

THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2012-CC-01089

COA 7

JOHN F. GUSSIO JR., BROKER;
GREGORY JOSEPH GUSSIO, BROKER/SALESPERSON
AND GUSSIO REALTY INC.

APPELLANTS

V.

MISSISSIPPI REAL ESTATE COMMISSION

APPELLEE

BRIEF OF APPELLANTS

FROM THE MISSISSIPPI REAL ESTATE COMMISSION
AND THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

David M. Sessums, MSB [REDACTED]
ATTORNEYS FOR APPELLANTS
VARNER, PARKER & SESSUMS
1110 Jackson St.
Vicksburg, MS 39181
Ph: (601)638-8741

**THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2012-CC-01089**

**JOHN F. GUSSIO JR., BROKER;
GREGORY JOSEPH GUSSIO, BROKER/SALESPERSON
AND GUSSIO REALTY INC.**

APPELLANTS

V.

MISSISSIPPI REAL ESTATE COMMISSION

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

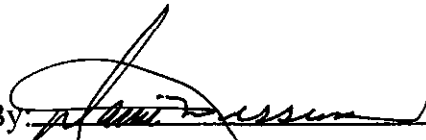
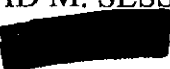
The undersigned counsel of record certifies that the following have an interest in this action. These representations are made so that the Justices of this Court may evaluate possible disqualification or recusal:

1. John F. Gussio, Jr.
2. Gregory Joseph Gussio
3. Gussio Realty, Inc.
4. David M. Sessums, Esq.
Varer, Parker & Sessums, P.A.
Attorneys for Appellants
1110 Jackson Street
Vicksburg, MS 39183
5. Mississippi Real Estate Commission
2506 Lakeland Drive
Suite 300
Flowood, MS 39232
6. John Maxey , Esq.
Attorney for Appellee
210 E. Capital Street

Suite 2100
Jackson, MS 39207-3977

7. Honorable John Emfinger
Madison County Circuit Court Judge
P.O. Box 1885
Brandon, MS 39043

Respectfully submitted,

By: 
DAVID M. SESSUMS
MSB 

OF COUNSEL:

VARNER, PARKER & SESSUMS, P.A.
Post Office Box 1237
1110 Jackson Street
Vicksburg, Mississippi 39181-1237
Telephone: 601/638-8741
Facsimile: 601/638-8666

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES i

TABLE OF CONTENTS iii

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES iv

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

 Evidentiary Standard 4

 Standard of Review on Appeal 5

 Heightened Scrutiny on Appeal 5

 Required Elements of a Contract 6

 Contractual Elements 7

 Representations to Commission (or Failure to cooperate) 20

 Jurisdiction 23

SUMMARY 25

CERTIFICATE OF SERVICE 27

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

1. *McDerment v. Mississippi Real Estate Commission*, 748 So. 2d 114 (Miss. 1999);
2. *Mississippi Real Estate Commission v. White*, 586 So. 2d 805 (Miss. 1991);
3. *Farris v. Mississippi Real Estate Commission*, 994 So. 2d 229 (Miss. App. 2008);
4. *Brooks v. Brooks*, 652 So. 2d 1113, 1118 (Miss. 1995);
5. *In Re: Estate of Davis*, 832 So. 2d 534 (Miss. App. 2001);
6. *Paulmere v. Curtis*, 789 So. 2d 126 (Miss. App. 2001)
7. *Service Electric Supply Co., Inc. v. Hazelhurst Lumber Co., Inc.*, 932 So. 2d 863 (Miss. App. 2006)
8. *Morris v. Liberty Mutual Insurance Co.*, 659 F. Supp. 201 (N.D. Miss 1987);
9. *Anderson v. Business Aircraft, Inc.*, 650 So. 2d 473 (Miss. 1995);
10. *Heritage Building Property, LLC v. Prime Income Asset Management, Inc.*, 43 So. 3d 1138 (Miss. App. 2009);
11. *Mississippi Real Estate Commission v. Hennessy*, 672 So. 2d 1209 (Miss. 1996);
12. Section 15-3-1 (c) Miss Code Ann (1972);
13. Section 75-35-1;
14. Section 73-35-3 (3);
15. Section 73-35-5 (5)
16. 17 C.J. S. Contracts, Section 43

STATEMENT OF THE ISSUES

1. The Commission erred in refusing to strike Exhibit No. 2 from evidence.
2. The Commission erred in determining that any misrepresentations had been made by any one or more of Appellants.
3. The Commission erred in finding that a valid contract existed.
4. The Order of the Commission is not based upon substantial evidence.
5. The Order of the Commission is arbitrary and capricious.
6. The Commission erred in failing to grant Appellants's Motion to Dismiss.
7. The Order of the Commission was beyond the power of the Commission to make.
8. The Order of the Commission violated Appellant's constitutional right of freedom of contract.
9. The Circuit Court erred in affirming the decision of the Commission for the reasons set forth above.

