

**IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI**

TERRY LEE ING

APPELLANT

vs.

Case Number: 2017-CA-00084-COA

SONG ADAMS

APPELLEE

Appeal from the
Circuit Court of the Marshall County, Mississippi
Civil Case No. CV2015-060

REPLY BRIEF OF APPELLANT
Terry Lee Ing

Attorney for Appellant

Joseph W. Cooper
MSB #104278
Farese, Farese, & Farese P.A.
P.O. Box 98
Ashland, Mississippi 38603
(662) 224-6211
Facsimile (662) 224-3229

**IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI**

TERRY LEE ING

APPELLANT

vs.

Case Number: 2017-TS-00084

SONG ADAMS

APPELLEE

Appeal from the
Circuit Court of the Marshall County, Mississippi
Civil Case No. CV2015-060

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made so that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate disqualification or recusal.

1. Terry Lee Ing - Appellant
2. Song Adams - Appellee
3. Joseph W. Cooper, Counsel for Appellant
4. Kent Smith, Counsel for Appellee
5. The Honorable John Gregory, Marshall County Circuit Judge

THIS the 17th day of October, 2017.

/s/JOSEPH W. COOPER
Joseph W. Cooper
Attorney for Appellant

TABLE OF CONTENTS

Certificate of Interested Persons.	ii
Table of Contents.....	iii
Table of Cases, Statutes and Other Authorities.....	iv
I. Statement of Issues Presented for Review.....	1
II. Statement of the Case.....	1
A. The Nature of the Case, the Course of the Proceedings, and the Disposition in the Court below.	1
B. Statement of Facts Relevant to the Issues Present for Review.	2
III. Summary of the Argument.....	3
IV. Argument.....	4
Issue I: The Trial Judge committed reversible error when he found that Appellant Ing did not adequately exercise his right to purchase the property in question.	4
Issue II: The Trial Judge committed reversible error when he found that the Terry Ing was responsible for rent withheld after Song Adams's material breach of the lease agreement.	7
V. Conclusion.....	9
Certificate of Service.....	10

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases:	Page(s):
<i>Busching v. Griffin</i> , 465 So. 2d 1037 (Miss. 1985)	6
<i>Crow v. Crow’s Sports Center, Inc.</i> , 119 So. 3d 352, 356 (Miss. Ct. App. 2012)	6, 7
<i>Duke v. Whatley</i> , 580 So. 2d 1267, 1273 (Miss. 1991)	7
<i>Favre Prop. Mgmt., LLC v. Cinque Bambini</i> , 863 So. 2d 1037, 1044 (Miss. Ct. App. 2004) . . .	7
<i>Gulf South Capital Corp. v. Brown</i> , 183 So.2d 802, 804–05 (Miss.1966)	7
<i>Warwick v. Matheney</i> , 603 So.2d 330, 336 (Miss.1992).	7
<i>Williams v. Estate of Ellis</i> , 176 So. 3d 133, 138 (Miss. 2015)	7, 8

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Terry Ing, who was the Defendant-Counter Plaintiff in the trial court and who is the Appellant in this appeal, presents the following issues for review:

1. The first assignment of error. The Trial Judge's finding that the Defendant-Appellant did not adequately exercise his option to purchase the property in question is not supported by substantial evidence and should be reversed.

2. The second assignment of error. The Trial Judge's finding that the Defendant-Appellant owes unpaid rent from the time of the end of the lease term is not supported by substantial evidence, applies an erroneous legal standard, and should be reversed.

II. STATEMENT OF THE CASE

A. *THE NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS, AND THE DISPOSITION IN THE COURT BELOW*

Song Adams filed suit against Terry Ing in the Circuit Court of Marshall County on March 19, 2015, claiming Mr. Ing was in breach of contract and was a holdover tenant according to the terms of their previously signed lease agreement.¹ [R. 1-19; E. 19]. Mr. Ing was served with the lawsuit on the same day and filed his Answer and Counterclaim for damages on April 16, 2015. [R. 20-33]. A bench trial was held on these matters before the Honorable Judge John A. Gregory in the Circuit Court of Marshall County, Mississippi on May 26, 2016. [R. 38; T. 1]. Judge Gregory found that Terry Ing did not breach the terms of his lease agreement with Song Adams. Judge Gregory further held that Terry Ing failed to adequately exercise his option to purchase the property in

¹In this brief, citations to the Record will be denominated as "R." followed by the appropriate page number, citations to the Record Excerpts will be denominated as "E." followed by the appropriate page number, and citations to the trial Transcript will be denominated as "T." followed by the appropriate page number.

question, and owed rent from the time of the expiration of the lease agreement to the date of the Judge's final order. [R. 106-108; E. 16].

B. *STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW*

On January 26, 2010, Defendant-Appellant Terry Ing and Plaintiff-Appellee Song Adams entered into a lease agreement for five years for the basement and parking lot of 110 Van Dorn Ave., Holly Springs, Mississippi at a rate of \$2,500.00 per month. [R. 7-15, 40-48; T. 6; E. 5]. Included within the many clauses of this contract was an option to “purchase the building at it’s [sic] then appraised value.” [R. 13, 46; T. 8-9]. Four days before the lease was set to expire, Mr. Ing hand delivered a letter that stated his intent to exercise his right to purchase the property in question. [R. 49; T. 9-11; E. 15]. Upon receipt of the letter, Mrs. Adams refused to sell the property to the Appellant. [T. 11]. On the day that the lease term was to expire, Mr. Ing received a letter from local attorney, J. Kizer Jones, stating that Mr. Ing was in material breach of the contract in various ways and for these reasons, Mrs. Adams would not sell him the property in question. [R. 32, 78; T. 21, 41, 51; E. 14]. After being told he was in breach of the contract and would not be sold the building, Mr. Ing withheld rent from Mrs. Adams while maintaining his presence at the property in question. [T. 40, 48; E. 29, 35]. While negotiating with Mrs. Adams’s initial attorney, J. Kizer Jones, Mr. Ing was sued for breach of contract and eviction in the Circuit Court of Marshall County. [R. 1-19; T. 24 ; E. 19]

III. SUMMARY OF THE ARGUMENT

1. The first assignment of error. There is no substantial, credible, or reasonable evidence to find that Terry Ing “did NOT adequately exercise his option to purchase said property.” The Judge’s reasoning is not supported by the facts in this case. Mr. Ing notified Mrs. Adams of his intent to purchase the building in writing before the expiration of his option. Mrs. Adams then sent Mr. Ing a letter stating he was in breach of the contract and that she would not allow him to purchase the building. The Circuit Court Judge is clearly erroneous in his assertion that Terry Ing failed to adequately exercise his option according to the terms of the lease agreement between the parties.

2. The second assignment of error. The Circuit Court Judge was manifestly wrong and applied an erroneous legal standard when finding that Terry Ing was in arrears of rent owed to Song Adams. Mississippi case law has consistently stated that the breach of a bilateral contract by one party relieves the non-breaching party of their contractual obligations. Mr. Ing was within his rights to withhold rent after the Mrs. Adams materially breached the lease agreement by refusing to sell Mr. Ing the property in question. The Judge’s decision must be reversed.

IV. ARGUMENT

ISSUE I: The trial court committed reversible error when it found that Appellant Ing did not adequately exercise his right to purchase the property in question.

Clause 21 of the lease agreement in question is titled “OPTIONS” and states in subsection (b) the following: “At the end of this current five year lease, provided that the Lessee is current upon all conditions of this lease, he has the option to extend the lease for an additional five years or to purchase the building at it’s [sic] then appraised value.” [R. 46; E. 5]. This language is the only time in the lease agreement that the option to purchase is mentioned. The words contained above are the only direction that Terry Ing was provided to instruct him as to the process of either extending the lease at the end of the five year term or exercising his option to purchase the property. Mr. Ing chose to notify his landlord, Mrs. Adams, in writing, prior to the expiration of the lease term of his intent to purchase. [R. 49; T. 10-11; E. 15]. Mrs. Adams refused to sign the piece of paper provided to her and chose to delay the decision until she spoke with her husband, Mike Adams. [T. 55; E. 42]. On the day that the lease agreement was to expire, Mr. Ing received a letter from an attorney that stated he was not current upon all conditions of the lease and the option to purchase had been denied. [R. 32, 78; T. 21; E. 14]. It is important to note that Mrs Adams’s brief fails to even acknowledge the letter from local attorney J. Kizer Jones.

At trial, Mr. Ing refuted Mrs Adams’s claims of breach of contract with relative ease. Mr. Ing had paid his portion of the year 2014 taxes shortly after he was notified his portion was due. [R. 79-81; T. 24-25; E. 25]. Mr. Ing proved he maintained insurance at all relevant times and that he complied with all city ordinances and health code requirements. [R. 82-105; T. 26-27]. Song and Mike Adams never once contacted Terry Ing in writing, or otherwise, inquiring about the status of insurance on the building in question or any matters relating to code violations. [T. 22]. These

matters are important because they show Mrs. Adams's true intent with the breach of contract lawsuit. The lawsuit, though filed by a different attorney, provides the same baseless claims for breach of contract as the January 26, 2015 letter from attorney J. Kizer Jones. [R. 1-17, 32, 78.; E. 14].

