IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

No, 2010-TS-00057

RICHARD REEVES & REGA, INC — APPELLANT

v.

MERIDIAN SOUTHERN RAILWAY, LLC — APPELLEE

BRIEF OF THE APPELLEE

ATTORNEY FOR THE APPELLEE

ROBERT M. DREYFUS, JR
ROBERT M. DREYFUS, PLLC
2212 NINTH STREET
MERIDIAN, MS 39302
(601) 553-8315 – PHONE
(601) 553-8334 – FAX
MSBN [redacted]

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

No, 2010-TS-00057

RICHARD REEVES & REGA, INC **APPELLANT**

v.

MERIDIAN SOUTHERN RAILWAY, LLC **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the justices of the Supreme Court and/or the justices of the Court of Appeals may evaluate possible disqualifications or recusal.

Hon. Robert W. Bailey
Clarke County Circuit Court Judge
Post Office Box 86
Meridian, MS 39302

Hon. Robert M. Dreyfus, Jr.
Attorney of Record for Appellee
Post Office Box 5847
Meridian, MS 39302
(601) 553-8315 – Phone
(601) 553-8334 – Fax

Hon Eric Tiebauer
Attorney of Record for Appellant
4363 Highway 145 North
Waynesboro, MS 39367
(601) 735-5222 – Phone
(601) 735-5008 – Fax

Mr. Richard Reeves
Appellant
1132 Hwy 145 South
Quitman, MS 39355

Rega, Inc.
Appellant
A Mississippi Corporation
102 Ascher Street
Quitman, MS 39355

Meridian Southern Railway, LLC
415 Woodland Road
Syracuse, NY 13219

SO CERTIFIED, this the 20th day of August, 2010.

ROBERT M. [illegible]REYTUS, JR
MSBN #[redacted]

TABLE OF CONTENTS

TABLE OF CASES, STATUTES & OTHER AUTHORITIES CITED

CASES

STATUTES & OTHER AUTHORITIES (RULES, REGULATIONS, SECONDARY SOURCES)

STATEMENT OF THE ISSUES

I. THE TRIAL COURT PROPERLY DISMISSED COUNT 7, CONVERSION, FOR THE DEFENDANTS/APPELLANTS FAILURE TO ESTABLISH ANY FACTS THAT WOULD SUPPORT THE ESSENTIAL ELEMENTS OF COUNT 7, CONVERSION.

II. THE TRIAL COURT PROPERLY DISMISSED COUNT 8, TRESPASS, AND/OR CONTINUING TRESPASS, FOR THE DEFENDANTS/APPELLANTS FAILURE TO ESTABLISH ANY FACTS THAT WOULD SUPPORT THE ESSENTIAL ELEMENTS OF COUNT 8, TRESPASS, INCLUDING DAMAGES.

III. THE TRIAL COURT DID NOT ERR IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT 10, UNJUST ENRICHMENT.

STATEMENT OF THE CASE

Appellee concurs with the Statement of the Case as set forth in Appellants Brief except to add that Plaintiff's Motion for Summary Judgment; or in the Alternative, for Partial Summary Judgment was supported by ***Exhibit "A"***- *Answer to First Set of Interrogatories Propounded to Meridian Southern Railway, LLC, by the Defendants,* **(R.E. 59),** and *The Response to Rega, Inc.'s First Set of Requests for Production of Documents Propounded to Meridian Southern Railway, LLC, by the Defendants*; ***Exhibit "B"***- *Defendants Responses to Meridian Southern Railway, LLC's First Set of Interrogatories and Requests for Production of Documents Propounded to Richard Reeves and Rega, Inc., by the Plaintiff,* **(App. R.E. 1);** and ***Exhibit "C"***- *Affidavit of Ricky Jacob,* **(R.E. 41).**

SUMMARY OF THE ARGUMENT

Defendant's Counterclaim originally raised ten (10) separate counts or causes of action against the Plaintiff. On Motion for Summary Judgment filed by Plaintiff, the trial court determined that the Defendant failed to establish the necessary elements of each count or cause of action and therefore, dismissed the Complaint. The Defendants filed their Appeal and raised an issue as to only three (3) of those separate counts.

