SUPREME COURT OF MISSISSIPPI
CASE NO.: 2010-TS-00495

PEARSON'S FIREWORKS, INC. **APPELLANT**

VS.

CITY OF HATTIESBURG **APPELLEE**

REPLY BRIEF OF THE APPELLANT

APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT OF LAMAR COUNTY

ORAL ARGUMENT REQUESTED

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STATEMENT OF ORAL ARGUMENT

Pearson's predicted to the Court in its opening brief that it would request oral argument. Having read the response of City of Hattiesburg, Pearson's feels more than ever that oral argument would be helpful to the Court. The undersigned counsel for Pearson's feels that oral argument generally is of assistance to the Court in every appeal, and this case is no exception.

INTRODUCTION

Pearson's Fireworks does not feel that all of the argument made by City of Hattiesburg in the Brief of Appellee needs further discussion. In particular, the issue raised by Pearson's as issue number 3, dealing with the "grandfather" provision of Hattiesburg's zoning code and the pre-existing use doctrine, have both been thoroughly briefed, and the competing contentions of each side can be seen in Pearson's initial brief and the brief of the City. However, the other two issues, the procedural impropriety of granting summary judgment without a written motion, and the failure of the trial court to address Pearson's regulatory takings claim, each warrant a brief reply.

ARGUMENT

I. Granting summary judgment without a written motion.

"The City concedes that it never filed a written motion for summary judgment." (Brief of the Appellee, P. 4). Hattiesburg, however, persists in arguing that no written motion was necessary in this case, and it cites a recent decision of the Court of Appeals, *Robison v. Enterprise Leasing Company-South Cent., Inc., 2010 WL 2816649 (Miss. App. 2010)* in support of this proposition.

To the contrary, the Rules of Civil Procedure do not allow summary judgments to be granted in the absence of a written motion, and *Robison v. Enterprise Leasing* is not even remotely similar to the case at hand.

Hattiesburg contends that its attorney's letter of December 10, 2009 (RE 3, R. 107), and conversations in a telephonic conference call with the Court are the functional equivalent of a written motion for summary judgment.

There is no question that the City's attorney requested the Court in the December 10, 2009, letter to "treat the pleadings and filings in this cause as mutual motions for summary judgment. . . ." There is also little doubt that this point was discussed in a telephonic conference call between counsel and the Court. Beyond this, memories vary greatly. Counsel for Pearson categorically denies they ever agreed that "the pleadings and filings" could be treated as a motion for summary judgment and never realized Pearson's was expected to defend against statements in the letter.

The Rules of Civil Procedure, if followed, would obviate any misunderstandings such as might have occurred in this case. M.R.C.P. 7(b)(1) is clear and unequivocal: motions "shall be made in writing." Rule 6(d) requires that substantive motions be accompanied by a notice of hearing, and Rule 56(c), the summary judgment rule, requires that "the motion shall be served at least ten days before the time fixed for the hearing." The Rules of Civil Procedure simply do not allow for a important substantive issues to be decided based upon a letter and comments made off the record in an informal telephonic conference between the trial judge and counsel.

The issue of Hattiesburg's right to close Pearson's Fireworks business was clearly addressed in Pearson's motion for summary judgment that the Court ruled upon, and it could perhaps be argued that if the Court ruled against Pearson's on this issue, it would possibly follow

that the City might be entitled to summary judgment upholding the validity of its anti-fireworks ordinance.

However, the motion for summary judgment the City apparently thinks that it made in this case must have encompassed more than simply a ruling upon the validity of the Hattiesburg ordinance. The Court's judgment goes further and actually dismisses Pearson's claim for damages for the regulatory taking of its business, and Pearson's was never given any opportunity at all to defend or present any arguments concerning this aspect of its complaint. Had there been a motion for summary judgment filed by the City, Pearson's would have offered evidence against it. Since there was never any such motion filed by the City, however, the effect of the ruling is that Pearson's case has been totally dismissed, even though it has never had a chance to present evidence in support of the issues raised in Count II of its Complaint.

Robison v. Enterprise Leasing Company is not at all like this case. In that case there was a written motion, a written response, and a rebuttal brief. There was actually a hearing and numerous exhibits and other documentary information presented to the trial court. Even though the motion was technically designated as a motion to dismiss, it was treated as a motion for summary judgment by both sides. Here there is no motion, no notice, no exhibits, no documentary evidence of any kind. *Robison v. Enterprise Leasing Company* simply has nothing to do with the issue before the Court on this appeal.

Due to the total failure of City of Hattiesburg to file a written motion for summary judgment, plus a notice and supporting documents, the judgment below must be reversed.

II. The regulatory takings issue.

The City of Hattiesburg has only one defense to this point, and that is that the land upon which Pearson's business is located can still be used for a variety of purposes and therefore has not been "taken."

This totally misses the point. Pearson's property interest is not fee simple title to the land in question, but rather a long-term leasehold. Leasehold interests are property just the same as fee simple absolute title, see *Miss. State Highway Commission v. Central Land & Rental Corp., 239 S. 3d 335 (Miss. 1970)*, holding that where a leasehold is taken by government action, the lessee's damages are the present value of the unexpired lease less rents due. Pearson's lease from MGM Partnership provides that it may not be used for any purpose except for selling fireworks. Apparently this provision was inserted into the lease because MGM did not want any competing retail businesses operating on its property and wanted to limit Pearson's operations to the few weeks each year when fireworks were sold. In any event, once Pearson's fireworks business is closed, it will have no more use for its leasehold property. Its property will thus been completely taken if the Hattiesburg anti-fireworks ordinance is enforced against Pearson's. In the words of the Supreme Court in *Lucas v. South Carolina Coastal Counsel, 505 U.S. 1004; 112 S. Ct. 2886 (1992)*, Pearson's has lost "all economically beneficial use" of its leasehold interest. Hattiesburg's argument, if adopted by the Court, would require a ruling by this Court that a long term leasehold interest is not a property interest protected by the United States Constitution, a holding that would appear to be diametrically opposed to the United States Supreme Court's decision in *Lucas* and the other cases cited in the brief of the appellant.

Even if this Court upholds enforcement of Hattiesburg's anti-fireworks ordinance and closes Pearson's business, nonetheless the case must be reversed and remanded for proceedings on Pearson's claim for damages.

Respectfully submitted this the 22 day of November, 2010.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have this day forwarded via United States Mail, postage prepaid, the original and three copies of the Brief of Appellant, along with an electronic disk of same for filing to:

Ms. Kathy Gillis, Clerk
Mississippi Supreme Court
P.O. Box 249
Jackson, MS 39205

I have caused to be mailed by Unites States Mail, postage prepaid, a copy of the above referenced Brief of Appellant to:

Charles E. Lawrence, Jr.
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Honorable Prentiss G. Harrell
Lamar County Circuit Court Judge
P.O. Box 488
Purvis, MS 39475

This the 22 day of November, 2010.

LAWRENCE C. GUNN, JR