

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-01774

JON ADAMS

APPELLANT

VS.

A & C ENTERTAINMENT

APPELLEE

Appeal from the Circuit Court
of the First Judicial District of Hinds County, Mississippi

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED


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TABLE OF AUTHORITIES

CASES CITED:

Dunham-Bush, Inc. v. Barron-Leggett Electric, Inc., 358 So.2d 1315 (Miss. 1978)

Sandlin v. Sandlin, 906 So.2d 39 (Miss. App. 2004)

OTHER AUTHORITIES:

Miss. Code Ann. §11-51-79

Rule 28(a)(6) M.R.A.P.

ATTORNEY FOR JON ADAMS

STATEMENT OF ISSUES

- I. THE CIRCUIT COURT ERRED IN NOT CONSIDERING THE APPEAL ON THE MERITS.
- II. THE TRIAL COURT ERRED IN ORDERING JON ADAMS TO RETURN POSSESSION OF THE PREMISES LOCATED AT 775 E. MCDOWELL ROAD, JACKSON, MS TO A & C ENTERTAINMENT CORPORATION.
- III. THE TRIAL COURT ERRED BY NOT FINDING A & C ENTERTAINMENT CORPORATION IN VIOLATION OF THE COURT'S ORDER ENTERED FEBRUARY 6, 2004 FOR ITS FAILURE TO OBTAIN AND MAINTAIN LIABILITY INSURANCE ON THE PREMISES.
- IV. THE TRIAL COURT ERRED BY NOT FINDING A & C ENTERTAINMENT CORPORATION IN VIOLATION OF THE COURT'S ORDER ENTERED ON FEBRUARY 6, 2004 FOR ITS FAILURE TO PERFORM MAINTENANCE ON THE LEASED PREMISES.
- V. THE TRIAL COURT ERRED BY NOT FINDING A & C ENTERTAINMENT CORPORATION IN VIOLATION OF THE COURT'S ORDER ENTERED ON FEBRUARY 6, 2004 FOR ITS FAILURE TO MAKE THE PREMISES AVAILABLE FOR INSPECTION BY JON ADAMS.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The parties entered into "Agreement to Sell Business and Lease Real Property" on October 14, 1999. (R. 6). Jon Adams filed a Complaint for Eviction against A & C Entertainment Corporation on July 22, 2003 and a judgment was entered against A & C Entertainment on February 3, 2004. (R. 14). Thereafter, A & C Entertainment filed its Complaint for Unlawful Entry and Detainer on April 14, 2004. (R. 3). Jon Adams filed his Affirmative Defenses and Answer to Complaint on April 27, 2004. (R. 9). On July 27, 2004, the Circuit Court of the First Judicial District of Hinds County entered its judgment. (R. 28). Jon Adams thereafter filed a Motion for New Trial/Reconsideration or in the Alternative to Set Appeal Bond. (R. 31). The County Court denied the Motion for Reconsideration on October 7, 2004. (R. 36). On October 15, 2004, Jon Adams appealed the County Court's ruling to the Circuit Court (R. 42) from which Jon Adams appealed. Ultimately, the Circuit Court entered its Order granting Motion to Strike Brief of Appellant, Jon Adams, and Dismiss Appeal. (R. 61). While not in the record, on January 29, 2007, Jon Adams filed a Motion for Reconsideration in this matter. On July 5, 2007, the Circuit Court of the First Judicial District of Hinds County entered its Order Denying Motion for Reconsideration. (R. 65). Defendant/Appellant filed his Notice of Appeal on July 16, 2007. (R. 66). Plaintiff/Appellant's Designation of Record was filed on August 28, 2006. (R. 68). Plaintiff/Appellant's Certificates of Compliance with Rule 11(b)(1) were filed on October 19, 2007, October 25, 2007 and January 9, 2008. (R. 70, 72, 74).

