

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION

LEAF RIVER ENERGY CENTER, LLC

PLAINTIFF/

COUNTER DEFENDANT

VS.

CIVIL ACTION NO. 3:10-cv-490-WHB-LRA

JAMES A FORD and BARBARA ANN FORD

DEFENDANTS  
COUNTER PLAINTIFFS

OPINION AND ORDER

This cause is before the Court on two motions that have been filed in the above referenced civil action. Having considered the pleadings, the attachments thereto, as well as supporting and opposing authorities, the Court finds:

The Motion of Leaf River Energy Center, LLC, for partial Summary Judgment is well taken and should be granted.

The Motion of Leaf River Energy Center, LLC, to Dismiss is not well taken and should be denied.

**I. Background Facts and Procedural History**

On July 21, 2006, James and Barbara Ann Ford (collectively, the "Fords"), and Earth Station Communications, LLC ("Earth Station"), entered a Gas Storage Lease ("Lease") under which the latter was granted the exclusive right to use certain property for, *inter alia*, the underground storage of natural gas and hydrocarbon liquids. See Mot. for Summ. J. [Docket No. 22], Ex. 1 (Lease) at

¶ 3. Relevant to the dispute presently before the Court, the Lease provides:

Term and Rental. This Lease, and all rights hereunder, shall remain in force for a period of ten (10) years from the date hereof, hereinafter referred to as the Primary Term, and as long thereafter as gas is being stored, held in storage, produced or withdrawn from the Leased Premises by Lessee, its successors or assigns. It is agreed that, in the event the Lessee, or its successors and assigns, after the Primary Term should cease gas storage operations, after initiating same, for a continuous period of two (2) years, then, upon expiration of such two (2) year period of non-use, all the estate, right and privilege, leased to the Lessee shall terminate, except for any gas pipeline right-of-way still in service. Lessor shall grant Lessee a reasonable time, not less than six (6) months, in which to remove Lessee's equipment and fixtures from the Leased Premises following termination of gas storage operations.

The annual rental for the [Lease] Agreement shall be an amount equal to \$200.00 per acre, the first payment being due upon the execution of this [Lease] Agreement by Lessor, and the remaining payments being due annually thereafter on the anniversary date hereof....

Id., Ex. 1, at ¶ 2.

According to the Fords, at the time the Lease was entered, they were told that Earth Station would later increase the payments due thereunder to match any higher payments made to adjacent landowners by way of similar lease agreements. After that promise was allegedly not honored, the Fords filed a lawsuit against Earth Station, which was settled in October 2008. Pursuant to the settlement, the Fords and Earth Station executed a Ratification of the Subject Lease, which was duly recorded. Earth Station later assigned the Lease to New Home Storage, LLC, which,

in turn, assigned the Lease to Leaf River Energy Center, LLC ("Leaf River"), on October 9, 2009.

Under the express terms of the Lease, the annual rent payment is due to be paid on or before July 21 of each year during the Primary Term. On July 24, 2010, Leaf River attempted to belatedly hand-deliver the 2010 annual rent payment to the Fords. The Fords rejected the payment, and claimed the Lease had been terminated because of the untimely tender.

On September 3, 2010, Leaf River filed a Complaint in this Court against the Fords seeking a declaratory judgment that the Lease was not terminated because of the untimely tender of the 2010 annual rent payment. Leaf River also seeks a declaratory judgment as to the description of the property covered by the subject Lease. The Fords counterclaimed. Through their counterclaims, the Fords seek a declaratory judgment that the Lease was terminated based on the untimely tender the 2010 annual rent payment. The Fords also seek actual and punitive damages on claims of breach of the duty of good faith and fair dealing, fraud, and violations of the Mississippi Litigation Accountability Act, codified at Mississippi Code Annotated Section 11-55-1, *et seq.* Leaf River has now moved for summary judgment on its claim for a declaratory judgment that the Lease was not terminated because of the untimely tender of the 2010 annual rent payment, and has also moved for dismissal of the Fords' counterclaims.

