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

BRIEF OF APPELLANT

FROM THE CIRCUIT COURT OF CLAIBORNE COUNTY

David M. Sessums, MSB #[redacted]
ATTORNEY FOR , WILTON HELVESTON, APPELLANT
VARNER, PARKER & SESSUMS
1110 Jackson St.
Vicksburg, MS 39181
Ph: (601)638-8741

IN THE COURT OF APPEALS OF 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**

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:

1. Wilton Helveston
   4570A Bridge Street Hwy
   St. Martinsville, LA 70582

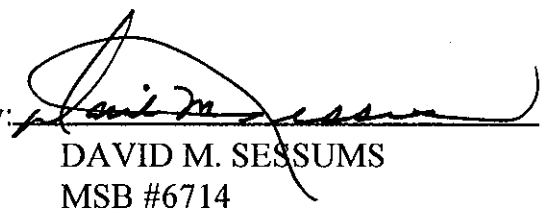
2. David M. Sessums, Esquire
   Varner, Parker & Sessums, P.A.
   Attorney for Appellant
   1110 Jackson Street
   Vicksburg, MS 39180

3. Lum Properties, Ltd.
   1207 Church Street
   Port Gibson, Mississippi 39150

4. Martha B. Lum
   1207 Church Street
   Port Gibson, Mississippi 39150

5. Lucien C. Gwin III, Esquire
Gwin Lewis & Punches, LLP
P.O. Box 1344
Natchez, MS 39121

Respectfully submitted,

By: 
DAVID M. SESSUMS
MSB #6714

OF COUNSEL:

VARNER, PARKER & SESSUMS, P.A.
Post Office Box 1237
1110 Jackson Street
Vicksburg, Mississippi 39181-1237
Telephone: 601/638-8741
Facsimile: 601/638-8666

TABLE OF CONTENTS

TABLE OF CASE, STATUES AND OTHER AUTHORITIES

STATEMENT OF ISSUES

1. The lower court erred in granting Defendants' Motion for Summary Judgment.

STATEMENT OF THE CASE

On October 31, 2005, Wilton Helveston filed his Complaint before the Circuit Court of Claiborne County, Mississippi against Lum Properties Limited, Martha B. Lum and Offshore Towing, Inc. (Vol. 1, Pg. 6)

On November 14, 2005, new counsel for Helveston (the undersigned) entered their appearance (Vol. 1, Pg. 20) and on November 18, 2005, Helveston filed his Amended Complaint. (Vol. 1, Pg. 30)

Helveston contended that under the lease between him and Lum Properties Limited, through Martha Lum, dated July 15, 2002, for a term of three (3) years expiring July 15, 2005, Helveston had with the knowledge, consent and acquiescence of Defendants Lum continued to occupy the property after July 15, 2005, while the parties negotiated to renew and extend Helveston's lease of the subject real property. (Vol. 1, Pg.30)

The subject lease, as did the lease which preceded it, contained a clause stating that all personal property which remained on the real property for thirty (30) days after July 15, 2005, became the property of the landlord. (Item 16, Vol. 1, Pg. 13) Notwithstanding this provision Helveston alleged that the parties continued negotiations for renewal of the lease up until September 22, 2005, at which time Defendants Lum wrote to advise Helveston (Vo. 3, Pg. 385) that there would be no further negotiations for the renewal or extension of the lease and that if he reentered the property he would be treated as a trespasser. (Vol 1, Pg 31) The Lums at that time claimed all of Helveston's personal property still on the land.

In his Amended Complaint Helveston continued his claim for replevin and also asserted that the Lum Defendants has converted his personal property to their own use and demanded actual and punitive damages. (Vol 1, Pg 30)

On January 10, 2006, Defendants Lum filed their Answer to Amended Complaint. (Vol. 1, Pg 38) and on January 13, 2006, Offshore Towing, Inc. filed its separate Answer and Defenses (Vol. 1, Pg 61) and upon disclaiming any interest in the disputed personal property Offshore Towing, Inc. was dismissed by an Agreed Judgment of Dismissal With Prejudice entered on June 19, 2006. (Vol. 2, Pg. 201)

After discovery Defendants Lum filed their Motion for Summary Judgment on April 18, 2007 (Vol. 2, Pg 253) and Plaintiff filed his Response to Motion for Summary Judgment on May 1, 2007 (Vol. 3, Pg 383) contending that genuine issues of material fact existed for the determination of the jury.