**STATEMENT OF THE CASE
AND SUMMARY OF THE ARGUMENT**

Prior to the Complaint filed in this matter by Timothy Keen on April 15, 2010, Lexis Homes, Inc. owned solely by Gregory Joseph Gussio (hereinafter "Greg Gussio or Greg") owned property located at 114 Carriage Lane, Florence, Mississippi which had been listed for sale through the Multiple Listing Service (MLS) on June 29, 2008, but removed from the MLS on February 4, 2010.

On February 26, 2010, Greg contracted with a person named Christopher Albright to purchase 114 Carriage Lane. It subsequently developed that Albright could not initially get financing for purchase after which time Greg was contacted by Becky Hathcock of Maselle Realty, representing Timothy Keen and his fiancé (the future Darla Keen).

Greg signed a form contract which provided, inter alia, "Buyer to provide proof of firm commitment letter to Seller within ten (10) days and home to remain on market for show and sale until this contingency is removed." (Exhibit "2").

Keen counter offered striking through the portion asserted by Gussio that the home would remain on the market for "show and sell" but this counter offer was never accepted by Gussio.

It was clear in all offers that Keen provide proof of a firm commitment letter to seller within ten (10) days and for the home to remain on the market. The contingencies remained in full force at all times.

Keen never produced proof of a firm commitment letter within the required ten (10) days. Indeed, he did not obtain any firm commitment at all until after he had filed his Complaint with the Real Estate Commission on April 16, 2010.

The home remained on the market as set forth in writing and Albright subsequently obtained

financing. Gussio (Lexis Homes) as owner sold 114 Carriage Lane to Albright on April 15, 2010, for \$150,000.00, \$6,000.00 less than the amount offered by Keen.

Upon the filing of Keen's Complaint the Commission requested information from John F. Gussio, Jr. and Gregory Joseph Gussio (co-owners of Gussio Realty, Inc.) and from Gussio, Realty, Inc.

On May 25, 2010, the Commission in direct response to the Keen matter received a letter from John Gussio and Greg Gussio which stated in part, "This transaction [note: referring to the Keen matter] did not go through Gussio Realty and was not in MLS. Therefore, please close this matter," although no documents were provided on May 25, 2010.

The Gussios subsequently retained the Stubblefield law firm to represent them which firm filed a response on their behalf. Among the defenses asserted by the Stubblefield firm there never was a contract with Timothy Keen as Keen did not meet the ten (10) day contingency and the contract offer indicated that the home would remain on the market.

In June or July the Gussios provided documents to the Commission.

A hearing was held before the Mississippi Real Estate Commission on November 21, 2011, at which time the Commission received exhibits into evidence and heard testimony from witnesses.

The Commission took the matter under advisement and on December 1, 2011, the Commission entered its Order finding, inter alia, that the failure of Appellants to cooperate with the Commission's investigation was a violation and without specifying exactly what or how, that Appellants had made substantial misrepresentations in connection with the real estate transaction and suspended the licence of John F. Gussio, Jr. for a period of sixty (60) days with the second thirty (30) days held in abeyance, suspended the licence of Greg Gussio for a period of six (60) days with

the second thirty (30) days held in abeyance.

Exactly what the Commission found to be “misrepresented” is not clear as the December 1, 2011, Order fails to identify any specific “misrepresentations.”

What is clear is that there was no contract or as acknowledged by the Commission when the Commission specifically found that there was a “failure to achieve an unambiguous meeting of the minds” ie: no contract.

Thereafter Appellants perfected their appeal to this Court.

For the Court’s reading convenience a chronological summary of the events in this matter is found in Exhibit No. 14.

ARGUMENT

Evidentiary Standard

In a concurring opinion Justice Waller in McDerment v. Mississippi Real Estate Commission, 748 So. 2d 114 (Miss. 1999), held:

“disciplinary charges against a professional must be proved by clear and convincing evidence.” 748 So. 2d at page 121

The case cited by Justice Waller, Mississippi Real Estate Commission v. White, 586 So. 2d 805 (Miss. 1991) held:

“Before the Mississippi Real Estate Commission where he faced the threat of suspension or loss of his broker’s licence, White was protected by familiar statutes that required that the “testimony . . . clearly establish . . . the guilt of the respondent.”

* * *

In a variety of contexts we have held that disciplinary charges against a professional must be proved by clear and convincing evidence.” 586 So. 2d at 808.

In this matter the MREC was required to prove all charges by clear and convincing evidence.

Standard of Review on Appeal

In reviewing an administrative agency's findings of fact circuit courts and appellate courts have a limited scope of review and an agency's decision will not be disturbed absent finding that (1) the agency's finding was not supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make or (4) violated some statutory or constitutional right of the complaining party. See McDerment v. Mississippi Real Estate Commission, supra.

Heightened Scrutiny on Appeal

Acknowledging the general standard of review on appeal, in situations where an agency adopts its own allegations as its own findings or conclusions there is a heightened degree of scrutiny on appeal. Or, as stated by the court in Farris v. Mississippi Real Estate Commission, 994 So. 2d 229 (Miss. App. 2008):

“Generally, administrative findings of fact are not reviewed de novo on appeal; however, heightened scrutiny may apply where the Commission adopts its own allegations as findings and conclusions. Anding, 732 So. At 196 (10) (citing Brooks v. Brooks, 652 So. 2d 1113, 1118 (Miss. 1995)).” 994 So. 2d at Page 232.

