UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: CLYDE CHRISTOPHER, JR. CASE NO. 02-10782

C. S. CHRISTOPHER, JR. PLAINTIFF

VERSUS ADV. PROC. NO. 02-1082

F. E. MILLS ENTERPRISES, INC.,
d/b/a BAY SPRINGS MARINA DEFENDANT

OPINION

On consideration before the court is a motion for summary judgment filed by F.E. Mills Enterprises, Inc., d/b/a Bay Springs Marina (hereinafter "defendant" or "marina"); response thereto having been filed by C.S. Christopher, Jr., (hereinafter "plaintiff" or "Christopher"); and the court, having considered same, hereby finds as follows, to-wit:

I.

The court has jurisdiction of the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(O).

II.

On July 6, 1999, Christopher filed a cause of action for damages against the marina and Christopher Mills, individually, in the Circuit Court of Prentiss County, Mississippi. On February 11, 2002, Christopher filed a voluntary Chapter 7 petition for relief in the U.S. Bankruptcy Court for the Northern District of Mississippi. Subsequently, the state court action was removed to the

bankruptcy court. A motion to dismiss Christopher Mills, the individual defendant, was sustained by this court on August 21, 2002. On that same date, an order was entered granting in part and denying in part the marina's motion to dismiss the adversary proceeding. The following claims were not dismissed and remained viable:

(a) The plaintiff's claim that certain provisions of the lease in question were unconscionable.

(b) The plaintiff's claim for constructive eviction.

(c) The plaintiff's claim that the marina violated state law and was guilty of unfair trade practices by allegedly overcharging on a repair bill for fire damages.

Thereafter, the marina filed a motion for summary judgment as to the three remaining claims, and the plaintiff timely responded.

III.

Summary judgment is properly granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056; Uniform Local Bankruptcy Rule 18. The court must examine each issue in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Phillips v. OKC Corp., 812 F.2d 265 (5th Cir. 1987); Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). The moving party must demonstrate to the court the basis on which it believes that summary judgment is justified. The nonmoving party must then show that a genuine issue of material fact arises as to that issue. Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.29 265 (1986); Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th

Cir. 1987), Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). An issue is genuine if "there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party." Phillips, 812 F.2d at 273. A fact is material if it would "affect the outcome of the lawsuit under the governing substantive law." Phillips, 812 F.2d at 272.

Local Rule 18 of the Uniform Local Rules of the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi provides procedural guidelines for the movant and respondent when a motion for summary judgment is filed by the party who does not bear the burden of persuasion on the issue upon which summary judgment is sought. For reference purposes, Part II of Local Rule 18 is set forth as follows:

> If Movant Does Not Have The Burden of Persuasion
> On The Issue Upon Which Summary Judgment Is Sought
>
> A. Movant
>
> 1. List the material facts that the movant contends constitute the non-moving party's prima facie case.
>
> 2. Designate which facts in the non-moving party's prima facie case the movant contends do not exist and (a) cite and attach the factual authorities the movant contends establish the non-existence of each designated fact and/or (b) assert that there is no evidence to support the existence of the designated fact. (footnote omitted)
>
> B. Respondent
>
> For each material fact designated by the movant as being part of the respondent's prima facie case and claimed by the movant that there is evidence of its non-existence and/or no evidence of its existence, the respondent should either (a) cite and attach any factual authorities supporting the existence of the fact or (b) deny that the respondent has the burden of persuasion to establish this fact as part of the respondent's prima facie case.

IV.

Having reviewed the pleadings filed in the original Prentiss County cause of action, as well as, the motion for summary judgment, the response thereto, and the accompanying exhibits, the court finds that the following material facts are undisputed.

1. At all times relevant to this action, the defendant leased, maintained, and operated a marina known as "Bay Springs Marina," located on Bay Springs Lake in Prentiss County, Mississippi. (Marina's answer to Paragraph 3 of the complaint.)

