IN THE CIRCUIT COURT OF COUNTY, MISSISSIPPI

APPELLANT

NO.

APPELLEE

**RESPONSE TO 'S MOTION
FOR PARTIAL SUMMARY JUDGMENT/REPLY IN SUPPORT OF
'S SUMMARY JUDGMENT MOTION**

(hereinafter " ") states its Response to 's Motion for Partial Summary Judgment, and its Reply in support of its Summary Judgment Motion, as following:

1. In County Circuit Cause No. , sued and recovered a judgment against for the rent in arrears owed to the date of , , when the lease term expired. In the instant lawsuit, County Circuit Cause No. , seeks a judgment against for the double rent penalty owed by as a trespasser or hold-over tenant from , to , . These two lawsuits involve two distinct causes of action, the first based on the lease contract and the instant case on the hold-over tenant Statute, and the lawsuits involve two Separate, distinct periods of time.

Separate lawsuits for distinct causes of action involving distinct periods of time have long been allowed by the courts. 49 Am.Jur.2d, Landlord and Tenant, § 633 at p. 606 ("Accordingly, under the theory that a holding over at the expiration of a definite term ... constitutes a new term separate and distinct from those that preceded it, claims for unpaid rent for each such term are separate and distinct causes of action, which may be made the subjects of independent actions for the recovery of rent for each term ....'1); Even though the above cited authorities specifically reject 's contention, nevertheless contends that the doctrines of res judicata or collateral estoppel required seek recovery of the double statute holdover penalty when it commenced the first lawsuit for recovery of rent in arrears due during the term of the lease. The case of Dunaway v. W. H. Hopper & Assoc., Inc., 422 So.2d 749 (Miss. 1982), contains an exhaustive discussion of res judicata and collateral estoppel. The opinion states with respect to res judicata.

Generally four identities must be present before the doctrine of res judicata would be applicable: (1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom the claim is made. If these four identities are present, the parties will be prevented from relitigating all issues tried in the prior lawsuit, as well as all matters, which should have been litigated and decided in the prior suit. In other words, "the doctrine of res judicata bars litigation in the second lawsuit on the same cause of action 'of all grounds for or defenses to, recovery that were available to the parties (in the first action, regardless of whether they were asserted or determined in the prior proceeding.'"

Id. at 751.

Obviously, 's argument that res judicata bars 's instant lawsuit is erroneous, because there is no "identity of the cause of action", since the cause of action in the first lawsuit was based on the lease contract remedy for past due rent owed during the term of the lease, and the second lawsuit is based on a statutory remedy permitted after the lease term had expired.

The Dunaway opinion states with respect to collateral estoppel .

When collateral estoppel is applicable, the parties will be precluded from relitigating a specific issue actually litigated, determined and … former , since the first lawsuit simply decided that was jointly and severally liable for the entire amount of the past due rent owed during the term of the lease.

2. also argues that prejudgment interest should not be awarded against him/her, because the principal sum owed to the was not liquidated at the time this lawsuit was filed, apparently overlooking the fact that the principal sum was not liquidated at that time simply because was still violating the law and refusing to vacate the office space after the expiration of the lease term.

Under Mississippi law, a debtor who is liable but does not know the amount he/she owes, is not charged interest for his/her failure to pay an unknown sum. However, where a debtor knows precisely what he/she is to pay and when he/she is to pay it, prejudgment interest as damages is allowed as a matter of right. Therefore, prejudgment interest can be awarded against a debtor for liquidated monthly amounts due upon specific dates, even though the debtor may be continuing to breach ongoing obligations even through the date of trial. Jim Murphree & Assoc. Inc. v. Lebleu, 511 So.2d 886, 895 (Miss. 1987). became obligated to pay $ double rent penalty to on the first date of each month in which he/she failed or refused to vacate the office premises.

