

IN THE SUPREME COURT OF MISSISSIPPI

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

APPELLANTS/DEFENDANTS

VERSUS

CASE NO. 2006-IA-00976-SCT

NNAM BILOXI, LLC

APPELLEE/PLAINTIFF

CONSOLIDATED WITH

NNAM BILOXI, LLC

APPELLANT/DEFENDANT

VERSUS

CASE NO. 2006-IA-1414-SCT

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

APPELLEES/PLAINTIFFS

**BRIEF OF APPELLEES
(No. 2006-IA-01414)**

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

Lawrence C. Gunn, Jr. MS Bar [REDACTED]
GUNN & HICKS PLLC
Post Office Box 1588
Hattiesburg, MS 39403-1588
Telephone (601) 544-6770
Facsimile (601) 544-6775
E-mail: larry@gunnandhicks.com
*Attorney for RAS Family Partners, LP
and Ray A. Sims*

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 Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. RAS Family Partners, LP, a Mississippi limited partnership
2. Jo Anne Sims, principal owner of RAS Family Partners, a citizen of Hattiesburg, Mississippi
3. Ray A. Sims, a citizen of Hattiesburg, Mississippi
4. Onnam Biloxi, LLC, a Mississippi limited liability company
5. Onnam Entertainment, LLC, a foreign limited liability company
6. Sandra Manno, a citizen of New Jersey, an owner of Onnam Entertainment, LLC
7. Joel Gold, a citizen of New York, an owner of Onnam Entertainment, LLC
8. Aryeh Lightstone, a citizen of Colorado, an owner of Onnam Entertainment, LLC
9. Alan Jacobs, a citizen of Florida, an owner of Onnam Entertainment, LLC
10. Irving Shwarzbaum, a citizen of New Jersey, an owner of Onnam Entertainment, LLC
11. Howard Berg, a citizen of New Jersey, an owner of Onnam Entertainment, LLC
12. Philip Lightstone, a citizen of Colorado, an owner of Onnam Entertainment, LLC
13. Gary Snitow, a citizen of New York, an owner of Onnam Entertainment, LLC
14. Ira Tannenbaum, a citizen of New York, an owner of Onnam Entertainment, LLC
15. Asher Shafran, a citizen of New York, an owner of Onnam Entertainment, LLC
16. Joel Shafran, a citizen of New York, an owner of Onnam Entertainment, LLC

17. Simon Horn, a citizen of New York, an owner of Onnam Entertainment, LLC
18. Alan Rubin, a citizen of New Jersey, an owner of Onnam Entertainment, LLC
19. DNF Financial LLC, a citizen of New Jersey, an owner of Onnam Entertainment, LLC
20. Precious Investments LLC, a citizen of New Jersey, an owner of Onnam Entertainment, LLC



LAWRENCE C. GUNN, JR.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	-ii-
TABLE OF CONTENTS	-iv-
TABLE OF AUTHORITIES	-v-
INTRODUCTORY STATEMENT	-6-
ARGUMENT	-6-
CONCLUSION	-11-
CERTIFICATE OF SERVICE	-12-

TABLE OF AUTHORITIES

CASES

<i>Burnette v. Hartford Underwriters Ins. Co.</i> , 770 So.2d 948 (Miss. 2000)	-8-
<i>Copiah Medical Associates v. Mississippi Baptist Health Systems</i> , 898 So.2d 656 (Miss. 2005)	-6-, -7-, -8-
<i>Employer’s Mutual Casualty Company v. Nossor</i> , 250 Miss. 542, 164 So.2d 426 (1964)	-9-
<i>Equitable Mortgage Corp. v. Mortgage Guaranty Insurance Corp. v. Mann</i> , 791 F.Supp. 620 (S.D. Miss. 1990)	-9-
<i>Huffman v. Griffin</i> , 337 So.2d 715 (Miss. 1976)	-6-
<i>Johnson v. Consolidated American Life Insurance Company</i> , 244 So. 2d 400 (Miss. 1971)	-9-
<i>Scruggs Millette Bozeman & Dent v. Merkel & Cocke, P.A.</i> , 804 So.2d 1000 (Miss. 2001)	-7-
<i>Southern Leisure Homes, Inc. v. Hardin</i> , 742 So.2d 1088 (Miss. 1999)	-8-
<i>Tyson Breeders, Inc. v. Harrison</i> , 940 So.2d 230 (Miss. 2006)	-8-
<i>Yazoo Properties v. Katz & Besthoff No. 284, Inc.</i> , 644 So.2d 429 (Miss. 1994)	-9-

INTRODUCTORY STATEMENT

The issue involved in this appeal, competing claims of jurisdiction between the Circuit and Chancery Courts of Harrison County involving the same controversy, is fully briefed by RAS Family Partners, LP and Ray A. Sims in their Appellants' Brief in the consolidated appeal No. 2006-IA-00976. The arguments they make there demonstrating why the chancery court was not an appropriate forum apply equally here to explain why the circuit court was in fact the proper jurisdiction for settlement of this controversy. They adopt all arguments made in their brief in appeal No. 2006-IA-00976, but respond separately here to the arguments advanced by Onnam.

