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CHOCTAW SUPREME COURT
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IN THE CHOCTAW SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

Mary J. Burns, Mary J. Burns, Owner — Appellant

vs. — Cause No. SC 2012-03

Mississippi Band of Choctaw Indians D/B/A
Choctaw Shopping Center Enterprise, John Hendrix,
General Manager and Mississippi Band of Indians D/B/A
Choctaw Shopping Center Enterprise — Appellees

AND

MJ's Coffee, And More, Mary J. Burns, Owner — Appellant

vs. — Cause No. SC 2013-02

Mississippi Band of Choctaw Indians
D/B/A/ Choctaw Shopping Center Enterprise — Appellee

Per Curium.

Background: Mary J. Burns (Burns) is an adult, resident citizen of Neshoba County, Mississippi, who is an enrolled member of the Mississippi Band of Choctaw Indians (MBCI or Tribe). Burns was the sole proprietor of MJ's Coffee & More which operated on a continuing basis between 2004 and February 10, 2012 within the confines and boundaries of the reservation at the MBCI's Choctaw Town Center (aka Choctaw Shopping Center). Burns and the Tribe executed two lease Agreements in 2004 at which point Burns became a tenant of the Choctaw Shopping Center occupying 450 sq. ft. at a rate of $12.00/sq. ft. for her business. In 2005, the Tribal Council approved the Choctaw Shopping Center Enterprise Board to enter into business leases with Burns and other tenants of the Choctaw Shopping Center utilizing a boilerplate lease agreement. Following Tribal Council's approval, Burns signed a 2005 Business Lease (Lease) with the MBCI d/b/a Choctaw Shopping Center Enterprise (CSCE).

The 2005 Lease increased the physical size of Burns' business to 1800 sq. ft. of space from 450 sq. ft. and the Lease reduced the rental rate from $12/sq. ft. to $4/sq. ft. and kept the same $2.00/sq. ft. for maintenance costs (CAM) for a total rental rate of $900/month. Following Burns' signing the 2005 Lease, Burns signed an Addendum to the 2005 Lease on December 9, 2005, which added an additional 725 square feet. Neither the 2005 Lease nor the Addendum, both of which were drafted by the Tribe, were signed by MBCI's Tribal Chief on behalf of the CSCE Board.

In 2009, Burns and John Hendrix, Director of the CSCE Board, signed a Memorandum of Agreement (MOA) referencing and incorporating a 2006 business lease that required Burns to pay rent and CAM payments in an amount of $900, and adding an additional payment by Burns in the amount of $583.91 to be paid toward arrearages owed by Burns. The MOA was to be renewed before December 1, 2011 to include higher payments that would reflect the balance of arrearages being reamortized.

On August 17, 2011 Burns wrote a letter to Miko Beasley Denson, MBCI Chief, that referenced a business lease and interest accumulation on arrearages owed thereunder and that requested a reduction in the interest rate and the payment amount as the current [MOA] agreement would expire in September 2011. Having found no resolution to her requests of Miko Denson, on or about September 30, 2011, Burns presented Miko Denson a document in the parking lot of Wal-Mart that she prepared and that set rent payments in the amount of $900/month with an additional amount of $588.55/month to be paid for back rent until it was paid in full. This document which was signed by Miko Denson and Burns further stated that the terms therein would begin on January 1, 2012 with payments due on the 1st of the month but no later than the 20th of the month. This Burns/Miko signed document was provided to the DeeSandra Ben, Small Business Coordinator for the Tribe, on January 20, 2012 with the one and only payment to be made in 2012. Burns made no payments under the 2005 Lease in October, November, or December 2011.

On February 10, 2012, the Tribe, utilizing self-help, changed the locks on the doors to MJ's Coffee & More. Burns was denied access to her business and property located in the

Choctaw Shopping Center, from February 10, 2012 until March 8, 2012. Burns had used her business equipment to secure a MBCI Entrepreneurial Loan. By Order of March 8, 2012, the trial court granted Burns motion for injunctive relief to regain entry and possession of the business premises and property. Burns regained access to her business on March 9, 2012.

On March 28, 2012, the Tribe served Burns with notice to terminate the "month-to-month tenancy of MJ's Coffee & More" effective April 22, 2012. Burns did not comply with the Tribe's notice to vacate the property on April 22, 2012, therefore, the Tribe filed a Petition and Affidavit for Ejectment to invoke the judicial process in the removal of Burns and her business from the leased space at the Choctaw Shopping Center.

