IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

WILTON HELVESTON	APPELLANT
VS.	CAUSE NO. 2007-CA-02277
LUM PROPERTIES, LTD., A MISSISSIPPI LIMITED PARTNERSHIP, MARTHA B. LUM, INDIVIDUALLY AND IN HER CAPACITY AS GENERAL PARTNER OF LUM PROPERTIES, LTD.	APPELLEES

BRIEF OF APPELLEES

FROM THE DISTRICT COURT OF CLAIBORNE COUNTY

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certified 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 or Judges of the Court of Appeals may evaluate possible disqualifications or recusal:

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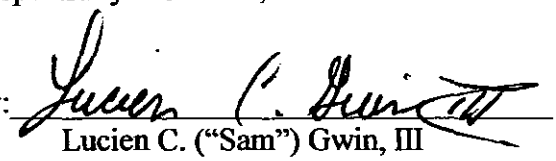
This the 4th day of June, 2008.

Respectfully submitted,

By: 

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STATEMENT OF ISSUES

1. The lower court was correct in granting summary judgment and finding that the parties had contractually agreed that any personal property left on the Defendants' land by the Plaintiff for more than thirty (30) days beyond the expiration of their hunting lease became the property of the Defendant landowners.

2. The lower court was correct in granting summary judgment and finding that the Plaintiff failed to produce any evidence of inequitable conduct on the part of the Defendants which would have justified an assertion of equitable estoppel against said Defendants.

3. Since title had passed to the Defendants' through the thirty (30) day expiration date of the 2002-2005 hunting lease, then the Defendants Lum had title to all personalty left by Plaintiff and thus Defendants can not be guilty of conversion.

STATEMENT OF THE CASE

This case was initiated by the Plaintiff, Wilton Helveston, as a replevin action and it was thereafter converted to an action for conversion on the part of the Plaintiff wherein he also asserted that the Defendants Lum were equitably estopped from asserting their rights in a hunting lease contract that was executed between the parties.

Plaintiff filed a complaint on October 31, 2005, seeking replevin for his personal property that he had left on the Defendants' real property after the expiration of a hunting lease between the Plaintiff and the Defendants Lum. (Vol. 1, Pg 6) The lease provided that if all personal property was not removed after thirty (30) days from expiration then the property became ipso facto the property of the Defendants Lum.

Before an answer was due and filed, Plaintiff filed an amended complaint charging the Defendants Lum with conversion of his personal property as well as punitive damages. (Vol. 1, Pg. 30)

Answers were filed by the Defendants Lum to both the complaint and amended complaint making a general denial of all allegations. (Vol. 1, Pgs. 35 and 38)

Thereafter Plaintiff filed a second amended complaint, with court order, alleging that the Defendants were estopped from claiming ownership of the personal property which was the subject to the original complaint. (Vol. 1, Pg. 139) Except for the estoppel pleading, Plaintiff has never pled nor argued that the thirty (30) day waiver period was void under Mississippi law.

On March 2, 2006, Heritage Banking Group of Carthage, Mississippi filed a motion to intervene as a lienholder of the personal property of which Plaintiff was seeking possession, and the said bank alleged that it was entitled to all of the personalty since Plaintiff was in default of a note

which was secured by all of the property that was the subject of Plaintiff's replevin action. (Vol.2, Pg. 163)

The Defendants Lum answered the second amended complaint and Defendants affirmatively plead advice of counsel as well as additional affirmative defenses. (Vol 2, Pg. 179)

On October 12, 2006, the Circuit Court of Claiborne County entered an order recognizing Carthage Bank's lien and awarding possession of all personalty which was the subject of the said original replevin action to said bank. Said order was agreed to by the Plaintiff and all Defendants at the time. (Vol.2, Pg. 214)

Thereafter, depositions of the Plaintiff, Plaintiff's representative Leoma Reed and attorney Sim Dulaney (original attorney for Lum) were taken and counsel for the Defendants Lum shortly thereafter filed a motion for summary judgment. (Vol. 2, Pg. 253)

After a response to the motion for summary judgment was filed by the Plaintiff and a rebuttal by the Defendants Lum, the Circuit Court of Claiborne County entered an opinion and order granting Defendants' motion for summary judgment. (See Vol. 4, Pg. 456) The court found that the contract between the parties was valid and that the Plaintiff, by waiting beyond thirty (30) days from the expiration of the hunting lease, had failed to exercise his rights; and further the court found that the Plaintiff put forth no evidence of any inequitable conduct on the part of the Defendants Lum to support Plaintiff's claim of equitable estoppel.

STATEMENT OF FACTS

When the facts, as sworn to by the Plaintiff and his representative Mrs. Reed, are reviewed in chronological order, this Court will easily see that the Defendants Lum were within their rights to act as they did pursuant to the expired hunting lease and further that there is not one ounce of evidence of inequitable conduct presented in this matter on the part of said Defendants.