ARGUMENT

Priority Jurisdiction

These two consolidated appeals are most easily decided by this Court under the doctrine of priority jurisdiction, and yet Onnam completely misconstrues the principle of priority jurisdiction in its brief.

Onnam appears to contend that the doctrine of priority jurisdiction depends upon the date of service of process rather than the date of filing the complaint.

This is a unique theory. Every recent decision of this Court expounding upon the doctrine of priority jurisdiction correctly states that the jurisdictional issue is determined by the date of the filing of the complaint, not by the date the summons is served on the defendant:

- *Copiah Medical Associates v. Mississippi Baptist Health Systems*, 898 So.2d 656 (Miss. 2005), "In this state, priority of jurisdiction between courts of concurrent jurisdiction is determined by **the date the initial pleading is filed**." (emphasis added) 898 So.2d at 663.
- *Huffman v. Griffin*, 337 So.2d 715 (Miss. 1976), "Priority of jurisdiction between courts of concurrent jurisdiction is determined by **the date the initial pleading is filed** provided process issues in due course." (emphasis added) 337 So.2d at 719.

- *Scruggs Millette Bozeman & Dent v. Merkel & Cocke, P.A.*, 804 So.2d 1000 (Miss. 2001), In the process of quoting from *Huffman*, the Court recognized the “first to file” rule: “The complaint filed in Jackson County Chancery Court was filed on September 22, 1997, obviously preceding the complaint filed in Coahoma County Chancery Court on March 26, 1998.” 804 So.2d at 1005, ¶11.

Since it is clear this case was filed nearly a month before Onnam filed its action in chancery court, the doctrine of priority jurisdiction mandates that the circuit court in this case, not the chancery court, acquired jurisdiction first and is the court where the case should proceed to final conclusion.

For some unexplained reason, Onnam appears to emphasize the caveat to MRCP 4 and in the cases cited above, which provides that priority jurisdiction only applies “provided process issues in due course.” See *Copiah Medical Associates*, 898 So.2d at 663. Appellees have difficulty understanding why Onnam makes an issue of this point, since the record reflects that process issued on December 28, the day after the complaint was filed. (See Docket Entry R.E. No. 1, Clerk’s Papers 2) The docket reflects that the process server did not serve Onnam until January 26, for reasons that are not known. Perhaps the holiday season festivities interfered with the process server’s duties. Perhaps the confusion and lack of communications on the Gulf Coast following Hurricane Katrina were hampering service of process activities. In any event, MRCP 4(h) provides a 120-day window for serving process once it is issued, and the service was accomplished well within this time frame. The rule is clear. A case begins when the complaint is filed provided process issues in due course, and the process in this case issued one day after the complaint was filed and was served less than 30 days later, well within the 120-day allowed limit.

Priority jurisdiction is not even a close call in this case. The circuit court acquired jurisdiction first and the order of the circuit court appealed from should be affirmed.

The Court of Most Appropriate Jurisdiction

Recent decisions of this Court make it clear that, the doctrine of priority jurisdiction completely aside, breach of contract disputes possibly involving both legal and equitable claims ought to be tried in the circuit court, not in chancery court. This is because a chancery court trial will deny a party of the right to jury trial provided by the Mississippi Constitution and further because the circuit court is a court of general jurisdiction, whereas chancery jurisdiction is limited. *Southern Leisure Homes, Inc. v. Hardin*, 742 So.2d 1088 (Miss. 1999).

First, Onnam states that its claim of specific performance makes this entire controversy equitable in nature. That, however, is not what *Copiah Medical Associates* and other recent decisions of this Court hold. Those cases hold that where there are both claims for specific performance and claims for damages, circuit court, not chancery court is the appropriate jurisdiction. In this particular case, RAS and Mr. Sims' complaint and amended complaint seek nothing but damages. Specific performance is raised only in Onnam's counterclaim. Where both a damages claim and a specific performance claim compete in the same case, the case ought to be in circuit court. *Southern Leisure*, supra; *Burnette v. Hartford Underwriters Ins. Co.*, 770 So.2d 948 (Miss. 2000); *Tyson Breeders, Inc. v. Harrison*, 940 So.2d 230 (Miss. 2006).

Onnam seems to insinuate that the fact that Mr. Sims was not an initial plaintiff in this case somehow makes a difference. However, *Copiah Medical*, supra, makes it clear that an amendment adding a party relates back to the date of the initial filing, see 898 So.2d at 663, ¶22, so Mr. Sims' claim against Onnam for analytical purposes is deemed to be made the same time RAS filed its damages claim against Onnam. In any event, Onnam has not sought specific performance against Mr. Sims, so the fact he was not initially a party to this case does not make any difference as far as Onnam's argument is concerned.