The trial court issued its Memorandum Opinion and Order of June 12, 2012 requiring Burns to evacuate the leased premises by June 15, 2012. Burns complied with that order and evacuated the leased space.

Consolidation of Cases: The appeal before this Court consolidates three cases all arising from the dispute over the validity and enforceability of the 2005 Business Lease between Burns and the MBCI d/b/a The Choctaw Shopping Center Enterprise. All cases involve the propriety of the Tribe's eviction of Burns from the Shopping Center property that was occupied by MJ's Coffee and More.

1. Cause No. 2012-235 (the injunction action) filed by Burns on February 21, 2012 and rendered on June 12, 2012 in a Memorandum Opinion and Order dissolving the preliminary injunction and finding that the Tribe had acted within its legal rights under the business lease in evicting Plaintiff in the first half of the bifurcated trial. The June 12, 2012 opinion and order also disposed of Burn's Petition for Contempt (filed on or about March 23, 2012) on the basis that while Plaintiff has a right under the ICRA to challenge the process of eviction, there was no authority for the court to entertain Plaintiff's monetary damages claims in the absence of her strict compliance with the notice of claim provisions of the Choctaw Tribal Code.

June 18, 2012 Burns sought relief pursuant to Rule 60 and Rule 62 of MBCI Rules of Civil Procedure from the order of June 12, 2012, putting forth information and arguments that, among other things, were meant to show the exceptional circumstances meriting relief from the Tribal Court.

On July 11, 2012, Burns filed her Notice of Appeal stating, inter alia, that she was aggrieved by the June 12, 2012 Memorandum Opinion and Order. Also, on July 11, 2012 Burns filed her Petition to Stay the Proceedings pending appeal with the trial court. The trial court denied Burns motion for relief from judgment and the request to stay the damages portion of the bifurcated trial. On August 7, 2012, the trial court entered a second Memorandum Opinion and Order addressing the issue of damages asserted by the parties in the second part of the bifurcated trial. The Court held that the Burns was delinquent in the payment of rent, interest and penalties in the amount of $34,426.00, but was entitled to offset that amount by $2000.00 for property removed from the restaurant when she was evicted; and that the Tribe was entitled to an award of $12,447.12 because Burns was in default on the business loan.

On August 21, 2012, the trial court issued its Final Judgement and Order of Dismissal. Final judgment was entered in favor of the Tribe against Burns in the amount of $44,873.25 on claims asserted in this action ($32,426.13 award for back rent after deducting the set-off of $2,000.00 awarded to Burns, plus the $12,447.12 award due to Burns' default on the business loan). All claims by Burns asserted against defendants MBCI d/b/a Choctaw Shopping Center and John Hendrix, General Manager were dismissed, with prejudice, with Burns taking nothing.

2. Cause No. 2012-715 (the ejectment action) was filed by the Tribe on May 16, 2012 seeking to invoke the judicial process in removing Burns and her business from space leased in the Choctaw Shopping Center, and Burns counter-claimed on June 12, 2012 alleging fraud, deceit, and negligent misrepresentation, emotional distress, and intentional interference with business relations. Burns sought actual and compensatory

damages in the amount of Five Hundred Thousand Dollars ($500,000), costs and attorneys' fees, and other relief.

On January 24, 2013, the trial court entered its Final Judgement and Dismissal with Prejudice. The claim for ejectment asserted by the Tribe against Burns is moot, and Counterclaims asserted by Burns against the Tribe in this action are dismissed, with prejudice, with Burns to take nothing.

3. Cause No. 2012-1151 (the replevin action) filed by the Tribe on July 20, 2012 requested that Burns be ordered to turn over certain equipment and goods pledged as collateral through a Security Agreement on a Promissory Note for a business loan from the Choctaw Entrepreneurial Loan Program (CELP). Burns counterclaimed on August 21, 2012 for fraud, deceit, and negligent misrepresentation; emotional distress; and intentional interference with business relations. Burns sought actual and compensatory damages in the amount of Five Hundred Thousand Dollars ($500,000), costs and attorneys' fees, and other relief.

   On November 14, 2012 the court, after finding that Burns defaulted on the Promissory Note and that the CELP properly accelerated the total amount due on the Promissory Note, granted the Tribe replevin.