The relationship between the Defendants Lum and Plaintiff Helveston (hereinafter referred to as Plaintiff) began sometime around July of 1999 when Plaintiff, a resident of South Louisiana, entered into a written hunting lease with said Defendants to lease their property located in Jefferson and Claiborne Counties for guided hunts. The initial lease was for a three (3) year term and was paid based on a rate of $21.50 an acre in 1999; $22.50 an acre in 2000; and $24.50 an acre in 2001. (See copy of original lease Vol. 2, Pg. 267) At the expiration of the first lease, the parties executed a second lease for a three (3) year term beginning July 2002 and ending July 15, 2005. Rent for these three (3) years was to be paid at the rate of $25.50 an acre for the first year; $26.50 per acre for the second year and $27.50 an acre for the final year of the lease. There is approximately 1100 acres in said property. (See second lease Vol 2, Pg. 274)

Both leases signed by the Plaintiff in 1999 and 2002 had an identical provision which stated:

> "Upon expiration or cancellation of this lease, Lessee shall have thirty (30) days thereafter to take and remove from the land any and all equipment or other personal property owned by Lessee; provided that if Lessee shall fail or refuse to remove the same within such time, title hereto shall ipso facto vest in Lessor." (Emphasis added.) (See Vol. 2, Pgs. 271 and 279)

Prior to the expiration of the subject lease (again which expired July 15, 2002), Plaintiff wrote a letter on April 24, 2005, to Defendant seeking to lease the properties again. (See Vol. 3, Pg. 309; Deposition of Plaintiff, pg. 100, lines 15). Plaintiff's offer was rejected. (See Vol. 3, Pg. 309; Deposition of the Plaintiff, pg. 101, lines 3-9). Thereafter Plaintiff recontacted the Lums and asked for a one (1) year lease. (See Vol. 3, Pg. 309; Deposition of Plaintiff pg. 101, line 10) Plaintiff specifically talked to Deborah Purviance (who is the daughter of Martha Lum) during this time who advised Plaintiff the family would go one more year with him at a price specified by Defendants. (See Vol. 3, Pg. 309; Deposition of Plaintiff, pg. 101, line 18). Subsequent to this Mrs. Lum wrote a letter on May 17, 2005, stating that she was having a lease drawn up and that it would be ready for

his review on his next trip to Port Gibson. (See Vol. 3, Pg. 309; Deposition of Plaintiff, pg 101, line 23 through 25 and Pg. 102, lines 1-25)

Thereafter, Plaintiff admits that pursuant to the letter of May 17, 2005, that at least an oral agreement had been reached. (See Vol. 2, Pg. 291; Deposition of Plaintiff, pg. 27, lines 15-21.) (See Vol.2, Pg. 282, Letter of May 17, 2005)

Subsequent to receiving the letter of May 17, 2005, Plaintiff admits that he never came to Port Gibson to see the lease; that he never called the Defendants Lum and asked for a copy of the lease; nor did he ever contact or call the Lum's attorney, Sim Dulaney, and ask for a copy of the lease; nor did he ever request that a copy of the lease be sent to any attorney on his behalf. (See Vol. 3, Pg. 310; Deposition of Plaintiff, pgs. 105-106.) (Emphasis added.) Prior to the expiration of the 2002 lease, Plaintiff sent a Mrs. Leoma Reed, an old friend of Mrs. Lum who was the ex-cook at his hunting operation on the Defendant Lum's property, to receive a copy of the lease directly from the Defendants Lum. Mrs. Reed was advised that the Lums could not turn the lease over to her but that Mr. Helveston would have to contact them directly. (See Vol. 3, Pg. 310; See Deposition of the Plaintiff, Pgs. 105, line 14)

It is at this point that Plaintiff wants to imply that Mrs. Reed became his "negotiator." The exact testimony is as follows:

> "Q: Why did Mrs. Reed tell you that? What has Mrs. Reed got to do with any of this?
> A: She was up there. She worked for me ... she was over here negotiating the thing (emphasis added.)" (See Vol.2, Pg. 293; See Deposition of Plaintiff Pg. 35, Lines 15-18)

See also Plaintiff's testimony where he stated the following:

> "Q: And you never called Mr. Dulaney and asked for a copy of the lease, did you?
> A: No, I sure didn't because I had a representative up there." (Emphasis added.)" (See Vol. 3, Pg. 310; Plaintiff's Deposition Pg. 105, Line 23)

