Ct. App. 2003) (citing Heritage Cablevision v. New Albany Elec. Power Sys., 646 So.2d 1305, 1312 (Miss. 1994)). As noted, the Contract provided that Great River purchased the property "more particularly described in Exhibit 'A', or if no Exhibit 'A' is attached as is recorded with the Chancery Clerk of the county in which the Property is located and is made a part of this Agreement by reference."[9] No Exhibit "A" was attached to the Contract, as previously discussed herein. *See* ¶ 9. The evidence presented at the Hearing established that the property recorded in the office of the Chancery Clerk of Forrest County, Mississippi, is the .97 acres. Accordingly, the unambiguous language of the Contract establishes that Great River purchased the Hattiesburg Building, comprised of the commercial building and .97 acres. *See* Jackson v. Sam Finley, Inc., 366 F.2d 148, 155 (5th Cir. 1966) (citing Landry v. Moody Grishman Agency, Inc., 181 So.2d 134 (Miss. 1965)).

Great River contends, however, that the Contract is ambiguous in that it provides two different methods of ascertaining the land description. Great River argues that the Contract, in providing for the land description to be attached or to be found in the land records of the Chancery Clerk, somehow creates an ambiguity. The Court is unpersuaded. The Contract merely states alternative methods of establishing the land description, either by attachment or by land records. Since no Exhibit "A" was attached to the Contract, the land records control. The land records reflect .97 acres, which is precisely the amount of acreage that the Trustee intended to sell, that the other

[9] Great River contends that the Contract merely contains boilerplate language, and that Great River did not intend to reference specifically the Chancery Clerk records. Yet, a contract is construed against its drafter, in this case, Great River. *See*, e.g., Cain v. Cain, 2007 WL 1816047 (Miss. Ct. App. 2007).

bidders bid on, and that actually was sold. The Court thus finds that the language of the Contract unambiguously establishes that Great River purchased the commercial building and .97 acres.

B. Did a Mistake Occur Which Would Justify Reformation of the Contract?[10]

An unambiguous contract may be reformed, however, if 1) a mistake occurred on the part of both parties or 2) a mistake occurred on the part of one party and that mistake is accompanied by evidence of fraud or inequitable conduct on the part of the other party. *See* Crosby-Mississippi Res., Ltd. v. Pursue Energy Corp., 974 F.2d at 620; Brown v. Chapman, 809 So.2d 772, 774 (Miss. Ct. App. 2002) (citing McCoy v. McCoy, 611 So.2d 957, 961 (Miss. 1992)) ("The law permits reformation of instruments to reflect the true intention of the parties when (a) the erroneous part of the contract is shown to have occurred by mutual mistake, . . . or (b) the error has arisen by the unilateral mistake of one party and that mistake is accompanied by evidence of some sort of fraud, deception, or other bad faith activity by the other party that prevented or hindered the mistaken party in the timely discovery of the mistake."); Union Planters Nat. Bank, N.A. v. Jetton, 856 So.2d at 678 (quoting Palmere v. Curtis, 789 So.2d 126, 131 (Miss. Ct. App. 2001)) ("'While a valid contract may be reformed where a mistake has been made, the general rule is that reformation is justified only if the mistake is a mutual one, or where one party made a mistake and the other party committed fraud or inequitable conduct.'"). Great River must prove its claim beyond a reasonable doubt. Crosby-Mississippi Res., Ltd.v Pursue Energy Corp., 974 F.2d at 616. The Court, therefore, will consider 1) whether both Great River and the Trustee made a mistake which would justify reformation of the Contract, or 2) whether Great River made a mistake and the Trustee engaged in any fraud or

[10] As discussed in footnote 7 herein, Great River evidently seeks reformation of the Contract.

inequitable conduct which would justify reformation of the Contract.

1. Did Both Parties Make a Mistake?

Under Mississippi law, the Contract may be reformed upon a showing that both Great River and the Trustee made a mistake. Crosby-Mississippi Res., Ltd. v. Pursue Energy Corp., 974 F.2d at 620; *see also* Bert Allen Toyota, Inc. v. Grasz, 909 So.2d at 768. Great River seems to contend that a mistake occurred by both parties in the making of the Contract because Gibson Realty incorrectly described the Hattiesburg Building on the Website and Great River based its bid on that wrongly described property.

Yet, even though the Website listing was incorrect, the Trustee knew at the time of the Auction that he was offering for sale the commercial building and the .97 acres. Thus, the Trustee was not mistaken as to the amount of acreage being sold with the Hattiesburg Building. Consequently, Great River has failed to demonstrate beyond a reasonable doubt that both parties made a mistake which would justify reformation of the Contract.

2. Did One Party Make a Mistake Which Was Coupled with the Fraud or Misconduct of the Other Party?

Mississippi law also provides that the Contract may be reformed if Great River can demonstrate that it made a mistake and that the Trustee engaged in fraud or inequitable conduct. Crosby-Mississippi Res., Ltd. v. Pursue Energy Corp., 974 F.2d at 620.

a) Did Great River Make a Mistake?