On May 8, 20207, the Court entered its Order continuing the existing trial date and setting the matter for pre-trial conference on July 30, 2007, and rescheduling the trial date to September 6, 2007. (Vol. 3, Pg 446)

The Circuit Court entered its Order granting Defendants Lum's Motion for Summary Judgment and denying said Defendants' Motion for Sanctions. (Vol. 4, Pg 456) whereupon Helveston filed his Motion for Reconsideration (Vol. 4, Pg 462) which motion was denied by entry of the Court's Order Denying Motion for Reconsideration on December 6, 2007. (Vol. 4, Pg 435) Helveston then filed his Notice of Appeal on December 18, 2007. (Vol. 4, Pg 436)

SUMMARY OF THE ARGUMENT

The lower Court's Memorandum Opinion and the Order Granting Summary Judgment (Vol. 4, Pg 456) makes several findings and fact which factual determinations should be left for the jury.

Helveston and Lum had initially entered a hunting lease running from July 1, 1999, through June 30, 2002. The lower Court correctly recognized that even though this first lease also contained the same forfeiture of personal property clause (ie: personal property left on the real estate for thirty (30) days after the expiration date became the property of the landlord) that eighteen (18) days after the first lease has expired on June 30, 2002, the parties had entered into a second lease with dates running from July 16, 2002, through July 15, 2005, and that the second lease also contained a clause (Vol. 1, Pg. 13) providing that any property left on the Lum real estate for more than thirty days after the expiration date would become vested in the Lums. (Vol. 4, Pg 456) This established that Lum continued to negotiate after the lease term had expired.

However, the Court made an impermissible factual determination when it stated, "The Defendants and Mr. Dulaney made it clear to Mrs. Reed that the lease was solely for Helveston, and that he would have to contact them directly. Helveston failed to contact the Defendants or Mr. Delaney to execute the lease." (Vol. 4, Pg 456) This was a question of fact for the jury as it is disputed as to what the Defendants did or did not "make clear" to Mrs. Reed as Helveston's representation. This was a factual determination to be made by the jury.

The Court also erroneously held that the lease language providing that Helveston

would have thirty (30) days after the expiration of the lease period to remove his personal property from the Lum property was the alpha and omega and was clear and unambiguous and because it was undisputed that Helveston did not remove his property within said thirty (30) day time period that the Court was bound to enforce said provision regardless of any claim of estoppel.

In addressing Helveston's equitable estoppel claim that the silence, actions and negotiations of the parties prevented a strict enforcement of the forfeiture clause the lower Court made impermissible factual findings as cases of estoppel present factual questions left to the trier of fact, in this case the jury.

The Court in its Opinion stated, "He argues that the parties were in negotiations regarding the renewal of the lease and at no time did any party terminate negotiations. However, he does not offer any evidence that the parties were negotiating the ten-month lease. In fact, the Defendants advised Helveston May 2005, that the proposed ten-month lease was non-negotiable." (Vol. 4, Pg 458) This factual finding by the Court was disputed by the deposition testimony of both Helveston and Ms. Leoma Reed.

The Court also held, "Helveston has not produced any evidence of any evidence of a "conduct or act, or language, or silence, amounting to a representation of concealment of material facts, with knowledge or imputed knowledge of such facts, with the intent that representation or silence, or concealment be relied upon, with the other parties ignorance of the true facts, and reliance of this damage upon the representation of silence." . . . "at such the doctrine effect of estoppel is not applicable in this matter." (Vol. 4, Pg 459)

Prior to their letter of September 22, 2005, (Vol. 3, Pg. 385) the Lums were silent leaving Helveston to believe he was still in negotiations for renewal.

If the parties were not negotiating why was the letter of September 22, 2005, even necessary? Why does the letter state that Helveston's offer "is" rejected instead of stating that all prior offers "were" previously rejected? Why does the letter state that "as of this date" (and not some previous date) Helveston would be treated as a trespasser? The answer is obvious; the parties were still negotiating or at a minimum negotiations had not been terminated.