It is undisputed that Mrs. Reed did have some telephone conversations with Mrs. Lum, however, Plaintiff would imply throughout his brief that he was too sick to deal with Mrs. Lum and thus Mrs. Reed had to take his place. However, Mrs. Reed by her own sworn testimony dispels any notion that the Plaintiff was too sick to deal directly with the Defendants Lum. In Mrs. Reed's sworn deposition, she testified as follows:

"Q: Let me rephrase my question; when Mr. Dulaney told you that he couldn't deal with you; he needed to deal with Heavy (Mr. Helveston) directly; you picked up the phone and called Heavy and said look you have got to deal with Mr. Dulaney directly.
A: Correct.
Q: When Mrs. Lum and Deborah said the exact same thing: we need Heavy to deal with this and not you, you told Heavy about that conversation as well, did you not?
A: Right.
Q: He wasn't so sick that he couldn't tell you or talk with you on the phone was he? (Emphasis added.)
A: At that time, no. (Emphasis added.) Before that he had been.
Q: Right, and that was back in the early spring when he was so sick, wasn't it? (Emphasis added.)
A: Right. Right. (Emphasis added.)
Q: So, do you know of any reason why he could not have picked up the phone and called the Lums directly?
A: No, I don't. (Emphasis added.)
Q: Do you know any reason why he couldn't have picked up the phone and called the Lums and said I'm not going to pay your asking price.
A: No." (See Vol. 3, Pg. 326; Deposition of Mrs. Reed, Pg. 49, lines 13 through Pg. 50, line 9)

So it is now abundantly clear that not only was Mr. Helveston healthy enough to deal with this matter, but in fact he was conversing with Mrs. Reed by telephone. Why could he not, before July 15th, have picked up the telephone and called the Defendants Lum? He offers no explanation other than he was too sick which Mrs. Reed shows was not the case.

The facts as shown through the sworn testimony of Plaintiff and his representative Mrs. Reed clearly demonstrate that the Plaintiff knew the amount of money that would be needed for the new lease for one year, and he knew that it was over $40,000.00.

In his deposition, the Plaintiff testified as follows:

"Q: What number did they tell you on the phone or in writing?
A: I don't have that exact number; it was somewhere over $40,000.00. (Emphasis added.)
Q: And you knew that before July 15th?
A: I knew that, but I didn't know what was in the lease. I had not seen a copy.... (Emphasis added.)
A: I knew that I didn't know what was in the lease. I had not seen a copy of the lease and I was coming up there and write them a check; and after I go to thinking about it, I needed to see a copy of the lease. We are talking somewhere over $40,000.00 ..." (See Vol. 3, Pg. 310; See Deposition of Plaintiff, Pg. 105, lines 2-12) (Emphasis added.)

So it is clear that the Plaintiff was fully aware of the amount that it would take to lease the property for one year and he admits in his sworn testimony that he knew this before July 15th. **THIS IS COMPELLING.**

Mrs. Reed learned through her phone conversation with Mrs. Lum that the amount of $40,000.00, was non-negotiable and that she made Plaintiff aware of this prior to the subject lease expiration of July 15, 2005. Furthermore, she establishes the fact that the Plaintiff was going to refuse to ever pay such an amount. In her testimony, she states as follows:

"Q: Did Mrs. Lum tell you that she wouldn't take anything but the amount that she wanted?
A: Correct.
Q: And did you tell Mr. Helveston that after she relayed that to you?
A: Correct. Correct.
Q: And again, what did he say after that conversation?
A: No." (See Vol. 3, Pg. 319, See Deposition of Mrs. Reed, Pg.18, Lines 18-25) (Emphasis added.)

"Q: When he told you he wasn't going to pay what they said they had to have, didn't you tell him, you need to tell them right now?
A: Yes.
Q: You told him that didn't you?
A: I told him that he needed to let them know what he wasn't going to do, right.
Q: And when was that?
A: That had to be around the time that either the lease was coming up or about the time that it expired." (See Vol.3, Pg. 327; Deposition of Mrs. Reed, Pg. 50, Lines 14-24) (Emphasis added.)

There is no sworn testimony or evidence that any further contact between the parties was had beyond this point and up to Plaintiff's September 21, 2005, letter when he offered $20.00, per acre for the one year lease.

As mentioned, the next contact between the parties was the letter dated September 21, 2005, from the Plaintiff to the Defendants wherein he states he will lease the properties for $20.00, per acre which was much less than the amount required by the Lums. (See Vol. 3, Pg. 330) This is over sixty-five (65) days from July 15, 2005, the date of expiration.

The undisputed facts are that the subject lease expired July 15, 2005, and Plaintiff admits that he failed to execute the new lease which had been prepared since May and was waiting for his acceptance or rejection at Sim Dulaney's office. Any argument or allegation by Plaintiff that negotiations were continuing after the July 15, 2005, deadline are specifically refuted in Mrs. Reed's testimony as shown above, and the fact that Plaintiff would never pay the amount required by Defendants..

