

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

WILTON HELVESTON

APPELLANT

Vs.

CAUSE NO. 2007-CA-02277

**LUM PROPERTIES LTD OF MISSISSIPPI
LIMITED PARTNERSHIP, MARTHA B. LUM,
INDIVIDUALLY AND IN HER CAPACITY AS
GENERAL PARTNER OF LUM PROPERTIES
LTD,**

APPELLEE

REPLY BRIEF OF APPELLANT

FROM THE CIRCUIT COURT OF CLAIBORNE COUNTY

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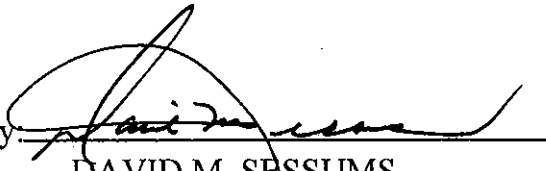
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed personas have an interest in the outcome of this case.. These representations are made in order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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Respectfully submitted,

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TABLE OF CASE, STATUES AND OTHER AUTHORITIES

1. Busick v. St. John, 856 So. 2d 304 (Miss. 2003)
2. Lane v. Oustalet, 873 So. 2d 92 (Miss. 2004)
3. Mississippi Power and Lights Co. v. Pitts, 179 So. 2d 363 (Miss. 1938)
4. Day v. McCandles, 142 So. 486 (Miss. 1932)

ARGUMENT

Appellee's Argument would be correct; if one were only referring to Appellee's selected review of the testimony.

However, a review of "other selected testimony" demonstrates that this matter presents obvious questions of fact for the determination of the jury and that the lower court was in error in granting Appellee's Motion for Summary Judgment.

Juries are not limited the facts of a case as a particular party would limit them but instead jurors have a long standing prerogative, indeed the duty, to draw inferences from the facts in reaching their conclusions and verdicts. Stated in terms of the instant case, a case should not be removed from a jury's consideration if the facts favorable to the adversely affected party, together with all reasonable inferences therefrom, are such that a rational jury could find in their favor. Busick v. St. John, 856 So. 2d 304 (Miss 2003) And, where the evidence favorable to the non-moving party, and the reasonable inferences which can be drawn therefrom, present a question for the jury a motion for directed verdict (and in this case motion for summary judgment) should not be granted. Lane v. Oustalet, 873 So. 2d 92 (Miss 2004)

On May 17, 2005, Martha Lum wrote Helveston declining Helveston's proposal of April 24, 2005, but also specifically representing to him that she was in the process of drawing up a new lease agreement for his review and that she would have it ready by his next return trip to Port Gibson (Vol. 3, Pg. 386).

After she represented that she was having a lease prepared for Helveston to review

Ms. Lum even inquired of Leoma Reed:

Q: Okay Earlier in your direct examination, you said that Ms, Lum asked you, "When is Mr. Helveston coming?" Do you remember that?

A: Yes

Q: Did you ever indicate to Ms. Martha Lum that maybe she should pick up the phone and call Mr. Helveston.

A: I probably did.

Q: Do you know if she ever did that?

A: Yes, she did. I am sure she did. But I don't think that he would answer. That was the (laughing) that I got.

Q: Tell me about that. The reason that you know that Ms. Lum tried to call Mr. Helveston is that Ms. Martha Lum told you?

A: Yes.

Q: And the basis for saying that Mr. Helveston would not answer is that's what Ms. Lum told you?

A: Yes

Q: Mr. Helveston never told you that he was ducking Mr. Lum's call did he?

A: No.

Q: Were you aware when this lease was getting ready to expire and needed to be renewed? Were you involved at that point and time around the summer of 2005?

A: That was when she was trying to get her money or find out - - I think that basically she was - - and I can understand her wanting to get it leased by these folks that were wanting it. She did not know if Heavy's health (authors note Heavy is Mr. Helveston) or something was going to happen to him because, like I said, he had almost died. She was more concerned

of being sure while she had somebody to lease it, to give her the money that she would get at that particular time.

Q: So Ms. Martha Lum told you she had another prospect on the line?

A: Yes.

Q: To lease the same property?

A: (Nods head in the affirmative). Quite a few. More than one. She told me she had several people.

[Author's Note: This was not true - see Interrogatory 10 response of Lum; Vol. 1, Pg 77]

Q: Did yall ever discuss the personal property, the equipment? Did you and Ms. Lum ever discuss the equipment or personally that was on the land at the lodge?

A: He had asked them to give him so many days to get his property out and they would not let him have that. He asked them to give him fifteen days of whatever to get the property out.

Q: How do you know that, Ms. Reed?