As to Count 7, Conversion, Appellee asserts that the issue is whether or not the trial court properly determined that the Defendants failed to establish any facts that would support the essential elements of conversion, including, but not limited to, any facts that would support a claim of damages.

As to Count 8, Trespass, Appellee asserts that the issue is whether or not the trial court erred in dismissing Count 8, Trespass, for the Defendants failure to establish any facts that would support the essential elements of trespass, including, but not limited to, damages.

As to Count 10, Unjust Enrichment, Appellee asserts that the issue is whether or not the trial court erred in sustaining the Plaintiff's motion for summary judgment as to Count 10, Unjust Enrichment, for the Defendants failure to establish any facts that would support the essential elements of unjust enrichment, including, but not limited to, damages.

ARGUMENT

STATEMENT OF FACTS

Meridian Southern Railway, LLC, (MDS), is a Delaware Limited Liability Company that owns and operates a "short line" railroad from Meridian, Mississippi to Waynesboro, Mississippi. MDS purchased its short line from The Kansas City Railway Company in March 2000, and has operated said line continuously since that time. Rega, Inc. is the owner of a certain tract of land located in the City of Quitman, Clarke County, Mississippi which is adjacent to the MDS main line and on which is located a side track spur. **(R.E. 41)** Rega, Inc. purchased said property from Clarke County, Mississippi in December 2006. **(R.E. 56)**

In March 2000, the property which is now owned by Rega, Inc. was occupied by Griffco Plastics Company, which operated a plastic pipe business. Beginning in March 2000, and through the time that Griffco Plastics was in business, MDS utilized the side track on said property for delivering and spotting rail cars for Griffco and for general switching operations. After a few years, Griffco ceased doing business and abandoned the premises. MDS continued to utilize the side track for switching operations in the usual and customary manner associated with industrial type tracks and even repaired and maintained the track at its expense to keep the track in service. At some point in time after Griffco abandoned the property, but before December 2006, MDS began storing railcars on said side track on an occasional basis. At all times between March 2000 and December 2006, Clarke County was the owner of subject property and made no objection to MDS concerning their use of the subject side track. **(R.E. 41)**

On or about December 28, 2006 Clarke County sold the subject property to Rega, Inc. No notice of the change of ownership was ever given to MDS by any agent, employee, representative, or any person on behalf of Rega, Inc., nor did any representative of Clarke County, Mississippi notify MDS of the change of ownership. MDS never received any notice from Rega, Inc., nor Richard Reeves, objecting to the Railroad's use of the side track and advising the Railroad that they were not authorized to use same. The first time that MDS had knowledge that the side track was owned by another entity and that their use of same was not authorized was in September 2008, when the Defendant's installed and locked a derail device on the side track. **(R.E. 41)**

When the Defendant's installed and locked a derail device, six railcars were locked inside the Defendant's property. On or about September 24, 2008, Ricky Jacobs and other employees of MDS attempted to remove the railcars from the property and in doing so requested the Quitman police to be present to prevent any disturbance of peace. Chuck Fowler, Chief of Police of Quitman Police Department, accompanied Jacobs onto the property while Jacobs cut the lock from the derail devise so that the cars could be removed. At that time, Richard Reeves appeared and stood in front of the coupling device of the front car and prevented the Railroad from coupling to the car. MDS then terminated its self help efforts, replaced the lock with an identical lock, left the premises and filed the original Complaint for Replevin in this civil action. Defendants then filed its Answer to Complaint for Replevin and Counterclaim. **(R.E. 41)** Subsequently, the railroad cars were released to the Plaintiff.