2. Commencing in March of 1994, the plaintiff executed a lease agreement with the marina for a boat slip. Additional leases, each with a term of one year, were executed between the marina and the plaintiff in March of 1995, March of 1996, and March of 1997. (Marina's answer to Paragraph 5 of the complaint.)

3. On or about December 1, 1997, the marina notified the plaintiff by letter that the lease would not be renewed upon its expiration on March 16, 1998. (Marina's answer to Paragraph 6 of the complaint.)

4. The defendant admits that the plaintiff caused a hole to be burned in a dock owned by the marina, after charcoal and/or other items fell from a smoker grill, owned and utilized by the plaintiff. The defendant admits that the marina had necessary repairs made to the dock which were charged to the plaintiff. (Marina's answer to Paragraph 7 of the complaint.)

5. The original repair bill for damages to the dock was $149.81. A second repair bill, in the amount of $184.00, was subsequently mailed to the plaintiff which included additional expenses which were inadvertently omitted from the prior bill. On or about October 9, 1997, the plaintiff forwarded to the marina the sum of $90.48, in partial payment of the repair costs. (Marina's response to Paragraph 8 of the complaint and excerpt from the deposition of Clyde S. Christopher, Jr., attached to the motion for summary judgment.)

6. Attached as Exhibit "A" to the original Prentiss County complaint is a copy of the lease agreement entered into between the parties in March, 1997. An identical copy of the lease is attached as Exhibit "D" to the marina's motion for summary judgment. The lease contains the following language at Paragraph 6a: "The vessel shall not be offered for sale by owner while it is on lessor's premises. No "FOR SALE" signs or other signs shall be placed on the vessel on lessor's premises, nor are prospective buyers allowed to use lessor's facilities for visitation or demonstration purposes unless a valid contract to broker has been executed with F.E. Mills Enterprises, Inc., or written permission by

> lessor." Because both parties submitted the identical document with their pleadings, the court finds that there is no dispute regarding the fact that the lease prohibits the plaintiff's vessel from being offered for sale at the marina property unless the marina either grants permission for the offering or participates as a broker.

V.

In its motion for summary judgment, the marina asserts that facts do not exist to support a prima facie case on each of the plaintiff's remaining claims. These claims are addressed separately as follows:

Unconscionability of the Lease

The plaintiff alleges that Paragraph 6a of the lease, which prohibits offering a boat for sale at the marina without first receiving the marina's permission or allowing the marina to participate as the broker, is unconscionable. In American Heritage Life Insurance Company v. Beasley, 174 F.Supp. 2d 450, aff'd. American Heritage Life v. Beasley, 2002 WL 1220408 (5th Cir., May 22, 2002), Chief Judge Glen Davidson was called upon to determine the unconscionability of an arbitration clause contained in a credit-life insurance contract. He made the following observations:

> Under Mississippi law, a court may refuse to enforce a contract, or any clause of a contract, that is found to have been unconscionable when made. See Miss. Code Ann. §75-2-302. Mississippi law defines an unconscionable contract as "one such as no man in his senses and not under a delusion would make on the one hand, and no honest and fair man would accept on the other." Entergy Mississippi, Inc. v Burdette Gin Co., 726 So.2d 1202, 1207 (Miss. 1998). Under Mississippi law, there are two types of unconscionability; procedural and substantive. York v. Georgia-Pacific Corp., 585 F.Supp. 1265, 1278 (N.D. Miss. 1984). A plaintiff may establish procedural unconscionability if she proves "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and

> inquire about the contract terms." York, 585 F.Supp. at 1278. A plaintiff may prove substantive unconscionability if she proves that the terms of the arbitration clause [i.e. the contract] were oppressive.

Id. at 456.