A: Because he told me that.

Q: Did you discuss that with Ms. Lum?

A: Yes.

Q: What did she say?

A: "No."

Q: Did she say why she would not give him that time? He was a sick man, requesting to get his property - -

A: Because he had not - -

Q: - - off of her land?

A: Because he had not paid her, and that was her holding, that was her way. In fact, she said he wasn't going to get it at all.

Q: What did she say about that? Tell me about that.

A: She just said that she wasn't going to let him have it because he hadn't paid her like he was supposed to and she felt that everything there should be left there, should stay there.

Q: Did she say that - -

A: And then I did explain to her at that time that it didn't belong to him that it belonged to the SBA.

Q: What did she say to that?

A: Well, she still . . .

I said, "I am going to tell you you're not dealing with Heavy. You're going to deal with the SBA. They are the ones that are going to come see you about this because they own this stuff here." Because I was out there when Pam and Charlie were doing the inventory when they were getting the loan - -

Q: So you told her she couldn't get it from the SBA; is that right?

A: Yes. Unless she paid them.

Q: And she still said she was going to keep it from Heavy.

A: Basically, I suppose so, yes. (Vol. 3, Pgs. 406-409)

That Leoma Reed was discussing the renewal of the lease with the Lums is also found in her verbatim testimony as follows:

Q: And you simply knew that the lease was coming up?

A: Well, yeah. When she called me - - I think she called me. And we talked all the time until all this came up. Now we can't talk.

Q: Uh-huh (affirmative)

A: But before this we talked. She called me in the night and we would talk about old family.

Q: When you say, "she," you are talking about - -

A: Ms. Lum.

Q: - - Ms. Lum and not Deborah?

A: No. No.

I did ask for Deborah there at the last to get involved, you know. I said, "Deborah, I think that you need to be the one that gets involved with this and tries to take care of all this because it is just upsetting your mother."

Q: Uh-huh (affirmative).

A: "And I think you need to be the one," and she did. She started then.

Q: My original question was: Who did you first talk to about the lease that was coming up? Did you talk to Ms. Lum first or did you talk to Mr. Helveston? And what was the gist of the conversation?

A: Ms. Lum had called me. She had called me about that time and I called him and told him.

Q: And what did she say to you?

A: I think time she wanted the whole thing or nothing. I think at that time she wanted the whole amount. She wanted - - I think it was around \$40,000.00 that she wanted. She wanted the taxes that were due and she wanted the total lease part and that was where the stall came up.

Q: Now did she just call you out of the clear blue and tell you this or had she already had discussions with him prior to this?

A: I don't recall that she - - I don't think that she had discussed this. I don't know that - - probably she had. She might have.

Q: Okay.

A: She probably had discussed this with him or either she had sent him a letter or something to this effect.

Q: Did she say why she was calling you and not him?

A. Well, I had been working with them as far as whenever - - like I told him, I was seeing

that he took care of her like he was suppose to take care of her because I lived here and we were friends. And even if I was working out there, I still wanted to be sure that he did the thing that he was suppose to be doing. I did that with all the people that were around that I was . . .

Q: Okay. When Ms. Lum called you and said what you say that she said about the taxes and the whole lease, did you call Mr. Helveston?

A: Yes, I'm sure I did.

Q: And what did he say?

A: He was not for paying - - the taxes were not due, he said, until the first of the year. As far as the other money I think that he was not wanting to pay as much as they had asked for the whatever. Or he would offer them so much.

Q: When was this conversation with Ms. Lum?

A: At don't recall. But it must have been around the time the lease was coming up." (Vol. 3, Pgs 395-398).

Regarding whether or not Helveston had refused to pay money Ms. Reed also testified:

A: Yeah. Well, like I said, he was going to pay her so much money, but I can't recall what he was trying to pay her, you know, as far as the other. And I think he was going to come up with the rest of it. This is to much. (Vol. 3, Pg 401)

Recall that it is undisputed that Ms. Lum had represented to Helveston by letter that she was going to have a new lease prepared for him that he could pick up the next time he was in Port Gibson. Also, recall that Mr. Helveston had gotten extremely sick (Vol. 3, Pgs. 403-404) which led to Helveston requesting Leoma Reed to discuss the lease terms with the Lums because of his illness. (Vol. 3, Pg. 395). When because of his illness Helveston could not personally travel to Port Gibson he requested the Lums to deliver a copy of the lease they had supposedly drawn up to Leoma Reed:

Q: Where did Ms. Reed go to get the lease?