STANDARD OF REVIEW

Summary Judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions, together with any supporting affidavits, show that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *MRCP 56 (c)*. In determining whether the Trial court was correct in granting a summary judgment, the Court must view the facts in a light most favorable to the non-moving party. *Robinson vs. Singing River Hospital Systems, 732 So.2d 204, 207(¶12)(Miss. 1999)* The moving party has the burden of establishing the absence of a genuine issue of a material fact, however, the non-moving party must diligently oppose a motion for summary judgment. *Grisham vs. John Q. Long, VFW Post #4057, Inc. 519 So.2d 413, 415 (Miss. 1988)* Once a motion for summary judgment is made and supported, the non-moving party may not rely merely upon the pleadings, but its response, by affidavit or otherwise, must set forth specific facts that show there is a genuine issue for trial . *MRCP 56 (e)* Summary judgment must be granted when the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his case and on which he bears the burden of proof. *Borne vs. Dunlap Tire Corp, 12 So.3d 565, 570, ¶16 (Miss. Ct App 2009) citing Grisham,519 So.2d 516.*

I. THE TRIAL COURT PROPERLY DISMISSED COUNT 7, CONVERSION, FOR THE DEFENDANTS/APPELLANTS FAILURE TO ESTABLISH ANY FACTS THAT WOULD SUPPORT THE ESSENTIAL ELEMENTS OF COUNT 7, CONVERSION.

Through interrogatories propounded to the Defendants, the Defendants were asked to state the facts that support their allegations as to each of the ten (10) separate counts. Specifically, Interrogatory #5, and the Defendants' response were as follows: **(App. R.E. 2)**

> "Interrogatory #5: Please state the facts that support your allegations in Count 3 of the Counter-Claim that the railroad interfered with Rega's business relations as set forth in Paragraph 26 of the Counter-Claim."
>
> "Response to Interrogatory #5: Meridian Southern Railway, LLC, brought law enforcement officials onto the Defendant, Rega, Inc.'s property, alleging Rega, Inc., had wrongfully blocked access to cars when in fact Meridian Southern Railway, LLC, makes substantial income storing cars on private spurs, including, but not limited to that of Rega, Inc.'s for profit. Meridian Southern, LLC chooses to retain monetary benefits which rightfully belong to Rega, Inc."

Appellants argue in Count 7 that Appellee is liable for conversion because it wrongfully converted to its own use Rega's private spur. To show conversion, there must be proof of a wrongful possession or the exercise of the dominion in exclusion or defiance of the owners' rights, or of an unauthorized use, or of an unlawful detention after demand. *Community Bank vs. Courtney, 888 So.2d 769, 772-773 (Miss. 2004)* There is no conversion until the title of the landowner is made know and resisted. *Mississippi Motor Finance, Inc. vs. Thomas, 149 So.2d 21, 25 (Miss. 1963)* In Interrogatory #9, Plaintiff requested the Defendants to state the facts that support their claim in Count 7 of the Counter-Claim that the railroad is liable to Rega for conversion of Rega's private spur as set forth in Count 38 of the Counter-Claim. **(App. R.E. 3)** The Defendant's answer was as follows:

> "Response to Interrogatory #9: Please see response to Interrogatory #5"

It should be noted in the Affidavit of Ricky Jacob that the railroad had been using this private sidetrack with permission and acquiescence of the prior owners and also in accordance with usual and standard practices involved in industrial sidetracks where railroads commonly use private sidetracks for railroad purposes, unless it interferes with the use of the owner or unless the owner objects. **(R.E. 41)** The Defendants/Appellants did not offer any evidence to rebut the statements of Mr. Jacob, nor did they proffer any evidence that would show that the Plaintiff exercised dominion of this spur in exclusion or defiance of the rights of Rega or that the use was unauthorized or that they continued to use the spur after demand. In fact, the Defendants/Appellants were silent for twenty (20) months while the railroad occasionally used the spur and no demand or notice was made by the Defendants until September 2008 when it installed a "de-rail" device and "no trespassing" sign on the spur, locking six (6) railcars onto its property. Moreover, in Interrogatory #13, Plaintiff asked the following: **(App. R.E. 4)**

> "Interrogatory #13: For Counts 1 thru 10, please itemized the damages incurred or suffered by Richard Reeves or Rega as a result of those acts alleged in each count."
>
> "Response to Interrogatory #13: This interrogatory will be supplemented at the close of discovery and in accord with MRCP."

Discovery subsequently concluded and no supplement evidence was given as to damages and no evidence as to damages was presented in opposition to Plaintiff's motion for summary judgment. Appellant's, in their argument, elude to the fact that Plaintiff received storage fees for the storage of railcars along and within its' railroad system between Meridian and Waynesboro, Mississippi, but offered no evidence as to what

damages were related to the Defendants' private rail spur in Quitman. Accordingly, the Defendants failed to establish the essential elements of conversion and failed to establish damages.