Following a review of the Prentiss County complaint and the subsequent pleadings filed in this court, the court could find no indication that the plaintiff is alleging procedural unconscionability. Accordingly, the court must presume that the plaintiff is alleging substantive unconscionability which requires proof that the contract term in question is "oppressive." In its motion for summary judgment, the marina asserts that "[N]othing in the lease prohibits plaintiff from taking his boat elsewhere for the purpose of sale or otherwise offering it outside the confines of the marina. Nothing about this provision is oppressive or one-sided, and is therefore not unconscionable." (Defendant's motion for summary judgment, Paragraph 7 (b).)

Since there are no material facts in dispute regarding this claim, the court finds, as a matter of law, that this provision is not sufficiently egregious or oppressive to rise to the level of unconscionability.

Constructive Eviction

In his complaint, the plaintiff alleges that the marina constructively evicted him from his boat slip when it sent the December, 1997, letter, which stated that the lease would not be renewed. The test for constructive eviction in Mississippi is set forth in the case of Perkins v. Blackledge, 285 So. 2d 761 (Miss. 1973) which provides as follows:

> "An *intentional act or omission* of the landlord, or by those acting under his authority or with his permission, that *permanently deprives* the tenant without his consent of the use and beneficial enjoyment of the demised premises or any substantial part thereof, in consequence of which he abandons the premises, constitutes a constructive eviction. However, not every deprivation of the beneficial enjoyment of the premises necessarily

> amounts to a constructive eviction, and *it is necessary that the landlord, by some intentional act or omission, materially and permanently interfere* with the beneficial enjoyment or use of the demised premises or a material part thereof, and that, *in consequence of such act or omission, the tenant abandoned the premises within a reasonable* time, as discussed infra §457.
>
> "Furthermore, there must be an injurious interference by the landlord, depriving the tenant of the beneficial enjoyment of the premises, or materially impairing such beneficial enjoyment. In other words, the landlord's interference with the tenant's use and enjoyment must be substantial and effectual, material, fundamental, permanent, and intentional...
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> ***
>
> "...The act or omission complained of must be that of the landlord, and must be one done by his procurement, or one for which he is responsible, and not merely that of a third person acting without his authority or permission, ..."

Perkins v. Blackledge, 285 So.2d 761, 764 (Miss. 1973) (quoting 52 C.J.S. Landlord & Tenant §455 (1968)) (emphasis in original).

As emphasized in the above quotation, constructive eviction occurs only when the landlord, by some intentional act or omission, materially and permanently interferes with the lessor's enjoyment or use of the premises. In support of its motion for summary judgment, the marina provided excerpts from the plaintiff's deposition testimony to show that no interference occurred with the beneficial enjoyment of the leased premises, to-wit:

> Q. (Mr. Dillard) Now, going back to the complaint, it states that you were constructively evicted. Now, did you ever use the marina or your boat from December 1, 1997 up through the end of that lease on March 16, 1998?
>
> A. Mr. Dillard, after the 4th of July, I used the boat very little.
>
> Q. Okay. What was the reason for that?
>
> A. Just - just didn't use it.

Q. Okay. Would you say that receiving this letter in December of 1997, did that prevent you from going to the marina if you chose to do so?

A. It did not stop me from going to the marina, no.

Q. Okay. And you were still paying rent on that slip from December through March?

A. I paid it every year just like I was supposed to, yes, sir.

Q. Okay. And you had every right to go to that slip as long as you were paying rent on it, correct?

A. I had every right to go to it, that's right.

Q. Okay. And, again, just my question is, did receiving that letter in any way stop you or hinder you from going up there and getting your boat?

A. It sure didn't welcome me very much, but it did not stop me or hinder me. It did not stop me.

See Exhibit "E" to motion for summary judgment, p. 36-37.

In addition, the marina alleges in its memorandum brief that the plaintiff's boat remained docked at the marina for the duration of the lease in question. The marina contends that the second prong of the constructive eviction requirement, i.e., that the aggrieved party was forced to abandon the premises, simply did not occur. The plaintiff was permitted to utilize the slip until the term of his lease expired. Therefore, the court must conclude as a matter of law that no constructive eviction occurred.