Without even bothering to subpoena Keen's documents from Prime Lending (Keen's mortgage company) to see whether or not Keen in fact had met the offer requirement of providing proof of a firm commitment within ten (10) days the Commission on May 9, 2011, filed its own complaint against John Gussio, Greg Gussio and Gussio Realty, Inc.

Paragraph 1 of the Complaint is identical to paragraph 1 of the Commission's Order of December 1, 2011.

There is no paragraph 2 of the Complaint although Paragraph 3 of the Complaint is identical to paragraph 2 of the Commission's Order of December 1, 2011.

Paragraph 4 of the Complaint is identical to paragraph 3 of the Commission's Order of December 1, 2011.

Paragraph 5 of the Complaint is heavily incorporated into paragraph 4 of the December 1, 2011, decision.

Paragraphs 4, 5, 6 of the Complaint are repeated, sometimes word for word, in paragraphs 4, and 5 of the decision of December 1, 2011.

Alarming, Paragraph 9 of the Complaint is identical to paragraph 13 of the decision of December 1, 2011.

Because the Commission, almost verbatim, adopted its own allegations as its own findings and conclusions there is a heightened degree of scrutiny on this appeal and the usual deferential standard review of an administrative agency's finding is not applicable.

Required Elements of a Contract

In Mississippi contracts for the sale and purchase of real estate must be in writing. See §15-3-1 (c) Miss Code Ann (1972).

For any contract to exist, and it did not, all the essential terms and conditions of any alleged contract were required to be in writing. In this case they were not.

Contractual Elements

A crucial element to the existence of a contract and important to this case, is that a meeting of the minds must take place before a valid and binding contractual agreement can arise. *In Re: Estate of Davis*, 832 So. 2d 534 (Miss. App. 2001), and a court can not draft a contract between two parties where they have not manifested a mutual assent to be bound. *Paulmere v. Curtis*, 789 So. 2d 126 (Miss. App. 2001)

Just as elemental is that an enforceable contract requires an offer and an acceptance of the offer. *Service Electric Supply Co., Inc. v. Hazelhurst Lumber Co., Inc.*, 932 So. 2d 863 (Miss. App. 2006) and it is not one's subjective intent, but one's objective manifestations, which determines whether an offer was made and accepted. See *Morris v. Liberty Mutual Insurance Co.*, 659 F. Supp. 201 (N.D. Miss 1987)

Just as basic is that the failure to communicate an acceptance of an offer is fatal to the creation of a valid contract. *Anderson v. Business Aircraft, Inc.*, 650 So. 2d 473 (Miss. 1995) and a contract is not formed until the offeree accepts the terms stated by the offeror. *Heritage Building Property, LLC v. Prime Income Asset Management, Inc.*, 43 So. 3d 1138 (Miss. App. 2009).

This black letter law is succinctly stated in 17 C.J. S. Contracts, Section 43 where the authors state:

“an acceptance, to be effectual, must be identical with the offer and unconditional; and where a person offers to do a definite thing, and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat or is a counter proposal, and in neither case is there an agreement; . . . In other words, a proposal to accept or an acceptance introducing new conditions or terms varying from those offered amounts to a rejection of the offer and the submission of a counter proposal and puts an end to the negotiations without forming a contract unless the party making the offer renews it or agrees to the suggested modifications.” 17 C.J.S. Contracts, Section 43 at Pages 681-683.

In this matter there was no contract. The Commission itself in its own Order dated December 1, 2011, expressly found that there was no meeting of the minds. See Order dated December 1, 2011, Page 8.

When presented with the initial offer for the purchase of 114 Carriage Lane, Greg Gussio inserted his counter offer, "Buyer to provide a proof of firm commitment letter to Seller within ten (10) days and home to remain on market for show and sale until this contingency is removed." See Exhibit "2."

In counter to Grey's counter offer Timothy Keen through his "new to the business" agent Becky Hathcock, struck out the words "for show and sale" and inserted an additional counter offer stating, "this contingency, first right of refusal as per paragraph 33." It is clear from the testimony of all parties that this counter offer was never accepted by Gussio. As such there was no meeting of the minds and no contract.

This is clear from the Commission's own investigator, Rick Stubblefield, as he testified when addressing the ten (10) day firm commitment letter requirement of the proposed contract:

"Q: Mr. Keen never got this (referring to firm commitment) from Prime Lending before he filed his complaint, did he?

A: No.

Q: And he certainly did not get it within ten (10) days of the signing of the contract with Mr. Gussio?

A: No.

Q: So it would be safe to say that Mr. Keen's ten day stay window expired even before he filed the complaint with the commission, correct?

A: It would.

Q: So it would be safe to say that Mr. Keen's contract was void. He didn't meet the terms of the contract.

A: I can't - - I can't say whether a contract is void or not. That's not my job.

Q: That's a legal term. I understand.