Further, the Court found as fact that "Helveston has no ownership interest in the property" (Vol. 4, Pg 459) when in truth Helveston had never conveyed his interest in his personal property to any party, although it was subject to a UCC in favor of Heritage Banking Group. Notwithstanding that there is no deed or bill of sale the Court found as a factual matter that, "therefore, he had no ownership in the property, and thus has no claim for replevin." (Vol. 4, Pg. 459) There was absolutely no evidence to support such a finding.

The lower Court made several factual determinations regarding what did or did not happen, who was or was not silent, and whether or not equitable estoppel applied and equitable estoppel is always a factual question, in this case, for the jury.

ARGUMENT

STANDARD OF REVIEW

On appeal this Court applies a de novo standard of review of a trial court's grant of summary judgment. Moss v. Batesville Casket Company, Inc., 935 So. 2d 393 (Miss. 2006)

As stated by the Moss court and the numerous other cases cited therein:

> "This court employs a factual review tantamount to that of the trial court when considering evidentiary matters in the record. . .
>
> The moving party has the burden of demonstrating that there in no genuine issue of material fact in existence, while the non-moving party should be given the benefit of every reasonable doubt . . . A fact is material if it "tends to resolve any of the issues properly raised by the parties." . . .
>
> Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. . . .
>
> If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed." 935 So. 2d at Pages 398-399

As stated by Justice Carlson in Price v. Purdue Pharma Company, 927 So. 2d 479 (Miss 2006):

> "In considering this issue, we must examine all the evidentiary matters before us, including admissions and pleadings, answers to interrogatories, depositions, and affidavits. Aetna, 669 So. 2d at 70." 928 So. 2d at 483

And as Chief Justice Roy Noble Lee stated in Mantachie Natual gas District v. Mississippi Valley Gas Company, 594 So. 2d 1170 (Miss 1992):

> "All Motions for Summary Judgment should be viewed with great skepticism and if the trial court is to err, that it is better to err on the side of denying the motion. When doubt exists whether there is a fact issue, the non-moving party gets its benefit. Indeed, the party against whom the summary judgment is sought should be given the benefit of every reasonable doubt." 594 So. 2d at Page 1173

This skepticism continues to be the rule as the Court of Appeals in Thomas v. Bradley, 2006-CA-01756-COA, decided January 29, 2008, held:

"Furthermore, we are to consider a motion for summary judgment with a skeptical eye because it is preferred to err on the side of denying the motion. Ratliff v. Ratliff, 500 So. 2d 981 (Miss 1986)"

In this case the Circuit Court of Claiborne County took it upon itself to sit as the trier of fact and rather than giving Helveston the benefit of the doubt resolved disputed factual issues in favor of Defendants Lum and was in error in granting the Lums' Motion for Summary Judgment.

FACTS

Martha B. Lum (hereinafter "Martha") and Lum Properties Limited are the owners of certain property involved in this matter located in Claiborne County, Mississippi.

Back in 1999, Wilton Helveston, entered into a hunting lease with the Lums with inclusive dates of July 1, 1999 through June 30, 2002.

Notwithstanding that lease expired June 30, 2002, the parties continued to negotiate and eighteen (18) days after the first lease expired on June 30, 2002, the parties entered into a second lease (dated July 16, 2002 through July 15, 2005). Both leases provided that any property left on the Lum land for more than thirty (30) days after expiration would become the property of the Lums. No new lease was ever signed between the parties after July 15, 2005.

However, beginning as early as April, 2005, the parties were engaged in negotiations for the renewal of Helveston's hunting lease on the Lum property which continued until a letter sent by attorney Sim C. Dulaney to Helveston dated September 22, 2005 (Vol. 3, Pg. 385), at which time Helveston was notified that his latest offer on the property was rejected and that if he thereafter attempted to enter the property he would be treated as a trespasser. (See Exhibit "A" to Response to Motion for Summary Judgment), (Vol. 3, Pg. 385).

