

IN THE SUPREME COURT OF MISSISSIPPI

**RAS FAMILY PARTNERS, LP
and RAY A. SIMS**

APPELLANTS/DEFENDANTS

VERSUS

CASE NO. 2006-IA-00976-SCT

ONNAM BILOXI, LLC

APPELLEE/PLAINTIFF

CONSOLIDATED WITH

ONNAM BILOXI, LLC

APPELLANT/DEFENDANT

VERSUS

CASE NO. 2006-IA-1414-SCT

**RAS FAMILY PARTNERS, LP
and RAY S. SIMS**

APPELLEES/PLAINTIFFS

**BRIEF OF APPELLEES
(No. 2006-IA-00976)**

**INTERLOCUTORY APPEAL FROM THE
CHANCERY COURT OF HARRISON COUNTY**

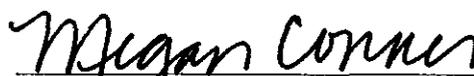
ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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

1. Onnam Biloxi, LLC, a Mississippi limited liability company
2. Sandra Manno, managing partner of Onnam Biloxi, LLC
3. Onnam Entertainment LLC, a foreign limited liability company
4. RAS Family Partners, LP, a Mississippi limited partnership
5. Jo Anne Sims, principal owner of RAS Family Partners, LP
6. Ray A. Sims
7. John Corlew and Megan Conner of Watkins & Eager PLLC
8. Allan Pepper of Kaye Scholer LLP
9. Lawrence Gunn of Gunn & Hicks, PLLC.



Attorney for Onnam Biloxi, LLC

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STATEMENT OF THE ISSUES

1. Whether the Chancery Court of Harrison County is the more appropriate jurisdiction for this case.
2. Whether the Circuit Court of Harrison County has priority jurisdiction.

STATEMENT OF THE CASE

This is a case in which two actions were filed, one in chancery court and one in circuit court. The defendant in each case moved to transfer the action to the court in which it was the plaintiff. Each court denied the motion. Both cases were then appealed to this Court. This Court has consolidated both interlocutory appeals. A third interlocutory appeal concerning the Circuit Court of Harrison County's granting of partial summary judgment will be considered once the jurisdictional issue is decided.

This case arises from an agreement between Onnam Biloxi, LLC, RAS Family Partnership, LP, and Ray A. Sims. R:4. The agreement encompassed both the lease of 10 acres of land for casino development in Biloxi, and the sale of 12,500 shares of stock from Mr. Sims to Onnam. Both transactions were subject to certain contingencies, including: approval of the site by the Mississippi Gaming Commission, the granting of a gaming license, approval of the Master Plan by the Board of Biloxi, an inspection showing the presence of no hazardous substances, the obtaining of all necessary permits, and the negotiation of a Tidelands Lease. R:6-7. On August 29, 2005, Hurricane Katrina made fulfillment of these conditions within the specified contract period impossible.

According to the lease, if each and every one of the contingencies are not fulfilled, then the Lessee (Onnam) has the option to void the lease. R:7. ("In the event that any one of the contingencies is not fulfilled to Lessee's satisfaction by August 30, 2005, then this Lease Agreement shall, **at the option of the Lessee**, become null and void")(emphasis added). However, Onnam and Mr. Sims unilaterally terminated the transaction on November 18, 2005, in violation of the lease agreement. Onnam agrees with the statement of the Appellants that it has two options: "either back out of the lease or stay in it." Appellants' Brief at 9. Onnam is choosing to uphold the lease and Onnam intends to fulfill its part of the bargain. Appellee's R.E. Tab 1; Ex. D-1 to 4.

Circuit Court hearing held April 18, 2006. Appellants' statement that "Onnam is apparently contending that it can keep the lease in effect and yet indefinitely postpone paying the consideration for the beginning of the lease and purchase of Mr. Sims' stock" is not accurate. Appellants' Brief at 10. Onnam did not make a September 1, 2005 payment because the conditions precedent set by the lease agreement were not fulfilled. Furthermore, Onnam has not given indication of when payment will be made, as RAS and Sims unilaterally terminated the transaction on November 18, 2005.

Until Sims' unlawful termination, Onnam diligently pursued the required contingencies, including seeking approval of the site by the Mississippi Gaming Commission and of the Master Plan by the city of Biloxi, and expended substantial resources to reach this goal. Appellee's R.E. Tab 1; Ex. D-1 to transcript of Circuit Court hearing held April 18, 2006. Onnam had entered into a contract with Yates Construction Company for the construction of the casino. *Id.* Onnam had hired a president, who had purchased a home in Biloxi which was subsequently destroyed by the hurricane. *Id.* Mr. Sims was present at the meetings with the Mississippi Gaming Commission on May 19, 2005 and on July 15, 2005. *Id.* On August 29, 2005, ten days before the hearing before the City of Biloxi's Planning Board to obtain approval of the Master Plan, which was already submitted to the Planning Board and the subject of extensive discussion between representatives of Onnam and the Board, Hurricane Katrina's extraordinary destruction created obstacles which prevented Onnam from accomplishing all contingencies by the date specified in the agreement. *Id.*