STATEMENT OF LAW

In a case of affirmance of the County Court by the Circuit Court the decision may be appealed to the Supreme Court under Miss. Code Ann. §11-51-79 which provides that such appeals are to be considered solely upon the record as made in the County Court. The statute also states that the judgment of the County Court is to be affirmed unless "prejudicial error be found." Jon Adams submits that the record supports a finding of prejudicial error by the County Court and that this Court should reverse the ruling of the County Court and render a decision for Jon Adams, returning the premises to him.

STATEMENT OF FACTS

Jon Adams and A & C Entertainment Corporation entered into the subject contract on October 14, 1999. This appeal involves the provisions in the contract pertaining to lease of the premises. The contract established a five year lease with an option to renew the lease for another five year period.

The contract required several things of A & C Entertainment Corporation. First, A & C Entertainment Corporation was to pay \$3,000 per month rent. Second, A & C Entertainment Corporation was to be responsible for all maintenance of the building and property. Third, A & C Entertainment Corporation was to obtain and maintain liability insurance on the premises. Fourth, A & C Entertainment Corporation was to make the premises available for inspection by Jon Adams or his designated agent.

Jon Adams filed his initial Complaint for Eviction against A & C Entertainment Corporation in cause number 251-03-3694 based upon A & C Entertainment Corporation's failure to fulfill its obligations under the subject contract. The trial court found that A & C Entertainment Corporation

had breached the contract and ordered it to cure its breach by 5:00 p.m. on February 16, 2004 or possession of the subject property would be returned to Jon Adams. By March 1, 2004, A & C Entertainment Corporation had not taken any steps to cure its breach and Jon Adams took possession of the subject property and subsequently leased the property to a third party.

On April 14, 2004, A & C Entertainment Corporation filed its Complaint for Unlawful Entry and Detainer alleging that it had cured its breach and fulfilled all of its obligations under the contract and was unlawfully deprived of possession of the subject property.

Despite evidence and testimony at trial to the contrary, the trial court held that A & C Entertainment Corporation was not in violation of the prior judgment and not in breach of the parties' contract and therefore, ordered that possession of the property was to be turned back over to A & C Entertainment Corporation by July 31, 2004.

STANDARD OF REVIEW

In this appeal which originated in the County Court and was thereafter appealed to the Circuit Court, the County Judge was the trier of the facts. His decision was appealed to the Circuit Court. In the Circuit Court, unless prejudicial error appears in the findings and decisions, then affirmance is proper. *Dunham-Bush, Inc. v. Barron-Leggett Electric, Inc.*, 358 So. 2d 1315 (Miss. 1978). In this case, the Circuit Court did not do so. It dismissed Jon Adams' appeal on procedural grounds. (R. 61). Accordingly, Jon Adams submits that this Court should reverse the decision of the Circuit Court and remand the case to that court for a decision in accordance with established precedent.

In this case, the Circuit Court dismissed Jon Adams' appeal since no law was cited in violation of Rule 28(a)(6) M.R.A.P. This ruling is apparently based upon the Circuit Court's finding that Adams did not cite authority for the positions advanced on appeal for which *Sandlin v. Sandlin*, 906

So. 2d 39 (Miss. App. 2004) is cited as authority. In *Sandlin*, Appellant was making an argument concerning application of *Albright* factors and failed to cite legal authority for his position. Nevertheless, the appellate court made a ruling on the merits of the issue. In this case, the Circuit Court did not do so but dismissed the entire appeal. It is a fact of litigation that some cases, such as the present case, are long on facts and short on law. The argument advanced by Adams in his appeal to the Circuit Court is essentially the same as that presented to this Court: the evidence submitted at trial does not support the trial court's rulings and thus, prejudicial error exists warranting reversal of the County Court's decision.

ARGUMENT

The trial court erred in ordering Jon Adams to return possession of the premises located at 775 E. McDowell Road, Jackson, Mississippi to A & C Entertainment Corporation. The parties' contract required A & C Entertainment Corporation to perform any needed maintenance of the subject property. (R. 6). A & C Entertainment Corporation failed to have any maintenance done to the property. Moreover, Bo Powell, who testified on behalf of A & C Entertainment Corporation at the hearing held on July 15, 2004, admitted that the company had only operated an adult entertainment business on the property from October, 1999 until the summer of 2001 and that from the summer of 2001 until the hearing on July 15, 2004 A & C Entertainment Corporation had allowed the property to remain vacant and unused, except for storage purposes. (Transcript 23-24).