Unfair Trade Practices

After repairing the fire damage to the dock, the marina sent the plaintiff a bill for $184.00. Paragraph 11 of the complaint states that the defendant violated state law and is guilty of unfair trade practices by overcharging on the repair bill. In Paragraph 9 of the motion for summary judgment, the marina states that the plaintiff failed to offer any facts or legal authority

which would demonstrate that a state law was violated or that the marina was guilty of unfair trade practices. In its brief, the marina states that it could find no Mississippi legal authority which imposes price restrictions on goods or services except Miss. Code Ann. §75-24-25 which applies only during a "state of emergency." In addition, the marina points out that the plaintiff paid the sum of $90.48 on the total bill, and that it never made demand for the unpaid balance. The plaintiff indicated that, in his opinion, the $90.48 that he paid represented a fair price for the work performed. (Deposition testimony of C.S. Christopher, Jr., Exhibit "E" to motion for summary judgment.)

Other than being unhappy with the amount of the repair bill, the plaintiff has cited no state or federal law that was or could have been violated by the marina in calculating the damage amount.

VI.

In responding to the marina's assertion that facts do not exist to support a prima facie case on issues of unconscionability, constructive eviction, and unfair trade practices, the plaintiff denies the allegations made by the marina and states, without specificity, that genuine issues of material fact remain in dispute as to each claim. These general denials and assertions in the response to the motion for summary judgment are not in keeping with Local Rule 18 which requires the respondent to either cite factual authorities or events supporting the existence of factual issues or to deny that the respondent has the burden of persuasion on the particular fact. Local Rule 18 was drafted in keeping with the dictates of Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) and Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The Fifth Circuit Court of Appeals has

recently had occasion to apply both cases when reviewing the granting of a motion for summary judgment filed by a defendant who did not have the burden of persuasion on the issue upon which summary judgment was sought. Judge Smith, writing for the court, found as follows:

> Once the moving party has initially shown "that there is an absence of evidence to support the non-moving party's cause," Celotex Corp v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the non-movant must come forward with "specific facts" showing a genuine factual issue for trial. Fed. R. Civ. P. 56(e); Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Conclusional allegations and denials, speculation, and probable inferences, unsubstantiated assertions and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial. SEC v. Recile, 10 F.3d 1093, 1097, 5th Cir. 1993.

TIG Insurance Co. v. Sedgwick James of Washington, 276 F.3d 754, 759 (5th Cir., 2002). (See also, Little v. Liquid Air Corp., 37 F.3d 1069, 1075, 5th Cir. 1994) (Non-movant cannot avoid summary judgment by merely making "conclusory allegations" or "unsubstantiated assertions."))

In determining whether a fact issue has been sufficiently created to preclude summary judgment, the court must draw inferences in a light most favorable to the non-moving party. Terrebonne Parish School Board v. Columbia Gulf Transmission Co., 290 F.3d 303 (5th Cir. 2002). However, if a party fails to make a showing sufficient to establish the existence of an element essential to the party's case when that party bears the burden of persuasion, "there ceases to be a genuine issue as to any material fact, such that the moving party is entitled to judgment as a matter of law." Texaco v. Duhe, 274 F.3d 911, 915 (5th Cir., 2001).

The court finds that the plaintiff has failed to identify "specific facts" that would indicate that there are remaining material disputed issues to be tried. As such, the marina is entitled to judgment as a matter of law on the plaintiff's three remaining claims.

VII.

Based on the foregoing analysis the court finds that the following claims should be dismissed with prejudice: (a) plaintiff's claim that certain provisions of the lease in question were unconscionable, (b) plaintiff's claim for constructive eviction, and (c) plaintiff's claim that defendants have violated state law and are guilty of unfair trade practices.

An order will be entered accordingly.

This the 27th day of May, 2003.

___/s/_____
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE