IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

IN RE:

STEPHEN STANSELL,

Case No. 92-22784-WHB

Debtor Chapter 11

STEPHEN STANSELL,

Plaintiff,

Vs. Adversary No. 95-0176

COLONIAL HILLS BAPTIST CHURCH,

Defendant.

MEMORANDUM OPINION ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

On August 21, 1995, the Court heard oral arguments of counsel for the parties concerning the plaintiff's motion for summary judgment and the defendant's response to that motion. The Court took the contested motion under advisement to allow the Court to read the relevant portions of depositions that had been referred to in the motion and response. The Court has considered the motion, response, depositions, relevant documents, and the arguments of counsel, and this opinion contains findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(M), as this Court on May 12, 1994, entered an Order Approving Lease Agreement With Option To Purchase concerning the debtor's agreements with the defendant, and that Order retained jurisdiction over the subject matter of that Order in the event of any disputes. Therefore, this Court may, at the appropriate time, enter a

final order in this adversary proceeding that will be subject to appeal to the United States District Court.

SUMMARY JUDGMENT

Summary judgment is governed by FED. R. BANKR. P. 7056, which incorporates FED. R. CIV. P. 56, and summary judgment may only be granted if it is shown that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). If the court is unable to fully adjudicate the proceeding upon such a motion, the court should, "if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." FED. R. CIV. P. 56(d).

In this particular proceeding, this Court has considered the evidence in the light most favorable to the defendant and has found that there is no genuine issue of material fact in dispute as to whether the option was exercised by the defendant, nor is there a factual dispute concerning the authority of the defendant's attorney to act on behalf of the defendant. Thus, partial summary judgment may be entered for the plaintiff on these issues. However, complete summary judgment may not be entered as there is a genuine factual dispute concerning the ultimate issue of the defendant's breach of the contract to purchase the subject realty. Specifically, there is a dispute as to whether the parties' contract was followed concerning the provision of a title search or documents for examination of a title on the subject property. In this opinion, the Court will discuss these issues.

DISCUSSION OF FACTS AND CONCLUSIONS OF LAW

The debtor is the record owner of real estate on which an office building is located at 5199 Highway South, Southaven, Mississippi. There is a dispute as to whether the debtor holds marketable, warrantable title to this property, an issue to be more fully discussed later in this

opinion. On February 17, 1994, the debtor in possession in this Chapter 11 case entered into a Lease Agreement for this property with Colonial Hills Baptist Church of Southaven, the defendant in this proceeding ("Colonial Hills"). The parties have consummated that Lease Agreement, which apparently is not in default. However, the parties also on the same date entered into a separate Option Contract, which set out terms under which Colonial Hills could purchase the same realty with its improvements from the debtor. Mr. Stansell's attorney filed a motion to approve these two contracts, and on May 12, 1994, the Court entered its Order approving the two contracts. That Order provided that in the event of a sale under the option the sale would be free and clear of liens and other interests pursuant to 11 U.S. C. §363(f), with any liens attaching to the proceeds of the sale.

As a part of the Option Contract, Colonial Hills paid $50,000 to Mr. Stansell, which amount would be credited toward the purchase price if Colonial Hills exercised its option within the three year lease term established by the separate lease agreement. If the option was not exercised then the $50,000 would be retained by Mr. Stansell. The Option Contract provided that it was contingent upon its approval by the membership of Colonial Hills Baptist Church; however, the church membership did approve the Option Contract on February 20, 1994. Bennett deposition, Exhibit 1. The Option Contract provided for a purchase price of $675,000 or less if the fair market value was established by an appraisal to be less than that amount. In a peculiar sequence of events, the designated appraiser first reported a market value to Colonial Hills of $677,000, then he reduced that appraisal value, after meeting with the church's pastor and a committee, to $430,000. Using the lower figure, Colonial Hills' attorney wrote to Mr. Stansell on July 25, 1994, advising that her client was exercising its option to purchase at $430,000.

The first issue asserted by Colonial Hills is that its attorney, Susan Brewer, was not authorized to send the July 25, 1994 letter to Mr. Stansell. Rather, Colonial Hills claims that Ms. Brewer was instructed only by the church's committee to send that letter. The first problem with the Colonial Hills' position is that the Option Contract only required the full church membership to approve the Option Contract, and that requirement was met by a membership vote of approval on February 20, 1994. Bennett Deposition, p. 11; Exhibit 1. The Option Contract does not address the need for membership approval of action in furtherance of the Option Contract once initially approved. The defendant may not overcome a summary judgment motion by merely alleging that full membership approval of its attorney's letter was required. Not only did the Option Contract not require that, but the church's actions deny such a need. Over several months of numerous activities on behalf of the church, Ms. Brewer acted as attorney for the church, and the church has presented no proof that it protested any of Ms. Brewer's actions. For that matter, there is no proof that the church membership disapproved of the actions of its attorney or its committee. The Court has been provided with no authority to support an assumption that membership approval of the exercise of the option was required. Under the facts before the Court, Colonial Hills would be estopped to deny the exercise of the option by its attorney.

Colonial Hills asserts that Ms. Brewer, its acknowledged attorney in this matter prior to litigation, lacked the authority, real or apparent, to exercise the option by her letter of July 25, 1994. This issue may be decided as a matter of law, as neither party disputes that the letter was sent and that it says what it contains. The cases cited by the parties on this issue dealt with apparent authority of an agent but those cases did not specifically address the special nature of an attorney as agent for her client. See, e.g., Andrew Jackson Life Insurance Co. v. Williams, 566 S.2d 1171, 1181 (Miss.

1990); Steen v. Andrews, 78 S. 2d 881 (Miss. 1955). It first should be noted that the legal issues in this proceeding are to be determined under Mississippi subtantive law, as the contract dealt with Mississippi realty. In attorney-client relationships the law in Mississippi appears to be that the burden of showing that an attorney lacked authority to act on behalf of her client rests with the party denying such authority. In Terrain Enterprises, Inc. v. Western Casualty and Surety Co., 774 F.2d 1320, 1322 (5th Cir. 1985), the Circuit Court of Appeals for the Fifth Circuit, citing a 1929 Mississippi Supreme Court case, interpreted Mississippi law accordingly. Hirsch Bros. & Co. v. R.E. Kennington Co., 155 Miss. 242, 124 So. 344 (Miss. 1929). See also Scott v. Quinn (In re Scott), 82 B.R. 760, 762 (Bankr. E.D. Pa. 1988).

Thus, Colonial Hills bears the burden of showing that Ms. Brewer did not have the authority to exercise the option. As stated earlier, there is no offer of proof that the church acted in any way to denounce Ms. Brewer's letter, nor is there proof that the church expressed its disapproval of its attorney's actions on its behalf. See, e.g., Keath deposition, pp. 45-46. In fact, there is proof that Ms. Brewer was authorized to send the letter. Brewer deposition, pp. 9, 26; Bennett deposition, pp. 26-27. The church's pastor testified that he relied upon Ms. Brewer for her explanation of how to exercise the option. Bennett deposition, p. 14. Ms. Brewer testified that she intended to exercise the option on behalf of the church. Brewer deposition, p. 26. Ms. Brewer did advise Mr. Coury, attorney for Mr. Stansell, by telephone message that the church must ratify its committee's action on August 31 and that the earliest closing would be September 1, 1994. Brewer deposition, Exhibit 10. Thereafter, the church continued to express through Ms. Brewer that it was proceeding toward a closing. On September 1, 1994, Ms. Brewer wrote to Mr. Stansell's real estate attorney that the church would be prepared to close in about two weeks and that the church's bank loan had been

approved. Brewer deposition, Exhibit 13. It is obvious from a reading of Dr. Bennett's, Ms. Brewer's and Mr. Keath's depositions that, once the option had been approved by the church membership, the church functioned through its committees. See, e.g., Bennett deposition, p. 26; Keath deposition, pp. 20-21, 25, 27, 33. Dr. Bennett's and Mr. Keath's depositions leave no doubt that Ms. Brewer was the church's attorney for this transaction. She prepared the lease and option agreements and participation in the negotiations. Brewer deposition, pp. 6-7. Clearly, Ms. Brewer was the attorney for the church, and Mr. Stansell was entitled to rely upon a letter from Ms. Brewer exercising the option. The church has only offered arguments against Ms. Brewer's authority, and arguments do not substitute for proof. The Court sees no genuine issue of material fact concerning Ms. Brewer's authority as attorney for the church to write the letter dated July 25, 1994.