The truly strange part of Onnam's argument is its assertion that this case ought to be in chancery court because the chancery court will be asked to alter the contract. As Onnam puts it, "all of the dates in the contract will have to be changed...." See Appellant's Brief at Page 6, ¶2.

Dates changed? Onnam cites no authority for the proposition that the chancery court, even if it were the appropriate court, could alter the time limits under a contract. While it is true that in rare circumstances a court can decree reformation of contracts, this doctrine is only applicable in extremely limited circumstances, such as, for instance, where a contract for some reason fails to reflect a specific term that was omitted due to a mutual mistake or misunderstanding. See *Johnson v. Consolidated American Life Insurance Company*, 244 So.2d 400, 402 (Miss. 1971).

The doctrine of reformation of contracts, however, does not imply that a court can rewrite contracts for parties. In fact, the law of this state is that a court may not remake a contract; see *Yazoo Properties v. Katz & Besthoff No. 284, Inc.*, 644 So.2d 429, 432, citing *Employer's Mutual Casualty Company v. Nossner*, 250 Miss. 542, 164 So.2d 426 (1964). Onnam cites no legal authority at all for the proposition that the chancery court or any other court has the authority to rewrite the lease agreement and stock purchase agreement that are at issue in this case to give Onnam an extended period of time to pay the sums of money that it acknowledges were due before September 30, 2005, over a year and a half ago.

Perhaps one of the best discussions of Mississippi law on this subject is the decision by United States District Court Judge Walter Gex in *Equitable Mortgage Corp. v. Mortgage Guaranty Insurance Corp. v. Mann*, 791 F.Supp. 620 (S.D. Miss. 1990), where the court, citing Mississippi precedent, makes it clear that the doctrine of reformation of contracts does not give a court the power to make a new agreement for the parties, but only to establish and clarify the true

existing agreement by making the instrument express the real intent of the parties. As Judge Gex observed, “The court cannot rewrite the contract which the parties have made so as to express an agreement which they did not enter into.” 791 F.Supp. At 624.

Onnam’s newly raised theory that it is seeking to have the contract dates changed, is not something that can be done under the law.

Furthermore, Onnam has not pleaded such a claim for reformation in its counterclaim in this case nor in its complaint filed in the chancery court case. Onnam’s counterclaim, denominated a “Cross-complaint for Specific Performance and Other Relief,” appears in the Clerk’s Papers in this appeal at Pages 60 through 63. In this “Cross-complaint,” Onnam charges RAS with breach of the lease agreement (Paragraph 7) and claims specific performance from RAS, (Paragraph 8) and damages only against Mr. Sims, personally (Paragraph 9). Not once in the “Cross-complaint” is a claim made that “all of the dates in the contract will have to be changed as a result of Hurricane Katrina.”

Onnam’s complaint filed in chancery court in appeal No. 2006-IA-00976 appears at Clerk’s Papers 1-3 in that record and uses the same paragraph numbering system as its counterclaim in this appeal. Onnam claims specific performance and damages against RAS and damages only against Mr. Sims, exactly as its “Cross-complaint” states in this case. There is no mention that “all of the dates in the contract will have to be changed.”

For reasons stated above, this related reformation theory of Onnam’s is not pleaded anywhere in the pleadings filed in the courts below, and even if it were, it would not constitute any kind of valid claim, as no court, circuit or chancery, can rewrite closing dates into a contract, especially where there is no claim of mutual mistake or fraud inherent in the formation stages of the contract.

CONCLUSION

For reasons stated in this brief as well as in the Appellant's Brief in appeal No. 2006-IA-00976, this Court should affirm the decision of the circuit court refusing to transfer this case to chancery court and, at the same time, reverse the chancery court order in appeal No. 2006-IA-00976.

Furthermore, the Court should proceed to decide the merits of the controversy that are fully briefed in the petition for interlocutory appeal and the response to that petition in appeal No. 2006-IA-01416. No further briefing on that issue should be necessary, as all factual and legal issues are fully developed in the petition for interlocutory appeal and the response, and this Court should likewise affirm the circuit court's grant of summary judgment in that appeal.

This the 20 day of March, 2007.

Respectfully submitted,



Lawrence C. Gunn, Jr., MS Bar [REDACTED]
GUNN & HICKS, PLLC
Post Office Box 1588
Hattiesburg, Mississippi 39403-1588
Telephone: (601) 544-6770
Facsimile: (601) 544-6775
E-mail: larry@gunnandhicks.com

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date mailed by United States Mail, postage prepaid, or served by facsimile or electronic mail, a true and correct copy of the above and foregoing document to:

John G. Corlew, Esq.
WATKINS AND EAGER, PLLC
The Emporium Building
400 East Capitol Street
P.O. Box 650
Jackson, Mississippi 39205

Honorable James B. Simpson
Circuit Court of Harrison County
P. O. Box 1570
Gulfport, MS 39502

THIS 20 day of March, 2007.



Lawrence C. Gunn, Jr.