   On January 24, 2013, the court issued its Final Judgment and Order of Dismissal in accord with its Order of Dismissal dated December 11, 2012 [scrivener's error January 24, 2013]. In that Order of Dismissal, the trial court dismissed with prejudice Burns' counterclaims on the basis of *res judicata* as all claims asserted were previously adjudicated in the trial court's ruling in the injunction action. The court's final judgment was entered in favor of the Tribe against Burns, and all Burns' claims against the MBCI d/b/a Choctaw Shopping Center were dismissed with prejudice, with Burns taking nothing. On February 22, 2013 Burns appealed the decisions in the January 24, 2013 Final Judgment and Order of Dismissal.

3/10/15: Appellant filed Brief of Appellant after appeal record completed.

5/15/15: Brief of Appellees filed.

6/24/15: Reply Brief of Appellant filed.

7/9/15: Appellees Motion to Strike or in the Alternative, for Leave to File Sur-Reply

Jurisdiction: This Court has jurisdiction over the parties and subject matter pursuant to Choctaw Tribal Code (CTC) §§ 1-2-3(2)(a) and 1-2-5(1).

Standard of Review: This Court reviews questions of law de novo. A trial judge is accorded the same deference regarding his factual findings as a chancellor and his findings will not be disturbed where there is substantial, credible and reasonable evidence. *Jones v. Mississippi Transp. Comm'm*, 920 So.2d 516, 518 (Miss. 2003). See also United States v. Wilkes, 662 F.3d 524, 532 (9th Cir. 2011) ("Factual findings underlying the district court's ruling are reviewed for clear error.") (citations omitted). Rule 12(b)(6) tests the legal sufficiency of a complaint and that "applying this rule, 'a motion to dismiss should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim.'" *Chalk v. Berthoff,* 980 So.2d 290 (Miss. Ct. App. 2007) (citations omitted).

Denial of Motion For Stay: Appellant Burns contends in her brief before this Court that the "seminal issue of the business lease and waiver provisions should have been addressed by this Court before the trial on the damages of the MBCI; and the ejectment/replevin actions brought by the MBCI." Specifically, Burns contends that the court erred by not staying the bifurcated trial's hearing on the Tribe's counterclaim for damages in CV 2012-235 pending appeal under CTC § 7-1-5 of the court's June 12, 2012 order finding and enforcing the 2005 Lease between Burns and the Tribe.

On July 11, 2012, Burns filed with this Court her notice of appeal on the Memorandum and Order of June 12, 2012 and the ruling on her Motion for Contempt in CV 2012-235. Burns on that same date also posted the cash bond as required under CTC § 7-1-3 Right to Appeal. The Tribe timely filed its motion to dismiss petitioner's appeal arguing that it was

interlocutory in nature as the trial court had bifurcated the trial and had yet to hear the Tribe's counter claim of damages. Under the CTC § 7-1-10, there is no absolute right to an interlocutory appeal; the decision on whether to hear an interlocutory appeal rests with this Court -- "a request for permission to appeal an action of the lower court which is not a final judgment shall be made by filing a request with the Clerk of the Supreme Court within fifteen (15) days of the action giving rise to the appeal." Until an appeal is perfected, under CTC § 7-1-5 the decision to stay proceedings or a judgment in a civil action is at the discretion of the trial judge.

Burns having failed to perfect her appeal in this Court prior to the issuance of the final judgment in CV-2012-235, the trial court had thereby denied Burns' August 7, 2012 motion for stay and had proceeded with the hearing on the Tribe's counter-claim for damages. On August 21, 2012, the trial court issued its order on damages and its Final Judgment and Order in CV-2012-235. This Court finds no error in regard to the trial court's decision to deny Burns' motion to stay the bifurcated trial on the Tribe's counter-claim for damages pending interlocutory appeal of the Memorandum Opinion and Order of June 12, 2012.

Burns filed her Amended Notice of Appeal on September 7, 2012 to include the adverse rulings entered on August 7, 2012 in CV 2012-235, the Order of August 7, 2012, and the Memorandum Opinion and Order of August 7, 2012. Burns filed her Second Amended Notice of Appeal on September 19, 2012 to include the Final Judgment and Order of Dismissal entered August 21, 2012 awarding a judgement to MBCI of $44,873.25, dismissing with prejudice the claims of Burns against MBCI, and ordering that Burns "take nothing."