A: Yes, sir.

Q: But we can agree that the specified number of days within which he had to do something did expire, can't we?

A: That is correct." (Vol. 1, Pgs 62-63)

Not only did the parties fail to reach a meeting of the minds and hence no contract, even had a contract existed it was contingent upon Keen, within ten days, providing "proof of a firm commitment letter to seller within ten (10) days" (See Exhibit 2, Vol. 2, Pg 187) and it is uncontradicted that he failed to do so.

In fact, even at the point in time when Keen filed his complaint with the MREC he still did not have final approval from any lenders.

The fact is that Greg Gussio continued to negotiate with both the Keens, through Becky Hathcock as their agent, and with Albright in hopes that he could sell the home to someone. That a contract was never reached, and only negotiations ongoing is clear from the testimony of Mr. Stubblefield, as follows:

"Q: Does this Commission not have subpoena powers?

A: It does.

Q: Did you subpoena those records from Prime Lending to find out if Mr. Keen ever got final approval?

A: No, I didn't.

Q: Would it surprise you to know that Mr. Keen got final approval eight days after he had filed a complaint with the Commission?

A: I was not aware of that.

Q: Do you think that would have been pertinent information to know before a complaint was filed in this matter?

A: Yes.

Q: Do you know why that was not done in the course of your investigation?

A: I looked at what appeared to be Mr. Gussio's continued negotiation with Mr. Keen regardless of the language in the contract.

Q: I'm sorry, Mr. Stubblefield. I thought the contract was the governing document in real estate transactions. Is that not your understanding?

A: Unless addendums or agreements upon both buyer and seller to continue.

Q: Well, Mr. Stubblefield, would you tell me what is unclear about this language, "Home to remain on market for show and sale until this contingency is removed." Is there anything unclear about that?

A: No, sir. It's clear.

Q: And that is exactly what Greg Gussio did, isn't it?

A: Yes." (Vol. 1, Pgs. 57-58)

Why the Commission did not bother to find out if Keen had ever met the plain terms and conditions of his proposed contract with Greg Gussio and did not subpoena the records from Keen's lender, Prime Lending before filing its complaint is mysterious at best, or as admitted by Mr. Stubblefield:

"Q: Mr. Stubblefield, I am going to hand you a document dated March 31, 2010. I know you have seen that . I just want you to locate it from me and yours. Can you identify that for us, please sir?

A: (reviews document) Yes. This is a credit approval letter for Mr. Keen from

Prime Lending.

Q: It's dated March 31, 2010?

A: Yes. (Exhibit 15, Vol. 3, Pg. 338)

Q: Mr. Stubblefield, if you will refer to Exhibit "15" and to help us move along I am going to read this, and you correct me if I get something wrong. Okay?

It's dated March 31, 2010. If they say that he has been approved - - Mr. Keen has - - for a mortgage loan not to exceed \$157,000.00. Is that right?

A: Yes.

Q: And this is based solely on his credit report at that point in time. Is that correct?

A: Correct.

Q: And it says, "and is conditional," does it not?

A: Yes.

Q: Because Mr. Keen at that point in time, he had not provided them his tax returns has he?

A: Not at this time.

Q: Have you seen a title commitment in your file?

A: No, sir.

Q: That would be Item Number 3 condition in Exhibit No. "15," the conditional approval of Mr. Keen.

A: No, sir.

Q: Okay, we can agree can we not, Mr. Stubblefield, that this document, the letter of Prime Lending dated March 31, 2010, Exhibit No. "15," is not a final approval, is it?

A: I don't believe it is.

Q: And yet that is what the contract calls for, does it not?

A: Yes.” (Vol. 1, Pgs. 58-59)

Referring to the documents subpoenaed by the undersigned from Prime Lending (what a final commitment looks like) (Exhibit 16, Vol. 3, Pg. 339) Mr. Stubblefield testified:

“Q: In contrast to the conditional commitment, this document actually says that “your application has been approved,” does it not?

A: Yes, it does.

Q: Okay. In fact it specifies that an exact loan amount that has been approved. Does it not?

A: Yes.

Q: And it also specifies exact terms that have been approved. Does it not?

A: Yes.

Q: And it also specifies an exact interest rate that has been approved, does it not?

A: Yes.

Q: And Mr. Keen never got this from Prime Lending before he filed his complaint, did he?

A; No.

Q: And he certainly did not get it within ten days of the signing of the contract with Mr. Gussio, did he?

A: No.” (Vol. 1, Pgs. 61-62)

Additionally, on the issue of misrepresentation, Timothy Keen admitted that Gussio never represented anything to him, or as stated by Keen:

“Q: Did Mr. Gussio or anybody on his behalf tell you before that that the house was under contract with someone else?

A: No. I spoke with my realtor the entire time.

Q: And did she tell you - -

A: My understanding is that you don't speak with a dealer if you are going through a realtor. That's what - - that's what my understanding was when Becky was talking to me.

Q: But did Mr. Gussio either directly or through someone else tell you ?