### III. Discussion

#### A. Motion of Leaf River for Partial Summary Judgment

##### 1. Standard

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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." FED. R. CIV. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also, Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. Id. As to issues on which the non-moving party

has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. Id. at 323-24. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id. at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. It is improper for the district court to "resolve factual disputes by weighing conflicting evidence, ... since it is the province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is also improper where the court merely believes it unlikely that the non-moving party will prevail at trial. National Screen Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962).

## **2. Discussion**

Under the terms of the Lease, Leaf River was required to tender the 2010 annual rent payment to the Fords on or before July 21, 2010. There is no dispute that Leaf River breached the Lease by failing to tender the required payment on or before that date. In dispute, however, is the manner in which the breach should be remedied. Leaf River argues that the proper remedy is payment of

the 2010 annual rental plus any interest that accrued prior to the date on which that payment was tendered. The Fords argue that the proper remedy is termination of the Lease. Thus, the issue before the Court is whether the Lease was subject to termination based on the untimely tender of the 2010 annual rent payment.

Under Mississippi law, "terminating a contract is viewed as an extreme remedy and should be granted sparingly." Ladner v. Pigg, 919 So. 2d 100, 102 (Miss. Ct. App. 2005). As such, "termination of [a] contract is not proper absent a material breach." Id. See also UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp., Inc., 525 So. 2d 746, 756 (Miss. 1987) ("The termination of a contract is an 'extreme' remedy that should be 'sparsely granted.'") (citations omitted). A material breach under Mississippi law occurs if there "is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially defeats its purpose," or when "the breach of the contract is such that upon a reasonable construction of the contract, it is shown that the parties considered the breach as vital to the existence of the contract." UHS-Qualicare, 525 So. 2d at 756 (quoting Gulf So. Capital Corp. v. Brown, 183 So. 2d 802, 805 (Miss. 1966) and Matheney v. McClain, 161 So. 2d 516, 520 (1964), respectively).

In support of its Motion for Summary Judgment, Leaf River argues that the Lease is not subject to termination because time

was not of the essence with regard to the tendering of the 2010 annual rent payment. Relevant to this argument, Mississippi courts have held that “[u]nless a contract expressly so states, or unless there is otherwise shown to be a clear indication of intent, time is not ordinarily considered to be of the essence in the performance of a contract.” Ladner, 919 So. 2d at 102 (citing Lee v. Schneider, 822 So. 2d 311, 314 (Miss. Ct. App. 2002) and Gault v. Branton, 75 So. 2d 439, 445 (1954)). Thus, “nonpayment of rent does not operate in the absence of a provision therefor in the lease as a forfeiture of the term or confer upon the lessor the right of re-entry. But, where there is a provision in the lease for forfeiture and re-entry for nonpayment of rent, such a provision is valid and enforceable.” Clark v. Service Auto Co., 108 So. 704, 706 (Miss. 1926). Here, a plain reading of the Lease shows that it does not contain an express provision that permits termination in the event of an untimely annual rent or other payment. Additionally, the Fords have not presented any evidence, by their affidavits or otherwise, that the parties clearly intended that the Lease would terminate in the event of untimely payment.

Notwithstanding the absence of an express contractual provision or other evidence of intent, the Fords argue that a “time is of the essence” provision may be read into the Lease because it pertains to mineral interests. In support of this argument, the Fords cite Waterman v. Banks, 144 U.S. 394, 403 (1892) for the

proposition that:

[T]ime may become of the essence of a contract for the sale of property, not only by the express stipulation of the parties, but from the very nature of the property itself. This principle is peculiarly applicable where the property is of such character that it will likely undergo sudden, frequent, or great fluctuations in value. In respect to mineral property, it has been said that it requires - and of all properties, perhaps, the most requires - the parties interested in it to be vigilant and active in asserting their rights.