The Option Contract only required that Colonial Hills exercise the option by giving Mr. Stansell written notice of its intention to exercise the option, said notice to be given by personal delivery or by registered mail. Ms. Brewer's letter met the latter requirement, and there is no question that Mr. Stansell received the letter. The letter specifically said that Colonial Hills "is exercising its option to purchase the ... property at a price of $430,000 less the $50,000 previously tendered." Brewer's July 25, 1994 letter. The defendant argues that this was not an effective exercise of the option because Mr. Stansell's first response from his attorney was that he treated the letter as an offer to renegotiate the purchase price. The church's response, again from its attorney, Ms. Brewer, was a rejection of any other purchase price and a restatement that its position had not changed; that is, the church continued to rely upon its exercise of the option at a price of $430,000. Brewer deposition, Exhibit 8. Mr. Stansell reevaluated his position and his attorney then wrote to Ms. Brewer accepting the church's option price and expressing a preparedness to close quickly.

Brewer deposition, Exhibit 9. Discussions then began about a closing date. At no time, until this litigation began, did the church or its attorney express that it had not intended to exercise its option. Rather, the closing did not occur after the church's attorney, still Ms. Brewer, wrote to Mr. Stansell's attorney on September 29, 1994, advising that the closing would be "temporarily put on hold until further notice." Brewer deposition, Exhibit 16. It was only when this litigation began that Colonial Hills raised a title defect as an excuse for not closing.

The undisputed facts clearly establish that the option was exercised by the letter from the church's attorney and that the church never altered its position until this litigation was filed. The only requirement under Mississippi law is that the requirement of written intent to exercise the option be satisfied. See Busching v. Griffin, 542 So.2d 860, 864 (Miss. 1989). There is no dispute about that in the facts before the Court. The defendant argues that Mr. Stansell's letter in response to the option exercise vitiated the exercise. Even if there were merit to that argument, and there is not because it is the intent of the church as the one exercising the option that controls whether the option was exercised, such an argument would be defeated by the fact that the church reaffirmed its option position both before and after Mr. Stansell accepted the option terms offered by the church. The Court is satisfied that, under any interpretation of the facts before the Court, the option was exercised.

Having found that the option was exercised and that the defendant's attorney had authority to so exercise, the issue remaining is one of whether the church had a valid reason not to close in compliance with the option as exercised. This brings us to the defendant's contention in its response to the summary judgment motion that Mr. Stansell did not supply satisfactory evidence of good title to the property. While the Option Contract is subject to opposing interpretations as to whether Mr.

Stansell was required to provide a title search or documents for title examination absent a demand by the purchaser, and while Mr. Stansell may argue that the church can not defend on the basis of unmarketable title until it is established by the church that he in fact did not have good title, those issues evidence that there is a genuine issue of material fact in dispute concerning the title to the property.

Mr. Stansell seeks a summary judgment that the defendant is in breach of its contract to purchase this property and that he is entitled to retain the $50,000 as liquidated damages and to obtain his attorney's fees as compensatory damages under the contract. The defendant on the other hand contends that it has a valid excuse not to close due to the lack of marketable title in the seller. While the Court is somewhat suspicious of this contention due to the failure of the church to raise it until a litigation issue, the Court concludes that it should not grant summary judgment until the title issues have either been settled or tried.

However, the Court will grant partial summary judgment on the issues of exercise of the option and on the defendant's attorney's authority to exercise the option on behalf of the church. A separate order will issue, which order will also set a further pretrial conference for the purpose of discussing the specific title issues to be tried. Also, at trial the plaintiff's entitlement to attorney's fees, and the amount thereof, will be determined. The Court will not enter a separate judgment at this time but will await entry of a judgment until all issues have been resolved finally.

SO ORDERED this 19th day of September, 1995.

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WILLIAM HOUSTON BROWN

UNITED STATES BANKRUPTCY JUDGE

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