A: No." (Vol. 1, Pg. 74)

Curiously, Keen did consider filing a complaint against Beck Hathcock (Vol. 1, Pg. 76-77)

On cross examination when Becky Hathcock was confronted on whether or not she informed the Keens that a previous offer was pending to Gussio she testified:

"Q: Did you ever tell anyone - - did you ever tell Mr. Keen that you would only be able to write a back up offer?

A: I don't remember.

Q: Do you still have a copy of your statement you gave this Commission?

A: I do not have a copy except for this one he just gave me.

Q: . . . If you would, look at the sixth paragraph of your statement.

A: (Reviews document) Okay.

Q: You see that third sentence that says, "I told him until the current contract expired that we would only be able to write a backup offer, but that I would call Mr. Keen and ask what he would like to do." Do you see that language?

A: Yes.

Q: Okay. So you clearly knew that what you were submitting on the part of Mr. Keen was a backup offer. Correct?

A: Well, I would have to look at the contract, but I believe in our contract it says that this is a backup offer, so we would have to look on there and see.

Q: We are going to get to that. But, clearly in your statement you are telling this

Commission - - this is your official statement to this Commission - - you were aware at all times that what Mr. Keen was submitting was a backup offer. Correct?

A: I am not sure of that.

Q: Well, read it in your own words, then. Read that sixth paragraph of your statement to this Commission.

A: "I told him until the current contract expired, that we would only be able to write a backup offer, but I would call Mr. Keen and ask what he would like to do." " (Vol. 1, Pgs. 103-104)

Yet according to Mr. Keen, Becky Hathcock never told him this information. Under any view this certainly is not a misrepresentation on the part of Greg Gussio.

Testifying as to the proposed contract language and Keen's duty to provide a firm commitment within ten days, Hathcock testified:

"Q: Alright. And it says quite clearly, "Buyer to provide proof of a firm commitment." Did you see that language?

A: Yes.

Q: Did you explain that language to Mr. Keen?

A: I don't remember. I mean, I am sure we discussed it, and I am sure we did, but I don't remember what I said to him exactly.

Q: That would be some pretty important information to discuss?

A: Yes.

Q: And you can't recollect any discussions of that?

A: We had a discussion in my office about the language, and obviously we crossed it out and wanted to have it as contingent right of first refusal. So that means we did not agree with keeping that as a part of the contract." (Vol. 1, Pg. 106)

Hathcock further testified:

Q: “. . . But in Exhibit “2” it clearly says “Buyer to provide proof of a firm commitment letter to Seller within ten days.” That has been a part of the agreement at all time. Correct?

A: Yes.” (Vol. 1, Pg. 107)

Ms. Hathcock had been in the real estate business less than a year prior to the events in question. (Vol. 1, Pg. 108)

When discussing where Ms. Hathcock had struck through the counter offer of Gussio that the home was to remain on the market for show and sale and where she inserted the still further counter offer of Keen that Keen would have a contingent right of first refusal Hathcock testified:

“Q: . . . And the part about it remaining on the market, what part about that was unclear to you?

A: Because I wrote “as contingent first right of refusal” on there, it is my understanding of that is that it would not be active. It would be contingent first right of refusal.

Q: Was that initialed by Mr. Gussio?

A: No.

Q: Oh, it wasn't. So you wrote an offer in there that was not accepted by Mr. Gussio.

A: Apparently.

Q: Well, then, we don't have a contract on that particular term, then, do we, Ms. Hathcock?

A: No, sir.

Q: So Mr. Gussio - - you tried to add something yet again to the contract, conditional right of first refusal. Mr. Gussio didn't agree to that, did he?

A: No.

Q: Alright. You agree with me, then, that that does not become part of the contract, does it?

A: No.” (Vol. 1, Pg. 109)

That a contract and a meeting of the minds was never reached is further emphasized by Ms.

Hathcock’s testimony:

“Q: That contract is dated, what, April 2, 3?

A: Well, no. What I considered an executed contract was April 5 - - or that Monday, April 6. Sorry.

Q: But you never got that initialed back from Mr. Gussio?

A: No.

Q: So you can’t operate off of that, can you?

A: No.” (Vol. 1, Pg. 111)

While she testified about a “preapproval” letter Hathcock admitted that Keen had never provided a firm commitment letter or as follows:

“Q: Do you remember the date?

A: - - but it is not a firm commitment letter, no.

Q: Okay. There is no firm commitment letter, is there?

A: No.

Q: There never was. Even up to the 15th of April there was no such document.

A: No.

Q: Okay. Do you even know the date that Mr. Keen might have gotten final approval as required by the contract?

A: No.” (Vol. 1, Pg. 112)

When asked by Commissioner Cumbest about whether she had communicated the ten day window to everyone, Hathcock stated:

“Q: Well, the thing that - - I know this ten - day window is a short period. Did you communicate to all the buyers, seller, and the lender of the importance of the ten days? I mean, that the deal was going to unplug if that was not - - that that was a certain contingency? Did you not communicate that back to the buyer?