On May 17, 2005, Martha Lum wrote Helveston stating that she was unable to accept his proposal dated April 24, 2005, but also advised that she was "in the process of drawing up a new lease agreement for you which would be for a term from July 16, 2005, to May 31, 2005. I should have it ready by your next return trip to Port Gibson." (Vol. 3, Pg. 386) Helveston was never able to view this lease prior to the letter of September 22, 2005, as the Lums refused to provide this lease to his representative Ms. Leoma Reed. (Vol. 3, Pg. 414)

The Lums at one point represented that they had decided to no longer lease the property for hunting purposes to instead pursue tree farming interests and other interests, but Ms. Leoma Reed in her deposition on January 24, 2007, (see Exhibit "E" to Defendant's Motion for Summary Judgment) testified at pages 37 and 38 (Vol. 3, Pgs. 406 - 407) quoted Martha Lum as saying that the Lums had other potential prospects on the line wanting to lease the property further quoting Martha Lum as stating that there were "quite a few" other people and "more than one" and "several people" wanting to lease the property for hunting purposes. (Reed Depo. Pg 37-38; Vol. 3, Pgs. 406 - 407) As seen infra, this was not true. Only after September 22, 2005, did the Lums lease the property to Offshore Towing for hunting purposes. The Lums did not begin negotiating with Offshore until September 27, 2005. This created a factual issue regarding the Lums intentions and actions.

Ms. Reed testified that as a personal friend of Martha Lum and Deborah Lum and as a person having a business relationship with Helveston (See Reed Depo, Page 32; Vol. 3, Pg. 405) that she discussed a proposed lease between the Lums and Helveston which was to be dated from July 16, 2005 to May 31, 2006.

After Martha Lum's letter advising that she was having a lease prepared for Helveston to

review on his next trip to Port Gibson, Lum inquired of Leoma Reed as to, "When is Mr. Helverston coming." (Vol. 3, Pg., 406)

Ms. Reed had gotten involved in the lease renewal discussions as Helveston's representative because Mr. Helveston got extremely sick in 2005 (Reed Depo, Page 30-31, Vol. 3, Pgs. 403 - 404). She testified that Helveston had requested her to discuss the lease terms with the Lums because of his illness. (Reed Depo, Page 14; Vol. 3, Pg. 395)

Ms. Reed testified that at some point she asked Deborah Lum to get involved in the discussions about the lease renewal because it was upsetting her mother (See Reed Depo, Page 15; Vol. 3, Pg. 396). She testified that Martha Lum would often call her about discussing the lease. (See Reed Depo, Page 16; Vol. 3, Pg. 396)

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

Ms. Reed stated that when Mrs. Lum called and said what she said about the taxes and the whole lease that Reed then called Helveston (Vol. 3, Pg. 396) and Helveston did not want to pay the taxes before they were due until the first of the next year. (Vol. 3, Pg. 398) Ms. Reed stated that this conversation with Mrs. Lum was about the time the lease was coming up (Vol. 3, Pg. 398).

Ms. Reed conveyed to Mrs. Lum that Helveston stated that he just did not have as much money as she wanted (Vol. 3, Pg. 399).

Ms. Reed testified that she has three or four telephone conversations with Mrs. Lum about the renewal and that she even went by Mrs. Lum's house to see her concerning the lease. (Vol. 3, Pg.

402)

Ms. Reed identified the time period when she started helping Helveston out on the lease negotiations was when "he almost died" and when he "was totally out of it." (Vol. 3, Pg. 404) and that it was during the renewal process in 2005, when Ms. Reed was assisting Helveston on the lease negotiations. (Vol. 3, Pg. 403)

Ms. Reed testified in her deposition that Helveston did not want to pay the 2005 taxes as requested by the Lums until the taxes were due in 2006 (See Reed Depo, Pages 17-19; Vol. 3, Pgs. 398 - 400) and that Ms. Reed had three or four telephone conversations with Martha Lum and discussed with Martha what Helveston was trying to offer. (See Depo, Pages 20-21; Vol. 3. Pgs. 401 - 402)

Ms. Reed testified that she was closer to the Lums than Helveston as she was a personal friend of both Martha Lum and Deborah Lum while only a business relation of Helveston's. (Reed Depo, Page 32; Vol. 3, Pg. 405)