Finally, on September 22, 2005, Plaintiff was instructed that he could not return to the property as there was never an agreement to lease the property. (See Vol. 1, Pg. 15) Since the Plaintiff failed to take possession of his personal effects by August 15, 2005, the Defendants relied upon the advice of their attorney, Sim Dulaney, that they could stand on the terms of their contract

and were not required to allow Plaintiff to return for all personal effects which had been left behind. (See Vol. 2, Pg. 258; paragraph 15)

SUMMARY OF THE ARGUMENT

The lower court ruled correctly when it determined that there were no factual disputes so that summary judgment was wholly justified in this instance.

Plaintiff's brief does not put the facts in chronological order and when the sworn testimony of the Plaintiff and the Plaintiffs' representative are reviewed in context and in chronological order it is abundantly clear that summary judgment is proper.

Plaintiff and Defendants enter into a hunting lease (second hunting lease) beginning July 16, 2002 through July 15, 2005. Plaintiff, a resident of South Louisiana, was leasing the properties of the Defendant's located in Jefferson and Claiborne Counties. In the hunting lease, there was a provision which stated that at the expiration or cancellation of the subject lease, the lessee would have thirty (30) days thereafter to take and remove from the land of the Defendants' any and all equipment or other personal property owned by lessee. In the even that the lessee failed or refused to remove the same within the such time limit, then title would ipso facto vest in lessor. (See Vol. 1, Pg. 13)

Plaintiff had initially contacted the Defendants about releasing the property for hunting through a letter dated April 24, 2005. (See Vol. 3, Pg. 309; Deposition of the Plaintiff Pg. 100, Line 15) Plaintiff's offer was rejected. (See Vol. 3, Pg. 103; Deposition of the Plaintiff, Pg. 101, Lines 3-9) Plaintiff thereafter suggested a one year lease which was subsequently accepted by the Defendants. (See Vol. 3, Pg. 309; Deposition of Plaintiff, Pg. 101, Lines 10-18)

On May 17, 2005, Mrs. Martha Lum wrote a letter to the Plaintiff that the lease was being drawn up and would be ready for his review at this next trip to Port Gibson. (See Vol. 3, Pg. 309; Deposition of Plaintiff, Pg. 101, Lines 23-25, Pg. 102, Lines 1-25)

Plaintiff admits that he never came to Port Gibson to see the lease; that he never called the Defendants and asked for a copy of the lease nor did he ever contact or call the Defendants' attorney Sim Dulaney for a copy of the lease; nor did he ever request that a copy of the lease be sent to any attorney on his behalf. (See Vol. 3, Pg. 310; Deposition of the Plaintiff Pg. 105-106)

Plaintiff maintains that due to illness that he sent a representative, Mrs. Leoma Reed, to discuss the matter with the Defendants Lum and be his "negotiator." (See Vol. 2, Pg. 293; Deposition of Plaintiff, Pg. 35, Line15-18; and Vol. 3, Pg. 310, Plaintiff's Deposition Pg. 105, Line 23) Mrs. Reed and Mrs. Lum were old friends.

It is admitted by both sides that Mrs. Reed and Mrs. Lum had discussions about the lease although Mrs. Reed was specifically advised that the review of the lease was only for Plaintiff Helveston and that Mr. Helveston would have to deal directly with them or their attorney. (See Vol. 3, Pg. 326; Deposition of Mrs. Reed, Pg. 49, Lines 13 through, Pg. 50, Line 9)

Mrs. Reed was however told what the amount of the lease would be and that this amount <u>was firm</u>. Plaintiff's own brief confirms this on page 10, in the third full paragraph, where Plaintiff makes the following concession:

> "Mrs. Reed testified that Mrs. Lum, as opposed to Helveston, had first called her to talk about the lease and quoted Mrs. Lum as saying that she wanted the whole thing for around <u>$40,000.00, or nothing</u> and wanted the taxes that were due and that 'this was where the <u>stall came up</u>.'" (See Vol. 3, Pg. 396-397) (Emphasis added.)

How can Plaintiff possibly infer that there were any negotiations to be had when it is obvious from his own admission in his brief to this Court, that early on in the discussions with Mrs. Reed and

Mrs. Lum, that Mrs. Lum was not negotiating anything. In fact, she told them exactly what the terms were to be or she would not lease. Plaintiff was completely apprised of all the details of Mrs. Lum's conversations with Mrs. Reed as Mrs. Reed repeatedly testified over and over that she contacted the Plaintiff and advised him of exactly what position the Lums took with the regard to the amount of the lease. (See Vol. 3, Pg. 326; Deposition of Mrs. Reed, Pg. 49, Lines 13 through Pg. 50, Line 9) Furthermore, Mrs. Reed confirms that the Plaintiff had been sick in the early spring and that she knew of no reason why he could not have picked up the phone and dealt with the Lums directly. (Same testimony as shown above, Vol.3, Pg. 326)

Further, Plaintiff himself was fully aware of the amount of the lease and that it was over $40,000.00, and further that he was aware of the exact amount over $40,000.00. (See Vol. 3, Pg. 310; Deposition of Plaintiff, Pg. 105, Lines 2-12)

Most importantly, Plaintiff was aware of this critical information and the fact that it was non-negotiable before the expiration of the 2002-2005 lease on July 15, 2005 as Mrs. Reed specifically advised that the terms were non-negotiable and the amount had to be paid to which the Plaintiff responded he would never pay. (See Vol. 3, Pg. 327; Deposition of Mrs. Reed, Pg. 50, Lines 14-24)

There were no negotiations beyond the July 15th expiration date.

After July 15th, Plaintiff waited beyond sixty-five (65) days to even contact the Defendant again viva his letter of September 21, 2005. (See Vol. 3, Pg. 330)

Furthermore, no where does Plaintiff offer any testimony or evidence in the form of an affidavit that he personally contacted the Defendants after the July 15th date other than his letter of September 21st. Furthermore, he offers no evidence either in the form of sworn testimony or affidavit that any of the terms had to be negotiated further; he gives no details of any negotiations whatsoever; he gives no evidence that any terms were in dispute; he clearly knew the amount the

Lums said that they had to have and agree to before the July 15, 2005; and he knew such amount was non-negotiable and he knew that he would never pay such an amount.

Under all of the shown evidence above, it is clear that Plaintiff simply let the contract expire on July 15th and furthermore let the thirty (30) days go by within which time he could have removed his personal property but yet he decided to remain **silent**. It is also shown from the sworn testimony above that there was no reason on the face of the earth why Plaintiff could not have picked up the telephone and called the Lums or their attorney or written a letter indicating his intentions. Again, he sat on his rights.

It was Plaintiff's duty to claim his property under the terms of the lease of 2002-2005, which he had signed, and he also had signed one previous thereto with identical language. Plaintiff was fully and completely aware of his rights under the lease and the Lums did nothing that would justify equitable estoppel in this matter.

The Lums presented him with a written lease that he refused to review or have his attorney do so. In fact it is the Plaintiff's silence and his failure to exercise his rights under the hunting lease that have cost him his personal property.

Plaintiff asserts that the Lums made representations that caused Plaintiff to take a course different than that would he would have taken. The most recent case by the Mississippi Supreme Court regarding equitable estoppel is found in Wyndham v. Latco of MS, Inc., 972 So.2d. 608 (Miss. Jan. 2008), wherein the Court stated that for there to be equitable estoppel:

> "There must be (1) belief and reliance on some representation; (2) a change if position as a result thereof and (3) detriment or prejudice caused by the changes of the position."

In the first place, the Lums did exactly what they said that they would do which was to present him with a lease that he could either accept or reject and which was available to him literally

months before the expiration of the July 15th deadline. Thus, Defendants have made no representations which have caused the Plaintiff to do anything other than to accept or reject their non-negotiable terms and in the event that he rejected the same, then he could have removed his own property pursuant to a contract term that he was already aware of.

In view of the fact that the contractual provisions of the lease provided that title to personalty passes to the Defendants under such circumstances, therefore there can be no conversion of Plaintiff's property. See Community Bank Ellisville v Courtney, 884 So.2d. 767 (Miss. 2004). (There is no conversion until title of the lawful owner is made known.) See also Wilson v General Motors Acceptance Corp., 883 So.2nd 56 (Miss. 2004).

ARGUMENT

STANDARD OF REVIEW

This Court has dealt with the issue of motions for summary judgment too many times to mention. In the most recent decision of Wyndham v. Latco of MS, Inc., 972 So.2d. 608 (Miss. Jan. 2008), this Court stated the following:

> "This Court applies a de novo standard of review to the trial court's grant of summary judgment... a motion for summary 'shall' be granted by a court 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'"

This Honorable Court is very versed on the requirements that one must meet in order to have a summary judgment affirmed and it will find that the Circuit Court of Claiborne County acted properly in granting summary judgment for the reason that the uncontroverted facts clearly deem summary judgment appropriate; that as a matter of law, the contract (i.e. hunting lease of 2002-2005) was valid, and Defendants had every legal right to assert and rely upon the provisions of the contract with Plaintiff.