also argues that prejudgment interest should not be awarded, claiming that the statutory penalty is the exclusive remedy, citing Tepper Bros. V. Buttross, 178 Miss. 659, 174 So. 556 (1937). That case merely held that the landlord could not recover the double statute penalty in a first suit, and then subsequently in a second suit, recover additional rent, punitive damages, and actual damages for the same period of time. The case makes no mention of the recovery of prejudgment interest at all, particularly when the amount of the double rent penalty is neither frivolous nor in bad faith. In response to this argument, merely asks the Court to note that none of the legal issues raised by 's attorney have any merit whatsoever and should be scrutinized pursuant to Rule 11, Miss.R.Civ.P., and the Mississippi Litigation Accountability Act, Miss. Code Ann. Sec. 11-55-1, et seq.

3. Finally, argues that the one year statute of limitations for lawsuits seeking the recovery of penalties should bar 's present lawsuit, arguing that the 's lease of office spaces to is a proprietary as opposed to a governmental function. In support of this argument, cites cases in which the Supreme Court has held that the operation of a garbage dump or the hauling of trash is a proprietary function, apparently being of the belief that the recruitment of by the provision of rental office space, is a comparable function.

Nevertheless, 's arguments have been rejected in City of Cleveland v. Leech, 227 Miss. ~ 86 So.2d 363 (1956), where our Court stated that: "It is a well recognized principle that the protection of the public health is one of the first duties of government..." and held that the operation of hospitals by a municipality is a governmental function. See, also, Enroth V. Memorial Hospital at Gulfport, 566 So.2d 202 (Miss. 1990) ("public operation of a hospital is a governmental rather than a proprietary function ....").

also contends that the lease of office space to should be considered a proprietary function, because also leased at one time a separate office space to a known as . purchased an office building in which the was already leasing one of the offices at the time of the purchase. See Supplemental Affidavit of . This office space was eventually leased by and another office space to a , and the earlier leased space to the has absolutely no relevance to the dispute between and .

also argues that since the state and its subdivisions have been stripped of common law sovereign immunity, that they should also be stripped of immunity from statutes of limitations applied to private litigants. has simply failed to note that Miss. Code Ann. 515-1-51 (Supp. 1991) has not been abolished, and that statute provides that no statute of limitations is available to bar a claim made by a public entity such as a hospital. See also, Enroth v. Memorial Hospital at Gulfport, cited above.

4. also alleges that has withdrawn its claim for attorneys fees and prejudgment interest prior to , . To the contrary, has merely filed for summary judgment on those theories on which no jury is necessary to decide any material issues of fact, and has not relinquished any of its alternative theories of recovery. Further, a claim for attorneys fees may be pursued after judgment is granted, on the basis of the Litigation Accountability Act and Rule 11, Miss.R.Civ.P.

5. In the prior lawsuit in which was awarded a judgment against for the rent in arrears during the lease term, the County Circuit Court specifically held that was jointly and severally liable for the entire past due rent and that the monthly rental obligation was $ per month. The doctrines of res judicata and collateral estoppel preclude from relitigating those issues already decided adversely to him/her. See Dunaway v. W. H. Hopper & Assoc., Inc., cited above. 's attempts to argue that he/she is not obligated to pay the full $ monthly rent, or that he/she does not have joint and several liability, or that the hospital acquiesced in reducing the rent (which is reduction of the monthly rental amount, but the affidavit of bookkeeper and his/her bookkeeping statement show that steadfastly billed for each deficiency owed, and in fact, sued and obtained a judgment for the full rental amounts owed. Further, the , statement for $ was sent to and as a result of a clerical error, and was a statement for the rent in arrears during the lease term, and not for $ owed by as a hold over tenant. See Supplemental Affidavit of .

WHEREFORE, PREMISES CONSIDERED, moves the court to grant summary judgment for the in the principal sum of $, plus prejudgment interest at % per annum, court costs, and interest on the judgment at the highest rate allowed by law, and to deny 's motion for partial summary judgment.

THIS the day of , 20 .

Respectfully submitted,

_____

Attorney for

Of Counsel:

Telephone:
MSB #
Attorney for