The Court finds Waterman and the other cases cited by the Fords under this line of authority are distinguishable.<sup>1</sup>

The Lease in this case does not pertain to the sale of mineral property but, instead, governs the rental of real property for the purpose of storing minerals. As such, the property at issue in this case - i.e. the real property that is being rented under the Lease - is not "of such character that it will likely undergo sudden, frequent, or great fluctuations in value." Under the Lease, the Fords are to be paid \$200.00 per acre for each year of the ten-year Primary Term. This amount is expressly fixed. There

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<sup>1</sup> The Fords cite Figg v. Culpit, 401 So. 2d 722, 724 (Miss. 1981), for the following: "When the excitement of the prospect of oil production enters a county and of quick riches beyond the dreams of avarice, time becomes of the essence and litigation the order of the day." The Court first finds the cited statement is not controlling because it is dicta. Second, the Court finds Figg is distinguishable because the case dealt with the sale of a royalty deed, not the lease of real property. Likewise, the Court finds Love Petroleum Co. v. Atlantic Oil Producing Co., 152 So. 829 (Miss. 1934), to be distinguishable because the evidence there showed the annual rent payment was nominal and secondary to both parties' interest in developing the land for the production and sale of gas and oil.

is no language in the Lease, and no evidence from the Fords, that the amount of the annual rent payment would be subject to change based on current market values and/or the price of the minerals to be stored on the property. As such, the Court finds the Fords have failed to show that there exists a genuine issue of material fact with regard to whether a "time is of the essence" provision should be implied into the Lease.<sup>2</sup>

Next, the Fords argue that summary judgment should not be granted because the issue of whether a material breach occurred is a question that should be decided by the jury. In support of this argument, the Fords raise three claims. First, that there exists a fact question regarding how untimely the 2010 annual rent payment was tendered.<sup>3</sup> Second, that because mineral storage operations had not yet begun on the leased property, there was nothing for Leaf

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<sup>2</sup> The Fords also cite cases from other jurisdictions in support of their argument that time is to be considered of the essence with regard to mineral leases. For example, the Fords cite to the cases of Amber Oil and Gas Co. v. Bratton, 711 S.W.2d 741 (Tex App. 1986) and Sandtana, Inc. vs. Wallin Ranch Co., 80 P.3d 1224 (Mont. 2003). Having reviewed these cases, the Court finds they are distinguishable as they deal with the consequences of failing to tender a timely payment after the primary term of a lease had expired. Here, the parties were still within the ten-year Primary Term of the Lease when the untimely tender of the annual rent payment was made.

<sup>3</sup> Leaf River claims the 2010 annual rent payment was tendered three days late, on July 24, 2010, when it was hand-delivered to the Fords but rejected. The Fords claim the attempted hand-delivery was invalid, and that the first legitimate tender occurred not earlier than - if at all - upon the filing of the subject lawsuit.

River to do under the Lease other than make timely payments and, therefore, the jury should decide whether the timely tender of rent payments constituted an essential term or was otherwise vital to the Lease. Third, that in light of the litigation that occurred between them and Earth Station, a jury should decide whether their expectation of timely rent payments was reasonable, and whether Leaf River materially breached the Lease by untimely tendering the 2010 annual rent payment.

As discussed above, however, the Court finds the Fords have failed to show, preliminarily, that there exists a genuine issue of material fact as to whether a "time is of the essence provision" should be implied into the Lease and/or whether the parties clearly intended that the Lease would terminate in the event of untimely payment. As such, the Court finds the Fords have failed to show that there exists a genuine issue of material fact to be decided by the jury with regard to whether the untimely tender constituted a material breach as there has been no showing that timeliness was a substantial part of the Lease, an essential term of the Lease, and/or vital to its existence.