Ms. Reed also testified that she had informed Martha Lum that Lum should pick up the phone and call Helveston (Reed Depo, Pages 36-37; Vol. 3, Pgs 406 - 407) and that Helveston never indicated to Reed that he was ducking the Lums. (Reed Depo, Page 37; Vol. 3, Pg. 407)

As further evidence of the ongoing negotiations between the parties Wilton Helveston testified in his deposition on November 14, 2006, that the lease matter was in negotiation (Helveston Depo, Page 27). He testified that he had sent Ms. Reed to go pick up the lease referred to by the Lums' in Martha Lum's letter to him of May 17, 2005, (Exhibit "B" to Response to Motion for Summary Judgment.)

Helveston testified that he learned that the Lums would not give the referenced lease to Reed

(Helveston Depo, Page 26; Vol. 3, Pg. 415) and while still demanding $40,000.00 in cash. (Helveston Depo, Page 46)

Helveston testified that the exact dollar amount of the renewal lease had never been nailed down because Helveston was never allowed to see the lease. (Helveston Depo, Page 28; Vol. 3, Pg. 415)

Helveston testified that a lot of numbers were thrown around (Helveston Depo, Page 28; Vol. 3, Pg. 415) but it was his understanding that he was going to have a lease for a set sum of money for the year 2005-2006 (Helveston Depo, Page 28; Vol. 3, Pg 415) but that the exact sum was never specified. (Helveston Depo, Pages 28, 29; Vol. 3, Pgs. 415 - 416)

Helveston testified that he was gathering up the cash money because he thought that the renewal lease was going to happen. (Helveston Depo, Page 30; Vol. 3, Pg. 417)

Helveston testified that when it began dawning up on him that the persons making the decisions had changed (Reed testified that she had requested Deborah Lum to take over; (Vol. 3, Pg. 412) Helveston thought it might be better to see the actual document. (Helveston Depo, Pages 30-31; Vol. 3, Pgs. 417 - 418)

When negotiations fell through in September 2005, the Lums then, and only then, leased the identical property to Offshore Towing Inc., (a Louisiana corporation which was initially a party Defendant in this matter because it was in possession of Plaintiff's personal property), which was subsequently dismissed herein after disclaiming any interest in Helveston's personal property. Even though Martha Lum told Ms. Reed that she had several other hunting lease prospects, trying to let Helveston think that others might pay more, the Lums in fact were not negotiating with anyone and were obviously of the belief that Helveston would renew.

In response to Interrogatory Number 10, requesting Defendants Lum to identify the date they began discussions or negotiations with Offshore Towing to lease the subject real property to Offshore, the Lums replied, "September 27, 2005." (Vol. 1, Pg. 77) When asked whether the Lums had discussed leasing the real property to anyone other than Offshore in response to Interrogatory Number 13 they could only identify a "Mr. Fagan from LA. no known address or telephone number." (Vol. 1, Pg. 78) In other words notwithstanding their later position that they had no lease with Helveston after July 15, 2005, and notwithstanding their position that they were not in negotiations with Helveston up until September 22, 2005, Defendants Lum did not even begin negotiations with any subsequent leasee until September 27, 2005. Other than Offshore they could only identify a nebulous, and probably fictitious, "Mr. Fagan from LA" with no known address and no known telephone number as someone with whom they had potentially discussed leasing the property. Obviously the Lums did believe that they were in negotiations with Helveston as otherwise they would not have waited until September 27, 2005, five days after Dulaney's letter, to begin lease negotiations with Offshore.

Helveston had other Mississippi properties in the area for which he could use his personal property and for this reason asked the Lums for one more year's lease to coincide with the termination of his other Mississippi leases. (Helveston Depo, Pages 32-33; Vol. 3, Pgs 419 - 420)

Helveston testified that he felt he could get an exact figure for the lease when he got up to Claiborne County and that this was not an uncommon time frame as every year there would be thirty days to forty five days in arrears. (Helveston Depo, Page 34; Vol. 3, Pg. 421) The parties also had a history of negotiating after the lease term expired as they did so for eighteen (18) days after the first lease expired on June 30, 2002.