Additionally, as a result of the hurricane, gaming regulations in the state of Mississippi changed. *Id.* The plans for the casino were based on laws that only allowed gaming on barges, and the casino was to be built on pilings. After Katrina, the law was changed to allow casinos in Biloxi to be built on land, and it was not clear to Onnam whether structures on pilings would continue to

be allowed. *Id.* Onnam continued its pursuit of approvals and other contingencies, and met with the Executive Director of the Mississippi Gaming Commission. *Id.* Mr. Sims attended this meeting and participated with representatives from Onnam in a discussion regarding development post-Katrina. *Id.* On November 18, 2005, Sims terminated the lease agreement.

Because of the termination by RAS and Sims, Onnam filed suit in federal court, seeking specific performance of the Lease Agreement and Agreement for Sale and Purchase of Stock. This federal suit was dismissed on January 24, 2006, on the basis of the Court's interpretation of the forum selection clause contained in the agreement. R:38. Onnam did not appeal this decision.

Immediately after the federal suit was dismissed, Onnam filed suit in the Chancery Court of Harrison County, again seeking specific performance of the Lease Agreement and Agreement for Sale and Purchase of Stock. R:1. At this point, Onnam was unaware that RAS, but not Sims, had filed a suit in the Circuit Court of Harrison County, as it had not yet been served. The RAS suit was filed before the federal court suit had even been dismissed, and did not include Mr. Sims as a party. R:39. Mr. Sims was not a party to the Circuit Court suit until the filing of the Amended Complaint on March 1, 2006, after Onnam had both filed suit and effected process on all parties in the chancery court action. RAS and Sims filed a Motion to Transfer to Circuit Court, which the Chancery Court denied. R:78. This interlocutory appeal followed.

SUMMARY OF THE ARGUMENT

The most appropriate jurisdiction for this case is the Chancery Court of Harrison County, as the issues involved are purely equitable. Onnam Biloxi, LLC is seeking specific performance of the contract terminated by RAS Family Partners, L.P. and Ray A. Sims. The chancery court is best equipped to fashion the requested remedy because of the unique circumstances which arose due to Hurricane Katrina. All of the dates for performance in the contract will need to be altered, as well as the plans for the casino itself, following changes in the gaming regulations.

The Circuit Court of Harrison County does not have priority jurisdiction over this case, as process was not effected, nor were all parties joined, in the circuit court case until after all parties were joined and process effected in the chancery court case.

ARGUMENT

I. The Chancery Court of Harrison County is the more appropriate jurisdiction for this case.

Appellants RAS and Sims focus extensively on the dates on which these suits were filed and on which service of process was effected. However, there is a simpler issue on which to focus - the central issue in this case: which court has the more appropriate jurisdiction, the chancery court or the circuit court. The Court focused upon this issue in *Copiah Medical Associates v. Mississippi Baptist Health Systems*, 898 So. 2d 656 (Miss. 2005), stating, “This Court must decide whether the chancery court is the more appropriate forum for the present action.” *Id.* at 660. While this Court held in *Copiah Medical Associates* that the claim asserted in chancery court was actually a breach of contract claim which “should have been brought in circuit court rather than chancery court,” *Copiah Medical Associates* is distinguishable from the instant situation. *Id.* at 661. Onnam’s suit is purely equitable, and thus was properly brought in chancery court. “The application for specific performance of [a] contract is addressed to the sound discretion of the chancery court.” *Crechale & Polles, Inc. v. Smith*, 295 So. 2d 275, 279 (Miss. 1974) (citing *Roberts v. Spence*, 209 So. 2d 623, 625 (Miss. 1968)). Specific performance is “a particularly appropriate remedy in matters relating to tracts of real property because of the unique nature of real estate.” *In re Estate of Pickens*, 879 So. 2d 467, 471 (Miss. Ct. App. 2004).

Due to the unique circumstances of this case, the chancery court is the best equipped to fashion the equitable remedy applicable to the facts of this case. This is not simply a breach of contract for which damages should be awarded. For example, all of the dates for performance in the contract will have to be changed as they have already occurred, as well as changes made to the plans for the casino due to new gaming regulations passed after the hurricane. The cases in which this

Court has held that the circuit court is the more appropriate jurisdiction involved questions that intertwined equitable and legal issues, or were predominately legal issues. *See ERA Franchise Systems, Inc. v. Mathis*, 931 So. 2d 1278, 1283 (Miss. 2006), *Union National Life Ins. Co. v. Crosby*, 870 So. 2d 1175, 1182 (Miss. 2004). The Court's basis for holding that the circuit court in *Mathis* was the appropriate jurisdiction was that "Mathis' claims contain questions of law and equity, request punitive damages, and because having the claims adjudicated in chancery court would deprive ERA of the right to a jury trial, we find the chancellor erred in denying the defendants' motion to transfer the case to circuit court." *Mathis*, 931 So. 2d at 1283-84.