II. THE TRIAL COURT PROPERLY DISMISSED COUNT 8, TRESPASS, AND/OR CONTINUING TRESPASS, FOR THE DEFENDANTS/APPELLANTS FAILURE TO ESTABLISH ANY FACTS THAT WOULD SUPPORT THE ESSENTIAL ELEMENTS OF COUNT 8, TRESPASS, INCLUDING DAMAGES.

Count 8 of the Counter-Claim alleges that the Plaintiff is liable to the Defendants for willful, wanton, and gross trespass causing substantial damage to Rega. Again, the Defendants were asked to provide the facts that support their allegations contained in Count 8. The response to Interrogatory #10 was as follows:

"Please see response to Interrogatory #5". **(App R.E. 3)**

Further, Plaintiff, in Interrogatory #13, requested the Defendants to itemize the damages incurred or suffered by Richard Reeves or Rega as a result of each alleged Count. The response to the Defendants to Interrogatory #13 was as follows:

> "Response to Interrogatory #13: This interrogatory will be supplemented at the close of discovery and in accord with MRCP".

The Defendants never supplemented their interrogatory nor did they provide any evidence of damages in response to Plaintiff's Motion for Summary Judgment.

The uncontradicted facts are that the Plaintiff began using the sidetrack in question for the benefit of and with the permission of Griffco Plastics, a prior business occupant. The railroad continued to utilize the sidetrack without objection from Clarke County,

Mississippi, and even performed maintenance and improvements to the sidetrack during its occasional use. Following the sale of the property to Rega in 2006, no notice was given to the Plaintiff that the ownership of the track had changed and no notice or objection was given by Rega or Reeves to the Plaintiff to the use of the sidetrack. Plaintiff continued to use the sidetrack on occasion in accordance with usual and customary practices. **(R.E. 41)** No counter-affidavit was offered by the Defendants to refute the lack of notice or objection, nor to refute the usual and customary practice of utilizing commercial sidetracks. Under Mississippi law, a verbal license by the owner of property is a valid defense for the action of trespass. *Hicks vs. Mississippi Lumber Company, 48 So.2d 624, 625 (Miss. 1909).* The facts are uncontradicted that Plaintiff had verbal permission from Griffco Plastics and no objection from Clarke County, Mississippi, concerning the occasional use of the track. Defendants made no objection to the use of the track for over twenty (20) months. Having failed to raise any objection as to the use of the side track for over twenty (20) months, Defendants/Appellants were estopped and/or waived their right to assert any claim for damages for said period of time. As stated in *David M. Cox, Inc. vs. Pitts, 29 So.3d 795, 802 ¶16 (Miss. 2009):*

> "If the owner of land with full knowledge, or with sufficient notice or means of knowledge, of his rights and of all the material facts, knowingly, though passively, looks on while another person expends money on the land under an erroneous opinion of title, it would be an injustice to permit the owner to exercise his legal rights against such other person. The owner is bound by the doctrine of equitable estoppel"

Further, Defendants/Appellants failed to establish any facts that prove damages, actual or nominal, and therefore the Court did not err in dismissing Count 8.

III. THE TRIAL COURT DID NOT ERR IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT 10, UNJUST ENRICHMENT.

Defendants/Appellants argue that Plaintiff has a duty to pay storage fees based on a promise, which is implied in law, that one will pay a person what he is entitled to according to equity and good conscious; therefore, Plaintiff is liable to Rega for unjust enrichment because it used Rega's sidetrack. Unjust enrichment is an equitable claim based upon the premise that a person should not be allowed to enrich himself unjustly at the expense of another. *1704 21st Avenue Limited vs. City of Gulfport, 988 So.2d 412, 416 (¶10) (Miss. Ct. App. 2008)* See also *Union National Life Insurance Company vs. Crosby, 870 So.2d 1175, 1180 (¶14) (Miss. 2004).* To recover damages under the theory of "unjust enrichment", the claimant must show "there is no legal contract but the person sought to be charged is in possession of money or property which in good conscious and justice, he should not retain, but should deliver to another." *Johnston vs. Palmer, 963 So.2d 586, 596 (Miss. Ct. App., 2007) citing Hans vs. Hans, 482 So.2d 1117, 1122 (Miss. 1986).*

