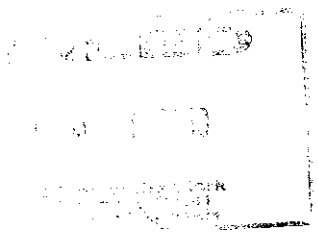
IN THE SUPREME COURT OF MISSISSIPPI

CYNTHIA STEWART — APPELLANT

V. — CASE NO.: 2009-CA-00305

BRIDGE PROPERTIES OF JACKSON, LLC — APPELLEE



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APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

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REPLY BRIEF OF APPELLANT

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The Appellant, Cynthia A. Stewart, respectfully submits this her reply brief in support of her appeal.

ACCORD AND SATISFACTION

The Mississippi Supreme Court has repeatedly held that the doctrine of accord and satisfaction consists of four requirements and that proof of these elements "may be express, or implied from the circumstances." *Cook v. Bowie,* 448 So.2d 286, 287 (Miss. 1984). These are that, first, something of value must be offered in full satisfaction. Second, the offer must be made in such a way, accompanied by acts and some sort of explicit or implied declaration which amount to a condition that if the thing of value is accepted, it is accepted in satisfaction. Third, it must be obvious that if it is accepted, the acceptance is subject to the conditions. Finally, the party must actually accept the offer of something of value. *Wallace v. United Mississippi Bank,* 726 So.2d 578, 589 (Miss. 1998); *Alexander v. Tri-County Coop, (AAL),* 609 So.2d 401, 404-05 (Miss. 1992).

Jud Lee testified that he offered a check for $7500.00. Tyson Bridges clearly understood that it was offered in full satisfaction, because he accepted it and allowed the three attorneys, Cynthia Stewart, Cynthia Speetjens and Jud Lee access for only a limited period of time to clear out their property. Tyson Bridges was clearly aware that the parties were vacating the premises, having been told that the parties were leaving and watching the move of the parties. He demonstrated his understanding of the accord and satisfaction by changing the locks on the office, accepting the tendered check and allowing Jud Lee the key to the premises only for the day. He provided no further access to the premises. The check was tendered and accepted under these circumstances. The Court below found that "Mr. Lee was very believable." The clear implication from the circumstances is that both parties understood that the check was offered in

full satisfaction. Bridges verified this by his behavior in denying the parties any further access to the premises. With regard to the credibility of Bridges, it is noteworthy that he testified that the move took place on a weekend (Tr. 191), then testifies that he immediately deposited the check on the day it was written, which, as noted by the Court below, was a work day. (Tr. 191) Furthermore, he contradicts the truth and Mr. Lee when he denies that the parties were given no further access to the premises.

The Mississippi Supreme Court addressed the matter in *Lovorn v. Iron Wood Prods. Corp.*, 362 So.2d 196, 197-198 (Miss. 1978), where it held that "Lovorn was sufficiently put on notice that the check was offered in full payment of all disputed claims for sums owed him...He should have understood upon such circumstances, that Iron Wood was contending that the amount of the check constituted the entire balance due him to that date. On these circumstances, Lovorn cannot be allowed to assert his claim for additional sums after having accepted, endorsed, and negotiated the check which was obviously tendered in full settlement. Having dealt with the check in such a manner and accepting the proceeds of the check, Lovorn is now precluded from recovering further sums..."

HABITABILITY

Not only does Section 89-8-15 of the Mississippi Code Ann. Provide for habitability of leased premises, the law contemplates an implied warranty of habitability. See *Dulin v. Sowell*, 919 So.2d 101 (Miss. 2005). Generally, this warranty incorporates consideration of the intended use of the leased premises.

In this case, the parties used the premises as a professional law office for attorneys in business for a considerable period of time. The importance of the professional appearance and

habitability of the location was evidenced by the fact that the parties put a considerable amount of their own money into painting and other improvements to ensure a professional appearance, incurring expenses of around $2700 in doing so. (Tr. 74)

Unfortunately, all efforts came to naught due to the failure of Bridges to address security issues, leaks, sludge dripping down the walls and from the ceiling continuously malfunctioning air conditioning, power outages, lack of door knobs, and homeless people urinating on the premises. The problems not only precluded the professional appearance necessary for the businesses of the three lawyers, but intefered with day to day business operations.

INVALID LEASE

The issue of the invalid lease was raised at the trial court level. The issue was raised in detail in a Motion for Summary Judgment and the parties were under no obligation to appeal the court's ruling on the motion for summary judgment.