The RAS suit does include a claim for damages. However, this claim is entirely baseless, as RAS and Sims are the parties who terminated the agreement in violation of the terms of the contract and cannot be due any damages, including damages for Onnam's filing of a lis pendens notice with the Chancery Court of Harrison County.¹ The damages argument asserted by RAS and Sims completely ignores the fact that Onnam is not the party at fault in either of these suits. It is difficult to understand how RAS and Sims could be due any damages when they unilaterally terminated the contract. They attempt to characterize this situation as one in which Onnam is "indefinitely postponing" payment, payment which is "now overdue since September 30, 2005, seventeen months." Appellant's Brief at 10. However, Onnam was completely unaware of problems with the delay in payment until the termination, as the parties were working in concert to fulfill the required conditions precedent and move forward with the contract. See Appellee's R.E. Tab 1, Exhibit D-1 to transcript of Circuit Court hearing held April 18, 2006. Onnam's actions simply are not those of a party who does not wish to perform or one that is deliberately postponing - Onnam continued to

¹ The filing of a lis pendens notice is a privileged communication and is not actionable for slander of title. *Dethlefs v. Beau Maison Development Corp.*, 511 So. 2d 112, 117 (Miss. 1987).

move forward with its plans as best it could following the hurricane, until RAS and Sims letter of November 18, 2005, terminating the contract. Thereafter, Onnam filed suit for specific performance of the contract, for the obvious reason that it wishes to perform. This simply is not a case in which monetary damages outweigh the equitable issues. RAS and Sims do not have a legitimate damages claim, and the core issue in both suits is Onnam's request for specific performance. Therefore, this case is distinguishable from the cases in which this court held that issues of law outweighed issues of equity, and the proper forum should be the chancery court.

The only sum to which RAS and Sims are potentially entitled is the \$25,000 deposit received by them on April 12, 2005, according to the terms of the agreement:

6. Contingencies:

f. . . . In the event that any one of the contingencies is not fulfilled to Lessee's satisfaction by August 30, 2005, then this Lease Agreement shall, **at the option of the Lessee**, become null and void and, in such event, the Lessee shall be refunded all deposits, rents and other amounts theretofore paid or made hereunder, except the \$25,000.00 paid by Lessee to Lessor on April 12, 2005.

R:7. This sum cannot properly be considered damages for two reasons. First, because Onnam has not exercised its option to void the lease, this clause has not yet been triggered. Second, this is an agreed upon term in the contract.

If the chancery court does not have the most appropriate jurisdiction over this case, one that is purely equitable in nature, then the jurisdiction of the chancery court has been severely restricted, far beyond the limits of Section 159 the Mississippi Constitution, which grants the chancery court jurisdiction over "all matters in equity."

II. The Circuit Court of Harrison County does not have priority jurisdiction.

This Court noted in *Copiah Medical Associates* that "in this state priority of jurisdiction between courts of concurrent jurisdiction is determined by the date the initial pleading is filed."

provided process issues in due course.” *Copiah Medical Associates*, 898 So. 2d at 663 (emphasis added). Service of process had not been effected on Onnam when the chancery court case was filed, and Onnam was completely unaware of the circuit court suit. Furthermore, RAS was served with process in the chancery court case before Onnam was served with process in the circuit court action filed by RAS. Finally, Sims was not even a party to the suit filed in circuit court until March 1, 2006, when the amended complaint was filed.

However, if this Court decides that the Circuit Court of Harrison County did have priority jurisdiction, this issue alone does not resolve the case. Priority jurisdiction in this case simply means that the court would have jurisdiction over the motion to transfer. Regardless which court has priority jurisdiction, this Court will still have to decide whether the circuit court or the chancery court is the more appropriate forum for the case.

CONCLUSION

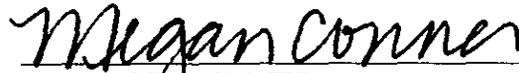
For the all the reasons stated above, Onnam Biloxi LLC respectfully requests that this Court uphold the ruling of the Harrison County Chancery Court.

Onnam Biloxi LLC further request that once this appeal and the consolidated appeal have been decided, if consideration of the merits of the appeal from the circuit court's grant of partial summary judgment (No. 2006-IA-01614) is necessary, that the parties be allowed to submit briefs concerning the issues in that appeal.

This the 25th day of April, 2007.

Respectfully submitted,

ONNAM BILOXI LLC
By and through its attorneys


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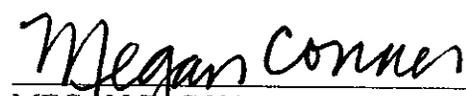
CERTIFICATE OF SERVICE

I, Megan B. Conner, do hereby certify that I have mailed a true and correct copy of the above and foregoing by United States mail, postage prepaid, to:

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Honorable James Persons
Chancery Court of Harrison County
Post Office Box 457
Gulfport, Mississippi 39502

This the 25th day of April, 2007.



MEGAN B. CONNER