Helveston testified that Martha Lum understood that it took Helveston time to get that much money together in cash (the sum of $40,000.00 had been discussed) in order to meet her request that the lease payment be made in cash. (Helveston Depo, Page 34; Vol. 3, Pg. 34)

After Sim Dulaney's letter on behlaf of Lum on September 22, 2005, advising Helveston that if he went back on the real estate to get his property that he would then be treated as a trespasser, Helveston filed a Complaint in Replevin on October 31, 2005, attaching as Exhibit "C" thereto a list of his personal property, "with each separate article of personal property having a value as set forth beside the description of each article of personal property and the total combined value of said property" (Paragraph 9) Helveston executed his Complaint in Replevin under oath as required by statute on October 31, 2005, swearing to the value of his property in issue. (Over $96,000.00)

Defendant's premised most of their argument to the lower court on their Motion for Summary Judgment upon the provision of the lease (Vol. 1, Pg. 13) which provides that any personal property still on the Lums' land thirty (30) days after expiration of the lease would become property of the Lums claiming this clause to be totally outcome determinative of all issues in the case.

However, as seen from the forgoing, the parties were in negotiations regarding the renewal of the lease from April, 2005 until Dulaney's letter to Helveston of September 22, 2005. Were this no so then why was such a letter necessary? Why was the letter phrased in the present tense rather than post tense? Why did the Lums not negotiate with anyone else until September 27, 2005?

Helveston had been deathly ill prior to July 2005, and in an attempt to renew the lease had asked Ms. Leoma Reed to act on his behalf in discussing the lease terms with the Lums. Martha Lum had already told him she was preparing a lease for his review on his next trip to Port Gibson.

When it became apparent that the Lums would not provide his representative, Ms. Reed, a

copy of the proposed lease and were asking that all lease payments be made in cash (and that the 2005 taxes be prepaid before they became due in January of 2006) Helveston began raising money to meet Martha Lum's cash demands.

While Helveston's Complaint before this Court initially sounded in replevin the Complaint was subsequently amended to claim the tort of conversion in addition to replevin. And, as discussed infra, the thirty day provision is inoperable due to estoppel.

CONVERSION

The actions of Lum constituted conversion as to make out a case of conversion there are three elements which must be established. There must be (1) proof of a wrongful possession (2) the exercise of a dominion in exclusion or defiance of the owner's right and (3) unauthorized use or a wrongful detention after demand for return. Community Bank, Ellisville, Mississippi v Courtney, 884 So. 2d 767 (Miss 2004)

Conversion is an intentional tort, Union National Life Insurance Co. v Crosby, 870 So. 2d 1175 (Miss 2004) and while intent is a necessary element of conversion, the intent need not be the intent to be a wrongdoer. Community Bank, Ellisville, Mississippi v Courtney, supra.

There is conversion when there is an intent to exercise dominion or control over goods which intent is inconsistent with the true owner's right but there need not be an intent to be a wrongdoer. Wilson v General Motors Acceptance Corp., 883 So. 2d 56 (Miss 2004)

In this case there is testimony from Leoma Reed that Martha Lum was deliberately withholding Helveston's personal property from him, presumably under guise of the thirty day provision, while at the same time being advised by Ms. Reed that because of the Bank's lien Lum could not possibly herself retain possession of the property.

Martha Lum intended to be a wrongdoer as the Lums attempted to retain possession of the property in face of the Bank's lien which could not serve them any lawful purpose but instead only operate to deprive Helveston the use of his property. The Lums could not hope to obtain any benefit to themselves by their actions but only cause injury to Helveston.

The rule in Mississippi is that conversion, an intentional tort, may be maintained where the defendant either exercises dominion or control over property in a manner inconsistent with the plaintiff's rights in the property **or** by refusal to relinquish possession or control over property after demand by the Plaintiff. National Benefit Administrators, Inc. v Mississippi Methodist Hospital, 748 F. Supp. 459 (S.D. Miss 1990).

In this case Helveston, while deathly ill, was doing the best he could to renegotiate the renewal lease while at the same time the Lums were refusing to provide his representative a copy of the lease, demanding that he come up with the cash to pay for the lease and/or refusing to specify an exact dollar amount, and led Helveston to believe that he had a lease for 2005-2006 with only a few details remaining unclear.

