

IN THE SUPREME COURT OF MISSISSIPPI

ONNAM BILOXI, LLC

APPELLANT/DEFENDANT

VERSUS

CASE NO. 2006-IA-1414-SCT

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

APPELLEES/PLAINTIFFS

CONSOLIDATED WITH

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

APPELLANTS/DEFENDANTS

VERSUS

CASE NO. 2006-IA-00976-SCT

ONNAM BILOXI, LLC

APPELLEE/PLAINTIFF

**REPLY BRIEF OF APPELLANTS
(No. 2006-IA-1414)**

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

ORAL ARGUMENT NOT REQUESTED

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ARGUMENT

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

This case arises from a contract between RAS Family Partners, Mr. Ray Sims, and Onnam Biloxi LLC. The controversy began when RAS and Sims terminated this contract on November 18, 2005. R:43. While all parties agree that this date is after the September 30 date specified for “closing,” Hurricane Katrina’s devastation to the Mississippi Gulf Coast on August 29, 2005 made performance of the conditions precedent to closing impossible. See Lease Agreement, R:11. The unilateral termination notice by RAS and Sims on November 18, 2005, came as a surprise to Onnam because the parties were working in concert to fulfill the required conditions precedent. See R.E. Tab 3, Exhibit D-1 to transcript of hearing held April 18, 2006. Furthermore, under the terms of the contract itself, the only party with the right to terminate under the circumstances was Onnam. See Lease Agreement, R:12.

RAS and Sims state in their Appellee’s Brief that Onnam is arguing “that its claim of specific performance makes this entire controversy equitable in nature.” Appellee’s Brief at 8. This does not precisely state Onnam’s argument. Onnam is not denying that RAS and Sims claim to be entitled to damages in their complaint, and Onnam is not arguing that somehow these claims are converted to equitable claims. However, the core issue of this case is indeed Onnam’s claim for specific performance, which is an equitable claim. *Crechale & Polles, Inc. v. Smith*, 295 So. 2d 275, 279 (Miss. 1974). Any claims for damages are either ancillary or completely without merit. RAS and Sims do not have a damages remedy. It is clear under the terms of the contract that the only possible sum due to RAS and Sims is the retention of the \$25,000 deposit. See Lease Agreement, R:12. In deciding the proper forum, the court should “look at the substance, and not the form, of the claim

in order to determine whether the claim is legal or equitable.” *Trustmark National Bank v. Johnson*, 865 So. 2d 1148, 1151 (Miss. 2004). Here, the fundamental substance of the two cases is equitable as the consolidated cases arise from RAS and Sims unlawful termination and Onnam’s desire for specific performance of the contract.

All of the cases cited by RAS and Sims were decided on the basis that the legal issues in those cases outweighed the equitable issues. For example, the claims in *Tyson Breeders, Inc. v. Harrison*, 940 So. 2d 230 (Miss. 2006), included fraud, fraudulent inducement, breach of contract, and negligence, as well as claims for both actual and punitive damages. *Southern Leisure Homes, Inc. v. Hardin*, 742 So. 2d 1088, 1089 (Miss. 1999), involved similar claims including fraud and negligence, and claims for both actual and punitive damages were asserted. Likewise, the claim in *Burnette v. Hartford Underwriters Ins. Co.*, 770 So. 2d 948, 950 (Miss. 2000), was bad faith breach of contract, as well as claims for actual and punitive damages.

There are two major distinctions between the cases cited by RAS and Sims and the instant case. First, all of the cited cases involved claims for punitive damages, which this Court stated are “clearly legal rather than equitable in nature.” *Burnette*, 770 So. 2d at 950. No claims for punitive damages are asserted in the instant case. Second, none of the cited cases involve specific performance of a contract for a specific piece of property, which is the issue in the instant case. Appellees comment that specific performance “is raised only in Onnam’s counterclaim” in the case filed in circuit court. Appellee’s Brief at 8. This is somewhat disingenuous, as Onnam’s desire for specific performance was raised in the original case first filed in federal court, as well as the complaint Onnam filed in the chancery court. Because this case revolves around a claim for specific performance of a real estate contract, it is predominately equitable and should be heard in the chancery court.

To address Appellee's argument regarding the reformation of the contract, Onnam did not plead for reformation of the contract in its complaint as it is not seeking reformation of the contract. Common sense, however, dictates that if the court grants Onnam's claim for specific performance, Onnam cannot then go back in time and offer payment on the agreed upon date in the contract. Obviously, the chancellor will have to set new dates for performance.

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

Appellees RAS and Sims misconstrue Onnam's argument regarding the priority jurisdiction of the Circuit Court of Harrison County. Onnam is not contending that the doctrine of priority jurisdiction depends upon the date of service of process. It is not unreasonable to quote language that appears in opinions issued by this Court, although RAS and Sims characterize this as "unexplained." Onnam's argument is that although the original complaint in the circuit court case was filed before Onnam's complaint was filed in chancery court, Mr. Sims was not a party to the circuit court case until after Onnam's complaint was filed, and all parties were joined and process in the chancery court case was fully effected before all parties were joined and process fully effected in the circuit court case.

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. Since this case properly belongs in the chancery court, even if the circuit court has priority jurisdiction, its decision to deny the motion to transfer should still be reversed.

CONCLUSION

For the all the reasons stated above, Onnam Biloxi LLC respectfully requests that this Court reverse the ruling of the Harrison County Circuit Court, which denied Onnam's motion to transfer this case to the Harrison County Chancery Court.

Onnam further requests that briefing be allowed before rendering a decision on the issue of the circuit court's grant of summary judgment. Although the facts of this case have been extensively discussed in the numerous briefs before this Court, the legal arguments regarding the premature grant of summary judgment have not been fully developed in these briefs, as this issue was not yet before this Court.

This the 5th 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 Stephen B. Simpson
Circuit Court of Harrison County
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This the 5th day of April, 2007.



MEGAN B. CONNER