VALIDITY OF CONTRACT

As pointed out earlier in this brief, Plaintiff does not plead, assert or aver that paragraph 16 of the 2002-2005 hunting lease (See Vol. 2, Pg. 279) is void, improper or against legal authority. The pertinent language of the contract states:

> "Upon expiration or cancellation of this lease, lessee shall have thirty (30) days to take and remove from the land any and all equipment or other personal property owned by lessee; provided that if lessee shall fail or refuse to remove the same within such time title thereto shall ipso facto vest in lessor."

A contract whose language is clear and unambiguous shall be enforced and the language therein will be given its plain and ordinary meaning. See Anglin v. Gulf Guaranty, 956 So.2d. 853 (Miss. 2007); Knoxubee School District v. United National Insurance Co., 883 So.2d. 1159 (Miss. 2004); Mississippi Farm Bureau Casualty Ins. Co. v. Britt, 826 So.2d. 1261 (Miss. 2002).

For over a century now, the Mississippi Supreme Court has accepted that a lessor and lessee may agree and contract among themselves regarding title to and removal of property, and they may reflect their wishes in formal agreements that the court will enforce. See Simmons v Bank of MS, 593 So.2d. 40 (Miss. 1992); Bondafoam v. Cook Const. Co. Inc., 529 So.2d. 655, 658 (Miss. 1988); Richardson v. Borden, 42 Miss. 71 (1869); See also Thompson Commentaries on the Law of Real Property, Section 80 (Rep. Vol. 1959)

Furthermore, a building constructed by a tenant on leased land becomes part of the realty and thus the property of the landowner unless it is removed before expiration of the tenancy, or the lease provides otherwise. See Liverpool& London & Globe Ins. Co. v. Fuston, 176 So. 913 (Miss.1937) (Emphasis added.); Zeigler v. Lexington Compress and Oil Mill Co., 63 So. 220 (Miss. 1913) (Tenant built cotton gin and seed shed on rented property; removed gin but left shed; and the court held that the tenant had surrendered the shed.)

Thus it is clear and undisputed that the thirty (30) day removal language is a clear and sound provision under Mississippi law.

EQUITABLE ESTOPPEL

Plaintiff has in essence put all of his eggs in the equitable estoppel basket.

If the Defendants have done nothing wrong that justifies them being equitably estopped from asserting their rights under the contractual thirty (30) day provision of the hunting lease, then they have every right to assert ownership and thus cannot be guilty of conversion.

The Mississippi Supreme Court has recently dealt with the issue of equitable estoppel in the case of Wyndham, supra. The court laid out the black letter law regarding estoppel as follows:

> "The United States Supreme Court previously has provided that:
> 'courts of law in modern times have introduced the doctrine of equitable estoppel, or as it is sometimes called estoppel 'in pais.' The principal is that where one party has by representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscious for him to assert, he would not in a court of justice be permitted to avail himself of that advantage... The general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim...'
> The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely on them. In other words, the principal is that a wrongdoer is not entitled to enjoy the fruits of his fraud. (Emphasis added.)"

The court further cited past authority and stated the following:

> "there must be (1) belief and reliance on some representation; (2) a change of position as a result thereof; and (3) detriment or prejudice caused by the changes of position."

The court in Wyndham finally stated:

> "To establish equitable estoppel which should only be used in exceptional circumstances and must be based on public policy, fair dealing, good faith and reasonableness..." (Emphasis added.)

> Wrongdoing ought not be shielded if fraudulent concealment can be proven. (Emphasis added.)

So it is clear from Wyndham, supra., that to prove that the doctrine of equitable estoppel should be applied, one must prove conduct on the part of the wrongdoer that is tantamount to fraud. Fraud of course has to be shown by clear and convincing evidence.

Based on Plaintiff's sworn testimony as well as that of Plaintiff's representative, Leoma Reed, there is nothing in this case close to fraud or inequitable conduct on the part of Defendants. The Circuit Court was correct to find that no evidence was presented in Plaintiff's response to motion for summary judgment that would even hint that Defendants engaged in any conduct that induced the Plaintiff into any transaction or course of conduct. The parties' rights were already spelled out in the hunting lease of 2002-2005.

It is undisputed that the Defendants stated clearly that they would offer the Plaintiff a one year hunting lease; that the amount of the new hunting lease was known and understood by the Plaintiff (See Plaintiff's testimony above); and that the terms were non-negotiable (See Mrs. Reed's testimony above); and that finally Plaintiff was aware of all of this at the time the 2002-2005 lease expired on July 15, 2005. (See Plaintiff and Mrs. Reed's testimony above.) **There were no negotiations to be had beyond the July 15th expiration**.

Plaintiff, however, would try to convince this court that the Defendants should have been required to give prior notice to Plaintiff that they would exercise their rights and rely upon the thirty (30) day provision in the 2002-2005 hunting lease. First, notice is given by virtue of the terms of the lease. Second, Plaintiff had signed an identical lease with the same provision in 1999. (And he even executed the 2002 lease before the thirty (30) days expired in the 1999 lease.)