Both Song Adams and her husband, Mike Adams, testified that Song Adams was willing and ready to sell the property in question to Terry Ing on January 22, 2015 when she received the exercise of the option to purchase in writing from Terry Ing. [T. 40-41, 46, 49, 53; E. 15; E. 29-33]. The letter from J. Kizer Jones was delivered to Terry Ing on January 26, 2015, the same date the option to purchase was to expire. [R. 32, 78; T. 21; E. 14]. The letter and the lawsuit are filled with baseless claims. The only purpose of these allegations is to restrict the sale of the property to Terry Ing as was contractually obligated. Terry Ing would have never paid the exorbitant rent for basement property in a small town in Mississippi if not for the option to purchase, and he was denied that right after being a faithful tenant for five years.

The testimony from Song and Mike Adams is perplexing. Both individuals state that Song Adams would have happily sold the building to Terry Ing on January 22, 2015, yet Song Adams refused to sign the option to purchase letter from Terry Ing and sent Ing a letter from an attorney stating that Ing was in material breach of the lease agreement and that he would not be sold the property. [R. 49, 32, 78; T. 40-41, 46, 49, 53; E. 14; E. 29-33]. Song Adams seems to state that she refused to sign the letter in order to speak with her husband Mike about the option to purchase. [T. 55; E. 42]. This fact may very well be true, but it still does not explain the rushed letter from a local attorney on the date the lease agreement is set to expire, which stated that Terry Ing was in breach of the lease agreement and would not be sold the property in question.

Song Adams never had any intent to sell the property to Terry Ing, and the proof is in the

testimony of her husband Mike Adams, when he stated that the main floor of the building is occupied by a liquor store owned and operated by Song and Mike Adams and the third floor is rented to Song Adams's nephew as a residence. [T. 38; E. 28]. If Terry Ing had been granted his contractually obligated option to purchase the property, the Adamses would pay rent to Terry Ing. Song Adams has not only been allowed to retain ownership of the building through blatant false testimony, but she has been allowed to operate her business without paying rent to Terry Ing since January 26, 2015.

The Appellee's brief quotes *Busching v. Griffin*, 465 So. 2d 1037 (1985) for the proposition that the initial option to purchase should be invalidated because the original contract did not state a purchase price. However, the Mississippi Court of Appeals has stated that the absence of a purchase price in an option contract does not invalidate the option contract as long as there is a "clear method" of determining a purchase price. *Crow v. Crow's Sports Center, Inc.*, 119 So. 3d 352, 356 (Miss. Ct. App. 2012). The contract in question states that Mr. Ing has the right to purchase the property at the "then appraised value." [R. 46; E. 5]. The contract is not ambiguous as to how to determine the purchase price. In fact, a recurring argument from Ms. Adams has been that Mr. Ing failed to have the property appraised and then tender money for purchase. The fair market value of the property is to be the purchase price of the property as described in the contract and the parties' actions dictate they knew the means of determining the purchase price of the property.

Mrs. Adams goes on to state in her brief that Mr. Ing's letter to her initiating his option to purchase seems to point to an already agreed upon purchase price between the parties, when he states that "[t]he purchase price shall be at appraised value as agreed." [R. 49; T. 10-11; E. 15]. Mr. Ing respectfully asserts that this reading of the letter is erroneous. Mr. Ing was referring to the fact that the purchase price is to be the fair market value as determined by a licensed real estate appraiser as

the parties had agreed upon in the initial contract. Mr. Ing was not referring to an already agreed upon purchase price. Mrs. Adams's brief then quotes *Duke v. Whatley*, 580 So. 2d 1267, 1273 (Miss. 1991) for the proposition that the option to purchase provision should be invalidated because of the lack of a purchase price. The Mississippi Court of Appeals quoted *Duke v. Whatley* in *Crow* when it found that options to purchase without a stated purchase price were enforceable when there is a "clear method of determining one." *Crow*, 119 So. 3d at 356. Mrs. Adams's arguments for invalidating the option to purchase are without merit.

ISSUE II: The trial court committed reversible error when it found that Terry Ing was responsible for rent withheld after Song Adams materially breached the lease agreement.