As to the first element, Great River asserts that it made a mistake in relying on the Website information in making its bid. "The general rule in Mississippi is that equity will not grant relief from a mistake if that mistake is merely the result of inattention, personal negligence, or misconduct on the part of the party applying for relief." Morris v. Liberty Mutual Ins. Co., 659 F.Supp.201, 205

(N.D. Miss. 1987) (citing Highlands Ins. Co. v. Allstate Ins. Co., 688 F.2d 398, 401 (5th Cir. 1982)). While Great River indeed made a mistake in basing its bid on the Website information, the Court is unpersuaded that the Contract should be reformed because Great River's mistake was the result of its own inattention or negligence.[11]

For instance, while there is no doubt that Gibson Realty should have corrected the Website upon determining that the Hattiesburg Building did not include the additional five (5) acres, the Website nonetheless included a clear disclaimer that all information should be independently verified. *See* ¶ 2 herein. Moreover, Vidal Davis ("Davis"), Great River's manager, admitted at the Hearing he had been advised by Campbell prior to making Great River's offer that the information provided by Phillips might not be reliable.

Moreover, Great River did not conduct adequate due diligence before the Auction. At the Hearing, Davis admitted that he understood the bankruptcy sale process was such that he needed to conduct his due diligence prior to the purchase. Yet, Davis conceded at the Hearing that he had not checked the land records prior to entering the Contract. Rather, Great River obtained the property description only after it became the successful bidder at the Auction. Moreover, even though at various times prior to the Trustee's filing of the Motion to Sell, Great River approached Campbell and the Trustee regarding the purchase of different estate properties, Great River did not inquire, or indicate its understanding, as to the amount of acreage included in the Hattiesburg Building. Neither did Great River at any time prior to or during the sale process, or at the Auction, ask for clarification

[11] There is no evidence that Great River engaged in any misconduct that also would disallow such reformation.

as to the amount of acreage included in the sale.[12]

In contrast, the other bidders did conduct their due diligence. As noted, the testimony at the Hearing established that a representative of the Braswell Family, prior to making an offer, contacted Campbell to discuss the property. The Braswell Family verified that the purchase included only the commercial building and .97 acres. Thus, the Braswell Family knew the exact acreage of the property on which it was bidding. Furthermore, in conducting his due diligence, Perkins also was made aware that the property consisted of the commercial building and .97 acres. Accordingly, Perkins understood the acreage included in the sale of the Hattiesburg Building.

Additionally, although it had an opportunity to do so, Great River did not condition the sale on verification of the property description. That is, the Trustee confirmed at the March 20 Hearing that no contingencies existed as to the purchase of the Hattiesburg Building. The transcript of the March 20 Hearing reflects:

> Mr. Henderson: Mr. Davis, there are no contingencies other than you get valid title; is that correct?
>
> Mr. Davis: That's correct.

(March 20 Hrg. Tr. 12:24 -13:1). The Court also inquired as to whether any further clarifications were needed, but Great River did not ask for any. (March 20 Hrg. Tr. 13:10-14). In the Court's opinion, the foregoing examples demonstrate that Great River was either inattentive or negligent in failing to independently verify the land description or clarify the acreage included with the sale prior to purchasing the Hattiesburg Building. Therefore, Great River's mistake occurred due to its own

[12] Davis stated that he had driven by the Hattiesburg Building, but had not attempted to discern the location of the additional five (5) acres. Yet, it seems that Great River's offer should have been based, at least in part, on the value of the five (5) acres, which could be affected by its location relative to the commercial building.

inattentiveness or negligence.

b) Did the Trustee Engage in Any Fraud or Misconduct?

Furthermore, not only must Great River establish that it made a mistake, but it also must demonstrate that the Trustee engaged in fraud or inequitable conduct. Great River, though, does not even allege that the Trustee engaged in any fraud or inequitable conduct, much less present proof of either. To the contrary, the evidence demonstrates that the Trustee did not actually know and had no reason to know that Great River believed that the Hattiesburg Building included an additional five (5) acres. *See* Palmere v. Curtis, 789 So. at 131 (quoting Mississippi State Highway Comm'n v. Patterson Enter. Ltd., 627 So.2d 261, 263 (Miss. 1993)) (in interpreting a contract, the Court is "concerned with what the contracting parties have said to each other, not some secret thought of the one [that was] not communicated to the other."). Accordingly, Great River has failed to persuade the Court beyond a reasonable doubt that the Contract should be reformed based on Great River's mistake coupled with any fraud or misconduct by the Trustee.

Based on the foregoing, the Court finds that the Trustee's Motion is well taken and should be granted, and that Great River's Motion is not well taken and should be denied. Accordingly, the $45,000 held in escrow should be released to the Trustee for the benefit of the bankruptcy estate.

A separate final judgment will be entered in accordance with Federal Rule of Bankruptcy Procedure 9021.

SO ORDERED,

Neil P. Olack
United States Bankruptcy Judge
Dated: August 24, 2007