Plaintiff, however, wants to assert that the Defendants had to notify him of their intentions to exercise their rights. He signed the lease and was thus held to its terms. Plaintiff states in this brief as follows:

> "If in this case Defendants Lum had stated on July 16, 2005, that all negotiations were at an end instead of waiting until September 22, 2005, and instead in engaging in on-going conversation with Leoma Reed as Helveston's representative, Helveston would have clearly known to get his personal property off the Lum's real estate within thirty (30) days of July 15, 2005, and easily could have done so."

First, the assertion that on-going negotiations with Mrs. Reed were being had is clearly a misrepresentation of the sworn testimony of Mrs. Reed herself. The Lums made it perfectly clear to Mrs. Reed that they in fact would not negotiate or provide a copy of the lease to her. Mrs. Reed testified to such:

> "Q: When Mr. Dulaney told you that he couldn't deal with you; he needed to deal with Heavy (Helveston) directly, you picked up the phone and called Heavy and said look you have got to deal with Mr. Dulaney directly.
> A: Correct.
> Q: And when Mrs. Lum and Deborah said the exact same thing, 'we need Heavy to deal with this and not you' you told Heavy about that conversation as well, did you not?
> A: Right." (See Vol. 3, Pg. 326, Deposition of Mrs. Reed, Pg. 49, Lines 13-21)

So Plaintiff's above quoted statement from his brief is an unsworn misrepresentation of facts. There were no on-going negotiations.

Mrs. Reed's testimony makes it clear that the Lums did not nor did they ever intend to negotiate any terms with Mrs. Reed in any manner. The fact that Mrs. Lum and Mrs. Reed did talk on the phone is no evidence of on-going negotiations between Defendants and Mrs. Reed. Mrs. Reed testified that she and Mrs. Lum were old friends and they did talk on the phone about family matters as well as the contract with Plaintiff although no where does Mrs. Reed testify that she was negotiating any terms for Plaintiff. (See Vol. 3, Pg. 318; Deposition of Mrs. Reed Pg. 15-16.)

Secondly, Plaintiff asserts that had he known all of this before the thirty (30) days was up, he would have acted. Again, the sworn evidence before this court clearly establishes that the Plaintiff did know all of this as of July 15, 2005. Again in Mrs. Reed's sworn testimony, she stated the following:

> "Q: When he told you that he wasn't going to pay what they said they had to have, did you tell him, that you need to tell them that right now.
> A: Yes.
> Q: You told him that, didn't you?
> A: I told him that he needed to let them know what he was going to do. Right.
> Q: And when was that? Was that before you encouraged him to make the phone call to them?
> A: This had to be around the time that either the lease was coming up or about the time that it had expired." (See Vol.3, Pg. 327; Deposition of Mrs. Reed, Pg. 50, Lines 14-24) (Emphasis added.)

(Again see also Plaintiff's testimony above where he under oath stated he knew the amount before July 15th.) Mrs. Reed's testimony above makes it clear she expected Plaintiff to deal with this matter. She told him he needed to let them know.

Both Mrs. Reed's testimony as well as Plaintiff's is clear that Plaintiff knew the **non-negotiable terms** as of the end of the 2002-2005 lease, and he was told to let them know what he was going to do "right now." Furthermore if Mrs. Reed was the one "negotiating" this lease why would she not have just told the Lums that their demand was not going to be met.

Plaintiff has produced neither affidavit nor sworn testimony that he personally contacted Defendants after July 15th. In fact, the very language of the Plaintiff's brief, quoted above, states that the "Defendants' continued negotiations with Mrs. Reed after July 16th" and not Plaintiff. Mrs. Reed's testimony clearly shows that she was told she could not negotiate anything with the Lums or their attorney. Plaintiff does not assert in his brief that he was negotiating anything. In fact,

Plaintiff had no personal conversations or letter correspondence with any of the Defendants after May 17, 2005, and up until September 21, 2005, which is a 157 day lapse.

For him to over and over allege in his brief that negotiations were on-going is simply a misrepresentation of the sworn facts.

Further, Plaintiff has asserted no evidence or issue of fact in his brief or through any affidavit or any sworn testimony that sets forth what, if any, terms had to be negotiated further; he gives no details of any negotiations whatsoever; he gives no evidence that any terms were in dispute; he clearly knew the amount that the Lums said they had to have which he knew of before July 15, 2005; he knew said amount was non-negotiable; and he knew that he would never pay that amount.