The Appellant filed a Motion for Summary Judgment asserting that Appellee failed to properly and specifically plead his claims for relief. The lease the Appellee attached to his Complaint failed to support his claims for relief. Specifically, the lease ***did not describe*** the subject premises for which the Complaint seeks relief.[1] The Appellant raised this issue with Appellee's counsel who, after several weeks, responded that the lease attached to the Complaint was the result of a "clerical error" and then produced an altered copy of the subject lease. The lease must describe the premises. See *Trotter v. Gaddis and McLaurin, Inc.*, 452 So.2d 453 (Miss. 1984).

On one hand, the Appellee urged this Court to believe that the parties orally agreed to modify the lease, yet on the other hand, the Appellee wanted to pass off a written modification to the lease. The Appellee cannot have it both ways – either the parties had an oral agreement (which by definition means there is no written agreement) or the parties agreed to modify the lease by crossing out the incorrect address and writing in another (hence, a written modification).[2] The problem for the Appellee, however, is that the ***Appellant never signed or initialed the purported written modification.***[3] Furthermore, the purported written modification does not support a claim for relief. Not only is it unsigned by the Appellant, but it excludes the entire essential consideration paragraph, thus removing a fundamental element necessary to have a valid contract.

It is noteworthy that the Appellee ***never*** alleged that a modification, oral or written, every existed, nor did the Appellee ever produce the altered lease until ***after*** the Appellant called his hand on this matter. Contrary to the Appellee's assertions, the Appellant ***never*** orally agreed to modify any purported lease with the Appellee in or around October 2003. Moreover, the Appellant ***never*** requested a written modification of the purported lease.

The evident truth is that the Appellee altered the purported lease attached to his Complaint after he realized that the document would not support his claims for relief. Then the Appellee concocted his story about the parties "orally agreeing" to a "written modification" of

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[2] The Appellee asserts that he made this written modification pursuant to Appellant's request shortly after the lease was executed. If the parties truly did agree to modify the lease in October 2003, then it would have been unnecessary for the Appellee to keep the original, unaltered document that he attached to his Complaint because by modifying that document he acknowledged that it was unenforceable in its original, unaltered form. Had the Appellee altered the lease in October 2003 as he swears he did, then he never would have had the unaltered version that he attached to his Complaint - - he would have altered the original.

[3] That is because the document was not altered until ***after*** the Appellant notified the Appellee of the problems with the version attached to the Complaint which was well after the Complaint was filed.

the purported lease. In sum, the Appellee has perpetrated a fraud upon this Court. For these reasons, this Court should dismiss the Appellee's Complaint with prejudice.

The documents the Appellee puts before the Court are not ambiguous; they are fraudulent. The document the Appellee attached to his Complaint does not support his claims.

LESSOR FAILED TO MITIGATION DAMAGES

The Plaintiff failed to adequately mitigate his damages in that the proof he offered at trial in support thereof was insufficient and was not a reasonable, good faith effort to mitigate his damages.

THE DEFENDANT PRESENTED SUFFICIENT EVIDENCE TO SUPPORT HER COUNTERCLAIM

Counterclaim of Defendant

The Appellant reasonably incurred expenses in locating other office space as a result of the uninhabitable nature of the demised premises which expenses were directly and proximately caused by the Appellee's failure to properly maintain the premises. Pursuant to the implied warranty of habitability and statutes previously cited, she is entitled to compensation for the damages incurred.

CONCLUSION

The purported lease attached to the Appellee's Complaint fails to support the Appellee's claims for relief, and therefore, this Court should dismiss the Appellee's claims with prejudice. Additionally, this Court should not consider the Appellee's altered version of the purported lease as it is not signed or initialed by the Appellant and thus it is unenforceable. Finally, this Court should not consider the Appellee's affidavit and allegations of an alleged oral agreement between the parties because the Appellee has argued inconsistently that there was an oral agreement but that there is a written modification commemorating that oral agreement and such

parol evidence is inadmissible. For these reasons, the Appellant respectfully requests that this Court enter a final judgment dismissing the Appellee's claims with prejudice. The Appellant requests any such other relief as this Court may deem just.

This the _____ day of February, 2010.

Respectfully submitted,

Cynthia A. Stewart

By: _____
Cynthia A. Stewart (MBN[redacted])

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via U.S. Mail, postage pre-paid, to:

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This the 16th day of February, 2010.

Cynthia A. Stewart