Mississippi law has consistently held that "a party's material breach of a bilateral contract excuses further performance by the other party." *Favre Prop. Mgmt., LLC v. Cinque Bambini*, 863 So. 2d 1037, 1044 (Miss. Ct. App. 2004) citing *Gulf South Capital Corp. v. Brown*, 183 So.2d 802, 804–05 (Miss.1966). A breach of contract is defined as: "(1) the existence of a valid and binding contract; (2) that the defendant has broken, or breached it; and (3) that the plaintiff has been thereby damaged monetarily." *Warwick v. Matheney*, 603 So.2d 330, 336 (Miss.1992). The Appellee correctly points out that the previous sentence in the Appellant's brief was a misquotation of the law as it appears in *Warwick v. Matheney*. The error was not meant to be malicious in any way nor was it meant to mislead the Court or the opposing party. The Appellee properly cites the definition for a material breach as it appears in *Williams v. Estate of Ellis*, 176 So. 3d 133, 138 (Miss. 2015):

"A breach is material where there is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such breach as substantially defeats its purpose, or when breach of the contract is such that upon a reasonable construction of the contract, it is shown that the parties considered the breach as vital to the existence of the contract."

Id.

Mr. Ing would assert again that Mrs. Adams's failure to agree to sell the property to him at the expiration of the lease term constituted a material breach of the contract. Under the definition of material breach in *Ellis*, the breach was material because Mrs. Adams failed to perform a substantial part of an essential term of the contract when she failed to sell him the property at the expiration of the lease term. Mrs. Adams's material breach was not a "mole hill" as she asserted in her brief. The fact that she failed to comply with the contract and agree to sell Mr. Ing the property at the expiration of the lease term was a material breach that excuses his further non-compliance with the original lease contract.

At the close of the Brief of the Appellee, Mrs. Adams asserts that Mr. Ing would like for the Courts to just award him a deed to the property in question without him having to pay for the property. Mrs. Adams once again fails to come to terms with the fact that she materially breached the contract when she failed to sell Mr. Ing the property at the expiration of the lease term. Mrs. Adams's breach caused Mr. Ing to either incur more rent or move his business. Mr. Ing chose to remain in the property while he assessed his options. Mrs. Adams would like this Court to excuse her material breach, award her rent she does not deserve, save her from paying rent to Mr. Ing for her business and a residence that are located within the building, and force Mr. Ing to remain in the building and continue to pay her rent. Mr. Ing is simply trying to avoid paying rent that he does not owe while attempting to purchase the property under the terms of the original contract. Mrs. Adams materially breached the contract in question and has, to this date, avoided any consequences of her actions while Terry Ing has been adjudicated to owe her rent moneys she does not deserve. The Trial Judge's ruling must be reversed.

V. CONCLUSION

The Judge's "Findings of Fact and Order of Judgment" is manifestly wrong in its assertion that Terry Ing failed to adequately exercise his option to purchase the property and was in arrears and owed rent to the lessor. Mrs. Adams failed to prove that Terry Ing was in breach of the lease agreement as she alleged in her letter and initial complaint. Mr. Ing adequately exercised his option to purchase the property when he notified Mrs. Adams in writing of his intent to purchase the property prior to the expiration of the lease agreement and purchase option. Mrs. Adams materially breached the contract when she refused to honor the option to purchase clause of the lease agreement. Finally, Mr. Ing was clearly within his rights under Mississippi law to withhold rent after Mrs. Adams's material breach. The Judge's decisions are not supported by substantial, credible, or admissible evidence and must be reversed.

ACCORDINGLY, the Appellant requests that the decision of the lower court be reversed.

RESPECTFULLY SUBMITTED,

s/JOSEPH W. COOPER
JOSEPH W. COOPER, (MSB #104278)
FARESE, FARESE & FARESE, P.A.

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, Joseph W. Cooper, Attorney for Appellant Respondent, do hereby certify that I have this day notified all parties listed below, via U.S. mail, postage prepaid and electronic mail, of the above and foregoing Reply Brief of Appellant, to:

Honorable John A. Gregory
Circuit Court Judge
Post Office Box 466
Okolona, Mississippi 38860

Terry Lee Ing
110 W. Van Dorn Ave
Holly Springs, Ms 38635

s/Joseph W. Cooper
JOSEPH W. COOPER (MS #104278)
Attorney for Terry Lee Ing, Defendant-Appellant

Farese, Farese & Farese, P.A.
Post Office Box 98
Ashland, Mississippi 38603
Telephone: 662-224-6211
Facsimile: 662-224-3229
wcooper@fareselaw.com

This the 17th day of October, 2017.