ESTOPPEL IS A FACTUAL ISSUE

In this case Helveston plead that the conduct of the Lums led him to believe that he would have the lease for 2005-2006 (Helveston Depo, Pages 28-29) and therefore the Lums are estopped from asserting the provisions of the thirty (30) day clause.

Equitable estoppel has been held to have its roots in the morals and ethics of society and the fundamental notions of justice and fair dealing provide its undergirding. Cothern v Vickers, Inc., 759 So. 2d 1241 (Miss 2000)

In Cothern v. Vickers Inc., supra the Court stated:

> "A party asserting equitable estoppel must show (1) belief and reliance on some representation; (2) change of position as a result thereof; (3) detriment or prejudice caused by the change of position. . . .
>
> Equitable estoppel has its roots in the "morals and ethics of our society." . . .
>
> It is sufficient if the acts of the parties sought to be estopped, although may without subjective intent to mislead, were, objectively speaking, calculated to mislead, and did mislead.
>
> Fraudulent intent to mislead or deceive where present may often, when relied upon, produce inequity and hence an estoppel. This does not mean that no estoppel may be enforced absent such intent ab initio. For there are cases, which this is one, where there has resulted substantial inequity produced by change of attitude sans original subjective fraudulent intent. Substantial inequity is our touch stone." 759 So. 2d at 2149

In this case a substantial inequity has been produced in that Wilton Helveston was deprived of a significant amount of personal property worth a significant amount of money. (ie: $96,000.00 per his original Complaint) He clearly indicated at all times that he was under the belief that he was negotiating a renewal of his lease, while, at best, the Lums did nothing until Sim Delaney's letter of September 22, 2005, where for the first time the Lums stated that if Helveston went on the property he would be treated as a trespasser.

"Equitable estoppel" has been defined as that prinicple by which a party is preconcluded from denying any material fact, induced by words or by conduct, upon which another person relied whereby the other person changed their position so that injury would be suffered if a denial or a contrary assertion was allowed. Kovall v Kovall, 576 So. 2d 134 (Miss 1991)

In Kovall v. Kovall, supra, the court held:

> "The doctrine of equitable estoppel is also sought to be invoked by the plaintiffs. It is defined generally as a principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed.

> The doctrine of estoppel is based upon the ground of public policy, fair dealing, good faith and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon. 28 Am. Jur. 2d 647, Sections 27 and 28.

> Normally, equitable estoppel is a rule of justice which prevails over all other rules. It may, in proper cases a operate the cut off a right or privilege conferred by statute or even by the constitution. 28 Am. Jur. 2d 627 Section 34" 576 So. 2d Page 137

In this case, Helveston was never advised until September 22, 2005, that the continued negotiations that he and Leoma Reed believed were ongoing were at a standstill.

To create an estoppel no consideration is necessary when the acts or conduct of a party are such as to estoppel him from insisting upon a right. Montgomery v Yarbrough, 6 So. 2 305 (Miss 1942)

Further, the doctrine of estoppel has reference to factual matters and not to contentions upon which the law is applied to a given state of facts. Mississippi Power & Light, Co. v Pitts, 179 So. 363 (Miss 1938) It is therefore crystal clear that it is up to the jury as the fact finder to determine whether or not the acts, or silence, of the Lums amount to estoppel so as to prevent operation of the thirty day clause.

And, it is also old but still valid law that equitable estoppel may not only arise by acts or representations but also by silence, Day v. McCandless, 142 So. 486 (Miss. 1932), and may arise from a failure to speak when called on to speak. Canal-Commercial Trust and Savings Bank v. Brewer, 109 So. 8 (Miss. 1926)

As explained quite sometime ago in Day v. McCandlesss, supra:

> "Estoppel operates only in favor of one who, in reliance upon and act, representation or silence of another, so changes his situation as that injury would result if the truth were shown." 142 So. at 489

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 of engaging in ongoing discussions with Leoma Reed as Helveston's representative, Helveston would have clearly known to get his personal property off of the Lums' real estate within thirty (30) days of July 15, 2005, and easily could have done so. Instead, the Lums, at best, sat silent until September 22, 2005, and then asserted that a forfeiture of Helveston's personal property had occurred and for the first time advised that he would be treated as a trespasser if he went back on to the real property to retrieve his personalty. They then waited until September 27, 2005, to begin discussions with any potential new tenant.