A: She talked to Deborah to get the lease, and she said, it is not available to you. So here we are, and I have not seen the lease, and they want all this huge sum of money in cash. (Vol. 3, Pg. 414)

At that point in time the parties were obviously negotiating a renewal of the lease. Ms. Lum had represented in writing, that she was having a written lease prepared for Helveston's review. Helveston was ill and could not come to Port Gibson to review the lease. Then Lum refused to provide the lease allegedly prepared, to Leoma Reed. A question obviously arises as to whether or not the Lums actually prepared the lease as represented.

Mr. Helveston also testified that the Lums wanted \$40,000.00 in cash and that he was reluctant to go get that much cash and bring it to Port Gibson:

A: "To be truthful, Mr. Gwin, I wasn't going down to the bank and get \$40,000.00 in cash and come packing it up here.

Q: Okay.

A: And in the years past, you know, the way I paid them, I give them a little small check and the rest in cash. And it will take me a while to assemble that instead of just going to the bank and draw this big money out. If you want the truth, there is the truth. And they knew that." (Vol. 3, Pg 414)

In the Brief of Appellees they do not even mention the fact that they did not lease the property to Offshore Towing until after Sim Delaney's letter to Helveston of September 22, 2005. To accept the Appellee's argument that there were no ongoing negotiations between the parties after the lease expired in July is to ignore the obvious. And the inferences logically flowing therefrom. If the Lums really considered the lease to be expired and negotiations at an end and that the parties were not in negotiation, why was Delaney's letter

of September 22, 2005, necessary at all? If the Lums considered all negotiations over why was said letter phrased in the present tense rather than in the past tense? Why did the Lums not negotiate with anyone else until September 27, 2005? (Their Responses to Interrogatories swear under oath that negotiations with Offshore did not commence until September 27, 2005). (See Response to Interrogatory No. 10; Vol. 1, Pg. 77)

Obviously these are all questions of fact for the jury and the jury would be free to draw its own reasonable inferences from these facts. One obvious inference the jury could easily reach is that the reason the Lums did not negotiate with anyone until five (5) days after the letter of September 22, 2005, is that they still considered themselves to be in negotiation with Helveston and were not free to negotiate with others.

With the Lums still considering themselves to be in negotiation discussions with Helveston the question obviously arises, "Did the actions or inactions of the Lums lull Helveston into a false belief that negotiations were ongoing and that he did not have to remove his personal property from the subject real estate as required under the terms of the lease?" (Only to return it should negotiations prove successful)

The doctrine of equitable estoppel is a very fact sensitive issue. Mississippi Power and Lights Co. v. Pitts, 179 So. 2d 363 (Miss. 1938) and may arise by silence. Day v. McCandles, 142 So. 486 (Miss. 1932)

Lum without question represented to Helveston that a lease was being prepared and would be made available to him. When his illness prevented him from personally picking up a copy of the lease Lum refused to deliver a copy of same (assuming it existed) to

Helveston's representative.

Despite what Lum told Leoma Reed about having several new prospective tenants in negotiation when they answered their sworn interrogatories the Lum stated that they had negotiated with no one (except some imaginary man with no address) until September 27, 2005 - five (5) days after Sim Dulaney finally informed Helveston that there would be no further negotiations.

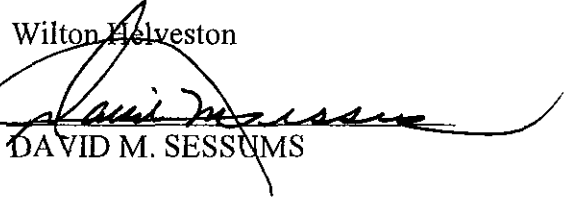
SUMMARY

Under any view of the facts, and the reasonable inference therefrom, the lower court was in error in substituting its judgment for that of the jury and this matter must be remanded to the Circuit Court of Claiborne County, Mississippi for trial.

Respectfully Submitted,

Wilton Helveston

By:


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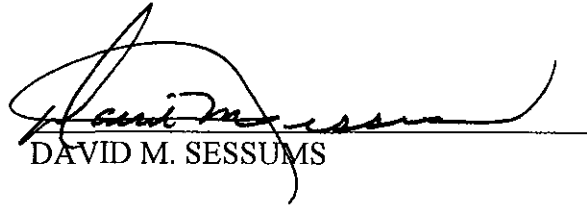
CERTIFICATE OF SERVICE

I, David M. Sessums, Attorney for Appellant, do hereby certify that I have this day caused to be served a true and correct copy of Reply Brief of Appellant to the following:

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Hon. Lamar Pickard
Circuit Court Judge
P.O. Box 310
Hazzlehurst, MS 39083

THIS the 27th day of June, 2008.



DAVID M. SESSUMS