Plaintiff in essence waited sixty-five (65) days from July 15, 2005, to have any further contact with the Lums which was his letter of September 21, 2005, where he offered $20.00, per acre. Furthermore, Plaintiff had already been told that no such amount would be accepted. (Incidentally, there were no other terms mentioned in the September 21, 2005, letter other than price which clearly shows that there was nothing to negotiate.) **This is not negotiation, but simply an offer with absolutely no acceptance or consideration.**

Plaintiff sat on his rights under a contract of which he had full knowledge of for at least six (6) years.

Although it is irrelevant, one has to wonder why Plaintiff waited until just days before the hunting season started on October 1st to make a low ball offer that he knew was going to be rejected. Could it be that he thought the Defendants would be desperate and would have to take whatever amount he threw at them. The $20.00, per acre sum is even lower than what he paid the first year he had the lease in 1999.

Under the sworn testimony of Plaintiff and his representative Mrs. Reed as is shown and set forth above, there is no conceivable way that the Defendants Lum engaged in any fraudulent conduct that would justify them being equitably estopped from asserting their rights and reliance upon the contract. In fact, the Lums clearly made their intentions known in a timely manner to both Plaintiff and his so-called representative.

Plaintiff cannot show or prove in view of his overwhelming testimony and the overwhelming evidence that the Defendants led him to believe anything other what they said they needed.

Plaintiff asserts that the Lums remained silent. The Lums did not remain silent and in fact told him that there was a lease waiting on him. It was Plaintiff's obligation to break the silence as he was advised, to do by Mrs. Reed. If he was not going to meet their absolute demand, he should have expressed such to the Lums. He had been notified by a letter of May 17, 2005, which he admits that he received, that the lease was prepared, ready and waiting for him to receive, and accept or reject.

The Mississippi Supreme Court has recently ruled that summary judgment is proper where equitable estoppel is charged but there is no evidence of fraud or inequitable conduct shown to justify such ruling of equitable estoppel. See Mitchell v Progressive Ins. Co., 965 So.2d. 679 (Miss. 2007). In Mitchell, the court stated:

> "No evidence was submitted to the circuit court or this court that Progressive engaged 'inequitable or fraudulent conduct, toward Mitchell. As the burden of establishing the elements of an estoppel is on the party asserting the estoppel, id., this court finds that the absent of any such evidence requires affirming the circuit court's dismissal."

Therefore it is abundantly clear that where Plaintiff Helveston has failed to produce evidence of any conduct on the part of the Defendants Lum that amounts or is tantamount to an inequitable or fraudulent conduct, then summary judgment is proper.

CONVERSION

Defendants state concisely that they cannot be guilty of conversion if they had a contractual right to the subject property. See Community Bank Ellisville, MS v. Courtney, 884 So. 2d. 767 (Miss. 2004) (There is no conversion until title of the lawful owner is made known.) See also Wilson v. General Motors Acceptance Corp., 883 So. 2d. 56 (Miss. 2004)

The fact that the Defendants (as well as Plaintiff) yielded to the Bank of Carthage's UCC lien in order to avoid further litigation still does not give rise to a conversion of property where the Defendants' rights in the personalty were conclusive as against the Plaintiff.

CONCLUSION

Under the established facts as sworn to by the Plaintiff himself and his representative, Mrs. Reed, there is no question but that the Defendants acted properly and in a timely fashion without any evidence of fraud. To allow the Plaintiff the right to seek conversion against the Defendants when he was playing fast and loose in hopes of backing them into a desperate moment with a low ball offer just before the hunting season would be a travesty of justice in this case.

Mississippi law is clear that lease provisions surrendering personal property are valid and to be enforced. Mr. Helveston (Plaintiff) failed to remove certain personal property within the deadline in his agreement and thus surrendered the same under the lease. The Defendants Lum made every effort to give Mr. Helveston an additional one year lease, but Mr. Helveston failed to accept the same.

There is no evidence of any improper or inequitable conduct that is tantamount to fraud or equitable estoppel on the part of the Defendants Lum, and the trial court was correct in determining that there was no genuine issues of material fact that remained for trial, and that the Lums were entitled to summary judgment as a matter of law. As there has been no showing of any genuine issue

of material fact, this court must uphold and affirm the trial court's grant of summary judgment as a matter of law.

This the 4th day of June, 2008.

Respectfully submitted,

By: Lucien C. Gwin III

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CERTIFICATE OF SERVICE

The undersigned, the attorneys for the Appellees, does hereby certify that he has this day mailed by United States mail, postage prepaid, a true and correct copy of the within and foregoing Brief on Behalf of Appellees to the following:

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Hon. Lamar Pickard
Circuit Court Judge
P.O. Box 310
Hazlehurst, MS 39083
Clairborne County Circuit Court Judge

This the 4th day of June, 2008.

Lucien C. "Sam" Gwin, III