In this case the parties had already created an established history of negotiations between them after the term of the lease was up. When the first lease between the Lums and Helveston expired on June 30, 2002, Helveston did not vacate the land, did not remove his personal property from the land and instead the parties continued to negotiate until a new lease was signed eighteen (18) days later with an effective date of July 16, 2002, through July 15, 2005.

As the second lease was coming up for renewal Martha Lum wrote Helveston and expressly told him that she herself was having a renewal lease prepared and that when it was prepared he could review it on his "next trip" to Port Gibson.

Prior to his next trip to Port Gibson Helveston fell ill and requested Leoma Reed to act on his behalf in the lease negotiations with the Lums. However, when Ms. Reed attempted to obtain a copy of the lease so as to forward same to Helveston the Lums would not provide same to her.

Leoma Reed during negotiations asked for Debra Lum, Martha Lum's daughter, to get involved in the lease discussions which did in fact occur and even though July 15, 2005, came and went Helveston felt that he was still "getting" the property and was still in negotiations.

There were no affirmative acts between the time when the Lums refused to provide Leoma Reed with a copy of the lease, which Martha Lum was supposedly having prepared, and Sim Delaney's letter on behalf of the Lums to Helveston dated September 22, 2005.

On September 22, 2005, Delaney, on behalf of the Lums, wrote Helveston stating that Helveston's offer "is rejected" instead of using any language to the effect that all previous offers "had been rejected" and specifically notifying Helveston that he was noticed as of "the date of this letter" that should Helveston attempt to "enter the property for any reason that he "will" be treated as a trespasser. (Vol. 3, Pg 385) Prior to September 22, 2005, the Lums had never told Helveston not to return to or be on the property.

There is no evidence of any nature prior to this letter of September 22, 2005, of that negotiations had been terminated, that Helveston had any point prior to September 22, 2005, been asked to vacate the property or not go on the property, nor is there any indication that prior to September 22, 2005, Helveston would not have been free to remove his personal property from the Lum real estate.

An equitable estoppel arose from the silence of the Lums coupled with the duty to act and certainly there were no actions indicating that lease negotiations were at an end, had been terminated, but in any event this was a question of the fact for the jury.

The lower court erred in substituting its judgment for that of the jury and was in error in granting Defendants' Motion for Summary Judgment.

CONCLUSION

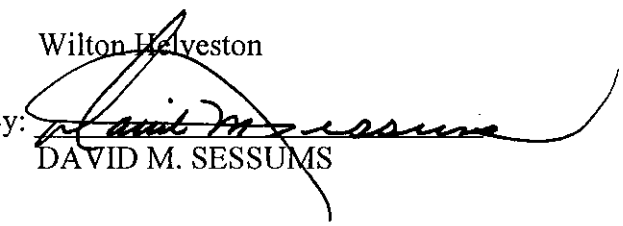
The thirty day clause in not the alpha and omega of whether Plaintiff is entitled to prevail on his claim for (1) replevin, and (2) conversion as the acts and conduct of the Lums lulled Plaintiff into believing that he was still negotiating the renewal of his lease for one more year.

Obviously, while such negotiations are going on it would not be in Helveston's best interest to first remove his personal property off of the Lum land only to have to turn around and move it back to operate under a one year renewal of the lease.

Estoppel was plead, the facts of who did or did not do or say what are in direct conflict and the Supreme Court is quite clear that under the facts of this case estoppel is a factual issue and for the jury.

Respectfully Submitted,

Wilton Helveston

By: 
DAVID M. SESSUMS

OF COUNSEL:

VARNER PARKER & SESSUMS, P.A.
1110 JACKSON STREET
P.O. BOX 1237
VICKSBURG, MS 39181
(601) 638-8741

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 Brief of Appellant to the following:

Lucien C. Gwin, III, Esquire
Gwin Lewis & Punches, LLP
P.O. Box 1344
Natchez, MS 39121

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

THIS the 16th day of May, 2007.

DAVID M. SESSUMS