A: I sent the contract to the bank, I sent it to the buyer, and I sent it to the attorney. But did I specifically go over it with each of them? I don't remember.” (Vol. 1, Pg. 114)

Finally, on the issue of existence and non existence of a contract, and any misrepresentations based thereon, board member Stedman made clear with Ms. Hathcock:

“Q: When he countered back to you, is there another date on there with an initial where - - I am trying to establish when his ten-day window should start.

A: Okay.

Q: Mr. Gussio thinks it is on the 2nd and you think it is on the 6th.

A: I think it is on the 6th.

Q: But we don't have any contract to tell us that, do we?

A: No.” (Vol. 1, Pgs. 121-122)

And Commissioner Dean established:

“Q: Alright. He never actually signed that final counter offer and sent it back.”
(Vol. 1, Pg. 122)

At this point in the testimony Appellant's moved to strike Exhibit “2” from evidence on the basis that the last thing on the table was a counter offer from Mr. Keen to Mr. Gussio that was never accepted and that being the case there was never a contract at all as each counter offer cancelled the offer ahead of it. Keen had countered Mr. Gussio's last offer which was never accepted, hence no

contract. This motion was taken under advisement and apparently from the Commission's decision was overruled.

Upon the Commission resting the Appellants moved to dismiss the complaint and matters as it related to anything connected with the Keens which motion was also overruled.

From all the evidence in this case it is clear that no contract ever existed between Lexis Homes/Greg Gussio and Timothy Keen and/or his fiancé.

The point is - nothing was misrepresented. The written offers ALL said the house would remain on the market!

Even as marked up on all offers and counter offers, the "contract" is clear that these terms remained in all offers and counter offers to wit:

"Buyer to provide a proof of a firm commitment letter to Seller within ten days and home to remain on market." (See Exhibit 2, Vol. 2, Pg. 187)

There was no contract and no misrepresentations by Greg Gussio (or John Gussio as broker) regarding these negotiations.

That Becky Hathcock did not appreciate the essential elements to the creation of a contract does not somehow translate into misrepresentation by Greg Gussio or anyone else.

That Becky Hathcock admits not advising Keen of the contingencies in the offers does not equate or translate into a misrepresentation by any of Appellants.

Rick Stubblefield admitted that the existence or non existence of a final commitment letter to Keen from Prime Lending "would have been pertinent information to know before a complaint was filed in this matter" (Vol. 1, Pg 57) but even though admitting that the Commission had subpoena power to determine this fact Stubblefield could provide no explanation as to why this was

not done.

Two things stand clear (1) Keen was required to provide a firm commitment letter within ten days and failed to do so and (2) the home was to remain on the market at all times.

There are no misrepresentation that relate to anything to do with the Keens or the “alleged contract in question.”

The Commission in its Conclusions of Law (Vol. 1, Pg. 19) of its decision of December 1, 2011, states only the following are factual conclusions:

1. Failure to cooperate with investigation (to be discussed infra by the undersigned);
2. Greg Gussio continued to act toward Ms. Hathcock and Mr. Keen that their contact would be honored whether or not it was an enforceable contract;
3. The failure of the licensees involved to achieve an unambiguous meeting of the minds permitted the misrepresentations to take place (See page 8, Order of December 1, 2011) (Vol. 1, Pg. 26)

The evidence is not clear and convincing that Greg Gussio continued to act toward Ms. Hathcock and Mr. Keen that the “contract” would be honored regardless of whether or not there was an enforceable contract as on the face of the contract itself it clearly provided that the home would remain on the market and for show and sale (Gussio never agreed to the last counter offer) and the home did continue to be on the market for show and sale. Without a binding contract Gussio did exactly what he said he would do and what he was entitled to do and made no misrepresentations. That Hathcock “believed,” “assumed” or “felt” something based on her erroneous, or defective, knowledge of contract law does not amount to a misrepresentation on the part of Greg Gussio.

Further, there being no misrepresentations in the first place there is no basis for the finding

of the Commission that John Gussio, as “responsible broker” failed to supervise anything or at least failed to supervise any actions amounting to misrepresentations.

Representations to Commission
(or failure to cooperate)

Also on Page 8 of its Order of December 1, 2011, (Vol. 1, Pg. 26) the Court found that the failure to cooperate with the investigation was a violation of the relationship between the Commission and its licensees.

The Commission pointed (Vol. 1, Pg. 21) to the fact that on May 25, 2010, the Commission received a letter from John Gussio, broker, and Greg Gussio, broker/sales person which stated the following:

“This transaction did not go through Gussio Realty, and was not in MLS.

Therefore, (sic) please close this matter.”

And on May 26, 2010, the Commission received a letter from Greg Gussio in which Greg contended that there was never a contract with Keen.

It should be noted in this matter that the complaint for Mr. Keen listed Becky Hathcock and Greg Gussio as the parties being complained of but in this matter the Commission proceeded only against Greg Gussio and his broker John Gussio, or as testified by Mr. Stubblefield:

“Q: The complaint for Mr. Keen listed Becky Hathcock and Greg Gussio. Is that right?

A: That’s correct.

Q: Now, we are proceeding in this case only against Greg Gussio and his broker, John Gussio, is that right?