Bo Powell and Daniel Reid testified that on or about February 13, 2004 they and one other gentleman had cleaned up around the outside of the building and had replaced a board that was missing around the eave. (Transcript 29, 44). However, as testified by Harry Rosenthal and Jon Adams, the property required much more cleaning and repair than was done by Bo Powell and the

two men working for him. (Transcript 10-12; 51-55). Jon Adams testified that while Bo Powell and the men had picked up some trash and replaced the missing board, the grass had not been cut; grass was growing up through the asphalt parking lot; a light pole was laying over; neon signs were broken; and the inside of the building had not been maintained. (Transcript 11-13). Jon Adams testified that they had to replace part of the stage because of water damage, two out of the three air conditioners did not work and the building had to be painted. (Transcript 19-20). Harry Rosenthal testified that the asphalt parking lot was covered by a layer of dirt that had washed over it and a sewer line had been busted on the back of the property. According to Jon Adams' testimony, it cost several thousand dollars to make all the needed repairs. The above described testimony and evidence which was presented at trial clearly shows that A & C Entertainment failed to abide by the terms of the lease and the Court's previous Order entered on February 3, 2004 in cause no. : 251-03-3694. Even though A & C Entertainment was required to maintain the premises in the same condition as it was at the time of the lease, the County Court found that A & C Entertainment was not in breach of the lease or in contempt of the Court's February 3, 2004 Order. The County Court's finding was not based upon substantial evidence and thus constitutes prejudicial error and warrants reversal of the lower court's decision.

The trial court erred by transferring the obligation to perform maintenance on the property to Jon Adams. The lease clearly states: "Purchaser agrees to maintain all of the property at his own costs." In the Judgment entered on July 27, 2004, the trial court held that if after being notified of needed maintenance ten (10) days in advance, A & C Entertainment Corporation fails to do the maintenance, Jon Adams may re-enter the property and make the required repairs and add the repair costs to the rent due. This was not the agreement entered into by the parties. A Court should not

modify the language and obligations in a valid and enforceable contract and the County Court's ruling in this cause did modify the terms of the parties' lease agreement which constitutes prejudicial error and warrants reversal of the lower court's decision.

The lease makes it the obligation of A & C Entertainment Corporation to make all repairs. A & C Entertainment Corporation's failure to make any needed repairs constitutes a breach of contract and does not operate to shift the obligation to Jon Adams to make the repairs. Jon Adams should be given the benefit of his bargain. A & C Entertainment Corporation failed to perform its obligations under the subject contract and the Court should have found A & C Entertainment Corporation to be in breach of the lease agreement. The County Court's finding that A & C Entertainment was not in breach of the lease agreement is not supported by substantial evidence and constitutes prejudicial error which warrants reversal of the lower court's decision.

The trial court erred in finding that A & C Entertainment Corporation was not in breach of its obligation under the parties' contract to obtain and maintain liability insurance on the subject property.

Further, the trial court erred in finding that A & C Entertainment Corporation was not in violation of the February 3, 2004 Judgment for failing to obtain and maintain liability insurance policy on the subject property in the amount of \$100,000.00 by February 16, 2004. (R. 28). Jon Adams testified that on February 16, 2004 and many times after that date he had questioned his attorney, William H. Pettey, about whether Mr. Pettey had received any proof of liability insurance from A & C Entertainment Corporation and was told by Mr. Pettey that no proof of insurance had been received.

Further, during the hearing on Jon Adams's Motion for New Trial/ Reconsideration or in the Alternative to Set Appeal Bond, Mr. Albert Harris who was called as an expert in insurance by Jon Adams, testified that the document supposedly sent to William H. Pettey before February 16, 2004 as proof of insurance was not a valid certificate of liability insurance because no holder was listed on the certificate and it was not signed by an agent. Mr. Harris also testified that a blank certificate of insurance could be obtained from an insurance office or the Internet and that therefore the signature of an insurance agent is required to be on the certificate in order for the certificate to be valid.