The Fords' next argument is that summary judgment is improper because there is an issue of fact as to whether the Lease should be considered an option contract and, under Mississippi law, time is always of the essence with regard to such contracts. By definition, an option contract is a "contract made for

consideration to keep an offer open for [a] prescribed period" and/or "a right which acts as a continuing offer, given for consideration, to purchase or lease property at an agreed upon price and terms, within a specified time." Blacks Law Dictionary 1094 (6th ed. 1979). Here, a review of the express terms of the Lease show that it does not contain any open offer to either purchase or lease property, and it does not contain or identify a specified time in which the parties must act to either purchase or lease. Instead, under the express terms of the Lease, the subject property was leased for a ten-year period beginning from the date on which the Lease was entered. Accordingly, the Court finds the Fords have failed to show that there exists a genuine issue of material fact with regard to whether the subject Lease should be construed as an option contract.

Finally, the Fords argue that summary judgment should not be granted because equitable considerations weigh in favor of cancelling the Lease.<sup>4</sup> In support of this argument, the Fords cite the failure of Earth Station (the predecessor in title to the subject property and with which the Fords originally negotiated and

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<sup>4</sup> The Fords also argue that summary judgment should not be granted because they have not yet reviewed all of the documents obtained in discovery. The Court finds no basis for denying the motion on these grounds because (1) the Fords did not submit an affidavit as is required under Rule 56(d) of the Federal Rules of Civil Procedure to permit discovery before a motion for summary judgment is considered, and (2) the Fords have had ample time to supplement their response to the motion had they so chosen.

entered the Lease) to abide by its promise to increase the annual rental payment to match the payments made to adjacent property owners. The Fords, however, have not presented any evidence to show that the actions of Earth Station are or should be attributed to Leaf River. Accordingly, the Court finds this argument does not create a genuine issue of fact. Next, the Fords cite the actions of Leaf River in (1) untimely tendering the 2010 annual rent payment, and (2) seeking a declaratory judgment as to whether it has a right to use portions of the Fords' property under the Lease even though the Coverall Clause to that agreement was deleted following litigation between the Fords and Earth Station. The Fords, however, have not presented any authority to show that a party who breaches a contract acts inequitably by so doing, or that a party acts inequitably by seeking to have its legal rights declared in a court of law. Accordingly, the Court finds the Fords have failed to show that there exists a genuine issue of material fact with regard to whether equitable considerations would preclude the entry of summary judgment in this case and/or whether such considerations would warrant cancellation of the Lease.

For the reasons discussed above, the Court finds the Fords have failed to show that there exists a genuine issue of material fact with regard to whether a "time is of the essence" provision should be implied into the subject Lease, and have likewise failed to show that there exists a genuine issue of material fact with

regard to whether the untimely tender of the 2010 annual rent payment constituted a material breach of the Lease such that would warrant its termination. Accordingly, the Court finds that the Motion of Leaf River for Partial Summary Judgment on its claim for a declaratory judgment that the Lease was not terminated because of the untimely tender of the 2010 annual rent payment should be granted.

#### **B. Motion to Dismiss**

Leaf River has moved to dismiss the Fords' counterclaims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Under this Rule, a party may seek dismissal based on its opponent's "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Thus, a motion seeking dismissal under Rule 12(b)(6) is one that challenges the sufficiency of the plaintiff's allegations. When considering a Rule 12(b)(6) motion to dismiss, the Court must accept "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." See Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004); Jones v. Greninger, 188 F.3d 322, 324 (5th Cir. 1999). To avoid dismissal under Rule 12(b)(6), "the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" See In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570

(2007)). The "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. As such, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl., 550 U.S. at 555.

In their Counterclaim, the Fords first allege that they are entitled to a declaratory judgment that the Lease was terminated based on the untimely tender of the 2010 annual rent payment. The Court, as discussed above, has already found that Leaf River is entitled to summary judgment on this issue. Accordingly, the Court finds this counterclaim should be dismissed.