A: Correct.” (Vol. 1, Pg. 41)

Argument was made of counsel for the Commission that Greg Gussio, “just blatantly disregarded the Commission’s efforts to find out what was going on in this case.” (Vol. 1, Pg. 126)

Greg Gussio testified that in June or July 2010, that he first retained counsel (Percy Saddlefield and his firm) and he relied on that firm to provide whatever documents were necessary to the Commission. (Vol. 1, Pg. 132)

The file shows that on April 30, 2010, the Gussios requested an additional thirty days to examine documents for the case (See Exhibit 4, Vol. 2, Pg. 226).

On July 6, 2010, John Gussio and Greg Gussio show where documents were sent to the Commission (See Exhibit 8, Vol. 2, Pg. 230).

There was no further request by the Commission for documents after this date.

Despite no further requests from the Commission for additional documents, previous counsel for Gussio wrote the Commission on February 22, 2011, and additional information was voluntarily sent to the Commission. (See letter of Beverly Poole dated February 22, 2011; Vol. 3, Pg. 345)

Rick Stubblefield, investigator for MREC, admitted that the firm commitment letter from Prime Lending was “pertinent information” (Vol. 1, Pg 57) but could provide no explanation why the Commission itself never requested this “pertinent information.”

It all boils down that there are only one thing that Appellants may be guilty of; Gussio Realty’s and John Gussio’s telephone number had not been updated with the Commission.

It is hard to conceive that this matter revolves around the failure to update a telephone number.

As far as a commission check being issued at the Christopher Albright closing to “Gussio

Realty” by the closing attorney Greg Gussio testified:

“Q: It shows that Gussio Realty received a \$5,000.00 commission.

A: Yes, sir.

Q: So it did go through Gussio Realty, didn’t it.

A: There was no listing, and it was out of multiple, and this was in reference to the Keens contract. And, additionally, that was not multiple. That was a mistake.” (Vol. 1, Pg. 143)

This has nothing to do with the complaint of Timothy Keen. This was an after the fact situation where when Geg Gussio appeared at the closing for Christopher Albright’s purchase when a check had been prepared regarding a property Greg had great difficulty selling, or as Greg testified:

“Q: . . . The HUD was prepared, and in a poor market and the man had additional problems getting his check. I kept my mouth shut and said “yes, sir.” (Vol. 1, Pg. 144)

The Commission made much ado about the letter of May 25, 2007, where John and Greg stated:

“This transaction did not go through Gussio Realty, it was not in MLS.

Therefore, (sic), please close this matter.” (Exhibit 6, Vol. 2, Pg. 228)

This statement is truthful. It refers to the Complaint of Timothy Keen filed with the Commission. The Commission contracted the Gussios and referred their attention to Timothy Keen. The Commission has misconstrued what was stated in the letter of May 25, 2010. The Gussio’s letter of May 25, 2010 (Exhibit 6, Vol. 2, Pg. 228) clearly referenced “MREC Case No. 033-1004” which is the Keen complaint. This matter. Said letter of May 25, 2010, clearly refers to the Keen matter not going through Gussio Realty. In plain fact the Keen matter did not go through Gussio Realty. The

letter of May 25, 2010, was not a representation that Nexus Homes (Greg Gussio) never sold 114 Carriage Lane to Christopher Albright or someone else. The representation is specific to the Keen complaint. No Keen “transaction” went through Gussio Realty. The representation in the letter of May 25, 2010, was, and remains, absolutely truthful.

Jurisdiction

Section 73-35-3 (3) provides that any one act in consideration of or with the expectation of or intention of or upon the promise of receiving compensation by fee, commission or otherwise and the performance of any act or activity contained in subsection (1) of this section shall constitute such person, partnership, association or corporation, a real estate broker and make, him, them or it subject to the provisions and requirements of this chapter.

In the Keen matter Nexus Homes (Greg Gussio), was not acting as a real estate broker or agent. Greg Gussio, through his sole ownership of Nexus Home, was not acting as a representative but as a seller acting on his own behalf. (Note: the offer does show “Gussio Realty” as listing agent)

That a subsequent or different transaction occurred where Christopher Albright purchased the property and Gussio Realty was paid a commission is of no consequence. In the Keen matter the owner of a particular piece of property was discussing selling to a buyer, Keen, who was being represented by a separate agent of their own choosing, Hathcock.

In the Keen matter Greg Gussio did not act as a real estate agent or broker for anyone. As such he did not commit any act in consideration of receiving a fee, commission or compensation. Therefore, in the Keen transaction is not “subject to the provisions and requirements of this (§75-35-1, et seq) Chapter.”

The undersigned counsel for Appellants, as an officer of this Court, has a duty to mention to this Court any known authority which may be contrary to the position taken by the Appellants. In that regard the Court should be aware of the case of Mississippi Real Estate Commission v. Hennessy, 672 So. 2d 1209 (Miss. 1996) where the Court held that real estate brokers in Mississippi are not permitted to commit misrepresentations in their private lives without disciplinary repercussion when they are not permitted to do the same thing while representing another's property.