An endorsement to the policy dated May 10, 2003 to May 10, 2004 was also entered as an exhibit at the hearing. The endorsement was dated June 9, 2004. Mr. Harris testified that an endorsement adding coverage for the subject property would not have been necessary unless the subject property had been added on or after the date that the policy renewed.

Since the policy was added on or after May 10, 2004, A & C Entertainment Corporation was in violation of the Court's Judgment entered on February 3, 2004 giving Jon Adam's the right to possession of the property. The lower court's findings regarding A & C Entertainment Corporation's failure to obtain and maintain insurance on the subject property is not supported by substantial evidence and constitutes prejudicial error which warrants reversal of the lower court's decision.

The lower court further erred by not finding A & C Entertainment Corporation in violation of the Court's Judgment entered on February 3, 2004 for failing to make the subject property available for inspection by Jon Adams or his agent. Jon Adams testified that the doors on the building were chained together and that he was never provided with a key. The lower court found that A & C Entertainment Corporation was not in contempt of the February 3, 2004 Order or in breach of the

lease agreement which is not supported by substantial evidence and constitutes prejudicial error warranting reversal of the lower court's ruling in this matter.

Based upon the above recitation of relevant facts, this Court should find that the decision of the County Court, which is the only substantive ruling in this case, was not based upon substantial evidence and therefore there exists prejudicial error which requires reversal of the County Court decision or, alternatively, remand to the Circuit Court for purposes of an evaluation of the facts and entry of an order based upon such evaluation.

CONCLUSION

In reviewing the County Court's ruling, which has been affirmed by the Circuit Court, Miss. Code Ann. §11-51-79 provides that appeals are may be taken to the Supreme Court and are to be considered solely on the record as made in the County Court. If prejudicial error is found in the record, the judgment of the County Court is to be reversed. In this case, the Circuit Court made no such findings or rulings and at a minimum, this case should be remanded to the Circuit Court for such determination.

In this case the record of the County Court proceedings reflects that A & C Entertainment Corporation had breached the lease agreement by failing to maintain the subject premises; for failing to obtain and maintain liability insurance on the subject premises; and for failing to make the subject premises available for inspection by Jon Adams.

The record also reflects that an order was entered relating the parties and the subject lease agreement in cause no.: 251-03-3694 on February 3, 2004. In that cause of action, the lower court found A & C Entertainment Corporation in breach of the lease agreement and ordered A & C Entertainment Corporation to cure its breach of the lease agreement by fulfilling the obligations set

out in the preceding paragraph on or before February 16, 2004 or Jon Adams could retake the premises. (R. 13).

A & C Entertainment Corporation failed to cure its breach by February 16, 2004 and Jon Adams took possession of the premises on March 1, 2004. A & C Entertainment Corporation filed its Complaint for Unlawful Entry and Detainer on April 14, 2004. At the trial of the matter testimony and evidence was presented to prove that A & C Entertainment Corporation had breached the lease agreement by failing to maintain the premises; obtain and maintain liability insurance; and to make the premises available for inspection by Jon Adams. The lower court found that A & C Entertainment was not in breach of the lease agreement or in contempt of the February 3, 2004 order. The lower court's findings were not supported by the evidence presented which clearly showed that A & C Entertainment Corporation had failed to abide by the terms of the lease agreement and the February 3, 2004 Order.


Upon review of the lower court's findings and the record, this Court should reverse the ruling of the County Court and render a decision for Jon Adams, returning the premises to him.

Respectfully submitted,

JON ADAMS

BY: 

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CERTIFICATE OF SERVICE

I, Paul E. Rogers, do hereby certify that I have this day caused to be served via U.S. mail, postage pre-paid, a true and correct copy of the above and foregoing to the following:

Honorable W. Swan Yerger
Hinds County Circuit Court Judge
P. O. Box 327
Jackson, MS 39205

Chris N. K. Ganner, Esquire
405 Tombigbee Street
Jackson, MS 39202

THIS the 26th day of August, 2008.


PAUL E. ROGERS