The Fords' second counterclaim is that Leaf River breached its duty of good faith and fair dealing by claiming an ownership interest in property that it knows is not included within the geographical scope of the Lease, and by attempting to deceive them into accepting the untimely 2010 annual rent payment. Under Mississippi law, "[a]ll contracts contain an implied covenant of good faith and fair dealing in performance and enforcement" that may be breached "by some conduct which violates standards of decency, fairness or reasonableness." American Bankers' Ins. Co. of Fla. v. Wells, 819 So. 2d 1196, 1206 (S.D. Miss. 2001). Having considered the pleadings, the Court finds the Fords have pleaded sufficient facts to state a breach of good faith and fair dealing

claim that is plausible on its face and above the level of speculation. Accordingly, the Court finds dismissal of this claim is not warranted under Rule 12(b)(6).

The Fords' third counterclaim against Leaf River is one of fraud. In support of this claim, the Fords allege:

The October 28, 2008, execution of the Ratification constituted a representation that the Coverall Clause was deleted. That representation was material and was intended to induce the Fords to enter into the Ratification. In signing the Ratification, the Fords reasonably and rightfully relied upon the representation that the Coverall Clause was no longer a part of the Subject Lease.

Leaf River as assignee stands in the shoes of Earth Station. On information and belief, Leaf River had knowledge of and involvement in the representation that the Coverall Clause was deleted.

The representation that the Coverall Clause was deleted was false, as evidenced by Leaf River's filing of the present action seeking to seize the Fords' land via the subterfuge of claiming that the Coverall Clause is valid.

The Fords have been damaged as a result of the misrepresentation regarding the Coverall Clause, including the dismissal of their claims in the Earth Station suit and the burden and expense of defending this action.

See Counterclaim [Docket No. 20], at ¶¶ 12-15. Under Mississippi law, to state a claim of fraud, the charging party must plead and prove the following elements: "(1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its

truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. Koury v. Ready, 911 So. 2d 441, 445 (Miss. 2005) (citing Mabus v. St. James Episcopal Church, 884 So. 2d 747, 762 (Miss. 2004)). Having considered the pleadings, the Court finds the Fords have pleaded sufficient facts to state a fraud claim that is plausible on its face and above the level of speculation. Accordingly, the Court finds dismissal of this claim is not warranted under Rule 12(b)(6).

The Fords' fourth counterclaim against Leaf River is one for damages under Rule 11 of the Federal Rules of Civil Procedure and/or the Mississippi Litigation Accountability Act ("MLAA"). This counterclaim is predicated on allegations that Leaf River has asserted an ownership claim to property that is now outside the geographical scope of the Lease without substantial justification for so doing and/or for the purposes of harassment or delay. See Countercl. at ¶ 17. Under the MLAA:

[I]n any civil action commenced ... in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment ...

MISS. CODE ANN. § 11-55-5. Similarly, under Rule 11 of the Federal Rules of Civil Procedure, a court may award sanctions in cases in which a pleading has been "presented for any improper purpose, such

as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." FED. R. CIV. P. 11(b)(1) & (c). Having considered the pleadings, the Court finds the Fords have pleaded sufficient facts to state a MLAA and/or Rule 11 claim that is plausible on its face. Accordingly, the Court finds dismissal of these claims is not warranted under Rule 12(b)(6).

#### **IV. Conclusion**

For the foregoing reasons:

IT IS THEREFORE ORDERED that the Motion of Leaf River Energy Center, LLC, for Partial Summary Judgment [Docket No. 22] is hereby granted. Leaf River Energy Center, LLC, is hereby granted a declaratory judgment that the Gas Storage Lease, which is the subject of this lawsuit, was not terminated because of its untimely tender of the 2010 annual rent payment to James R. Ford and/or Barbara A. Ford.

IT IS FURTHER ORDERED that the Motion of Leaf River Energy Center, LLC, to Dismiss [Docket No. 24] is hereby denied.

SO ORDERED this the 10<sup>th</sup> day of November, 2011.

s/William H. Barbour, Jr.  
UNITED STATES DISTRICT JUDGE