Appellants would point out however, that in Mississippi Real Estate Commission v. Hennessy, supra, the contract for sale in that case evidenced that the broker had signed a contract for sale in three capacities; (1) as seller, (2) as realtor and (3) as the listing agent. And, further, that the broker in that matter had accepted a \$500.00 earnest money deposit, put it in their account and applied it towards the purchase balance and, further, that the closing transaction (also unlike the present case which did not close) took place in the broker's real estate office.

In this matter Greg Gussio did not sign as an agent or broker, he did not sign as a listing or selling agent, he did not accept any earnest money or deposit it into his trust account, and not only did the closing not take place in his office, no closing at all occurred with Keen. Based upon these factual distinctions Appellants believe that the Hennessy Court would have reached a contrary decision had they been presented these facts.

It should also be noted that Section 73-35-5, supra has been amended since the decision in Hennessy, supra, said section formerly containing Section 73-35-5 (5) which exempted bonafide owners from selling their own property from the licensing requirements of the chapter, said subsection having been deleted effective from and after July 1, 2002.

The revised Section 73-35-5 being deleted, the above quoted provisions of Section 73-35-3,

supra control this matter and the Keen matter was not subject to the jurisdiction of the Commission.

SUMMARY

In this matter the Commission's order is not supported by substantial evidence.

- A. There was no contract, only ongoing negotiations.
- B. The "contract" (ie: offers) clearly stated that the home would remain on the market. It did.
- C. The last offer of Greg Gussio clearly stated that the home would remain on the market for show and sale. It did.
- D. The last offer of Gussio stated that Keen had ten days from date to provide a firm commitment letter. He never did.
- E. The letter of May 25, 2010, referenced that Gussio Realty did not have any part in the Keen transaction. It did not. (The Gussio Realty check was in the Christopher Albright transaction.)
- F. The Commission's decision, not being supported by substantial evidence was arbitrary and capricious.
- G. The Order of December 1, 2011, was beyond the power of the Commission to make as in the Keen "matter" Greg Gussio, through his solely owned corporation, Nexus Homes, did not act as an agent or broker for anyone. He was selling his own property, potentially to Keen who was represented by separate agent Becky Hathcock.
- H. The Keen matter was not subject to the provisions of §73-35-1 et seq and specifically excluded under provisions of § 75-35-3 (3) and was not subject to the "provisions

and requirements of this chapter.”

- I. The decision of the Commission violated Gussio’s constitutional right of freedom of contract to sell his own property to whoever he saw fit without undue interference by licensing authority which had no jurisdiction over the transaction.

About the worst that can be said in this matter is that John Gussio failed to provide an updated telephone number to the Commission.

The Gussios responded that the Keen matter was not in MLS (it was not), did not go through Gussio Realty, they began supplying documents in May 2010, supplied further documents in June or July 2010, and thereafter there was no further request for documents by the Commission, which itself did not subpoena pertinent documents, followed by yet more documents being voluntarily produced in February 2011.

Someone at the Commission get mad that their phone calls were not returned as quickly as they would have liked but this does not amount to failure to cooperate on the part of the Gussios.

Under any view of the facts there was no contract, no jurisdiction, and certainly no misrepresentations that can be identified by anyone other than the failure to provide a telephone number.

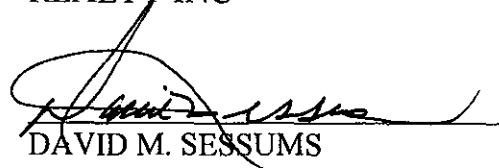
The Circuit Court erred in not reversing and rendering this matter.

Under these set of facts and applicable law this matter must be reversed and rendered.

Respectfully Submitted this the 1st day of November, 2012.

JOHN F. GUSSIO JR., GREGORY
JOSEPH GUSSIO, AND GUSSIO
REALTY INC

BY:


DAVID M. SESSUMS

OF COUNSEL:

Varner, Parker & Sessums, P.A.
1110 Jackson Street
P.O. Box 1237
Vicksburg, MS 39181-1237
Telephone: 601-638-8741
Facsimile: 601-638-8666

CERTIFICATE OF SERVICE

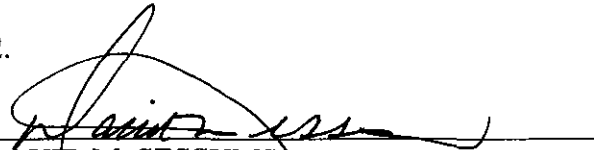
I, DAVID M. SESSUMS, do hereby certify that I have this date mailed via United States Mail, postage prepaid, MEC Electronic Mailing and/or hand delivered a true and correct copy of the above and foregoing document to the following counsel:

Mississippi Real Estate Commission
2506 Lakeland Drive
Suite 300
Flowood, MS 39232

John Maxey , Esq.
Attorney for Appellee
210 E. Capital Street
Suite 2100
Jackson, MS 39207-3977

Honorable John Emfinger
Madison County Circuit Court Judge
P.O. Box 1885
Brandon, MS 39043

THIS the 1ST day of November, 2012.


DAVID M. SESSUMS