Rega failed to demonstrate that Plaintiff benefited from the use of the spur *at the expense* of the Defendant. At no time were the Defendants deprived of the use of the spur and, in fact, during the period of time when Plaintiff occasionally used the spur it maintained the spur in good condition. Defendants alleged to have suffered financial

damages as a result of Plaintiffs use of the sidetrack, yet they failed to object and put the Plaintiff on notice that it was not authorized to use the sidetrack for nearly twenty (20) months. Unjust enrichment is an equitable remedy and therefore should be guided by the great maxims of equity. One of these maxims is "equity pays the vigilant and not those who slumber on their rights" and a second maxim being "he who seeks equity must do equity". *Griffith, Mississippi Chancery Court Practice, 2nd Edition, 1950, pp. 43, 45.* Moreover, the Defendants/Appellants having failed to present any evidence to the Court as to damages are not entitled to relief for unjust enrichment.

CONCLUSION

The Defendants filed a Counter-Claim consisting of ten (10) separate counts, and when asked to furnish facts that support each count, Defendants were unable to establish any facts that would prove the essential elements of each count, including the counts of conversion, trespass, and unjust enrichment. Further, when asked in Interrogatory #13 to itemize the damages incurred or suffered as a result of those acts alleged in each count, Defendants responded as follows:

> "Answer: This interrogatory will be supplemented at the close of discover and in accord with MRCP."

Defendants never supplemented their answer as to damages nor did the Defendants furnish any evidence in opposition to the Motion for Summary Judgment to establish any damages. **(R.E. 54)** In *Grisham vs. John Q. Long VFW Post #4057, Inc.,*

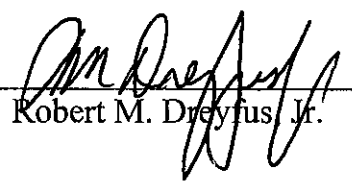
supra., the Court, citing *Galloway, et al vs. Travelers Insurance Company, 515 So.2d 678 (Miss. 1987),* quoted as follows:

> "In our view, the plain language of rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to the parties case, and on which that party will bear the burden of proof at trial . In such a situation there can be 'no genuine issue as to any material fact', since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."

In *Kuiper v. Tarnabine, 20 So.3d 658, 660(¶13) (Miss. 2009),* this court reversed the trial court's denial of the Defendant's Motion for Summary Judgment because the Plaintiff had failed to provide any evidence, expert or otherwise, for response to the Defendant's Motion for Summary Judgment. The Plaintiff in *Kuiper, supra*, just as the Defendant's in this case, made no response to the Motion for Summary Judgment.

The Defendants/Appellants failed to establish the essential elements of conversion, trespass, and unjust enrichment and failed to make a showing sufficient to establish damages of any kind, nominal or actual, and accordingly, the trial court's Summary Judgment should be affirmed.

Respectfully Submitted,
Meridian Southern Railway, LLC, Appellee

By: 
Robert M. Dreyfus, Jr.

CERTIFICATE OF SERVICE

I Robert M. Dreyfus, Jr., do hereby certify that I have on this date, served a true and correct copy of the foregoing ***Brief of the Appellee***, via United States Mail, postage pre-paid, to the following counsel of record for the Appellant at his usual and customary mailing address:

Honorable Eric Tiebauer
Attorney at Law
P.O. Box 1421
Waynesboro, MS 39367

Hon. Robert W. Bailey
Clarke County Circuit Court Judge
P.O. Box 86
Meridian, MS 39302

So certified on this the 20th day of August, 2010.

ROBERT M. DREYFUS, JR.
Attorney for Appellee

Prepared by:

Robert M. Dreyfus, Jr.
MSBN: [redacted]
Robert M. Dreyfus, Jr., PLLC
2212 Ninth Street
P.O. Box 5847
Meridian, MS 39302-5847
601-553-8315
File No. 3900