Finding an Enforceable Lease: Burns asserts on appeal that the lower court erred by finding the 2005 Business Lease which she admittedly signed to be valid and enforceable. Burns raises several issues challenging the trial court's recognition of a valid lease agreement absent signature of the appropriate Tribal parties, including the lack of mutual assent to contract as evidenced by the lack of the Chief's signature on the lease, lack of

voluntary waiver of due process rights afforded under the MBCI constitution, and lack of delivery of a contract signed by the parties.

Mutual Assent

Burns cites to *Ingraffia v. NME Hosp., Inc.*, 943 F.2d 561 (5th Cir. 1991) to support her claim that the court must first make a determination that there is a valid and binding agreement considering the basic requirements for contract formation before engaging in contract interpretation. In Ingraffia, the court held that "uncontradicted evidence" revealed that mutual assent was missing in the case; and that the District Court erred in engaging in contract interpretation before determining that the parties had a valid and binding agreement. 943 F.2d 565, 66.

It is well settled Mississippi law that a contract without the appropriate signatures may be enforced as long as there is evidence of "mutuality or assent" as shown through "acts or conduct of the parties." *Turney v. Marion County Board of Education*, 481 So. 2d 770, 774 (Miss. 1985) (internal citations omitted).

Furthermore, the record shows the following acts or conduct of the parties to show mutuality or assent to enter into the 2005 Lease:

1. Burns entered into two fully-executed standard form lease agreements with CSCE in 2004. The Shopping Center space being leased by Burns in the final 2004 Lease was for 450 sq. ft. at a rate of $12.00/sq. ft. of space. The terms of the lease agreements signed by Burns in 2004 and 2005 are substantially the same, absent lease rate and square footage, and both include identical language under the section titled "Default by Lessee."

2. Resolution CHO 06-019(B), dated October 28, 2005, authorized the Tribe d/b/a CSCE to enter into business leases with Burns and various other commercial tenants utilizing its standard form business lease.

3. John Hendrix and DeeSandra Ben both testified to utilizing the Tribe's standard business lease to lease property at the Choctaw Shopping Center. The record shows that the same business lease having thirty-one boilerplate terms was utilized when Burns and the Tribe both executed their first business leases in 2004, and also in the instance of the 2005 Business Lease signed only by Burns.

4. Burns operated her business MJ's Coffee & More from 2004 to February 2012 in the Choctaw Shopping Center.

5. Following Tribal Council's resolution CHO 06-019(B) that approved the CSCE Board entering into a lease with Burns and other tenants, Burns admittedly signed the boilerplate 2005 Lease between MBCI d/b/a CSCE and Mary J. Burns d/b/a MJ's Coffee & More for 1800 sq. ft. of space at a rate of $4.00/ sq. ft. plus $2.00/sq. ft. for maintenance (CAM), resulting in a monthly tenant rate of $900/month.

6. On December 9, 2005, Burns signed an Addendum to Lease Between the Mississippi Band of Choctaw Indians d/b/a Choctaw Shopping Center Enterprise (CSCE) and Mary J. Burns d/b/a MJ's Coffee & More (Addendum) referencing the 2005 Lease between the parties for bay D1-7 and D1-8 at the Choctaw Town Center. The Addendum modified the second paragraph of the terms entitled "Premises" which provided Burns with a total of approximately 1800 square feet of space by adding 725 square feet of space to the original lease signed only by Burns earlier in 2005; the Addendum did not amend any other paragraph or term of the Lease.

7. On September 30, 2006 the CSCE forgave $10,125.00 of Burns' Lease arrearages.

8. On December 11, 2007, John Hendrix, General Manager of the CSCE, sent a letter to Burns informing her that she was "in default under the terms of your Lease Agreement. According to Section 19 of your Lease Agreement, if all past due payments are not collected within 30 calendar days of receiving this notice, the

Landlord may seek remedy according to the terms of your Lease Agreement." To cure the default, Burns needed to pay $13,540.40 by January 10, 2008.

9. The same notice was provided again on January 4, 2008 by John Hendrix to Burns citing default under the terms of her Lease Agreement. To cure the default, Burns needed to pay $14,616.44 by noon on Friday February 4, 2008.

10. On August 24, 2009 Burns and John Hendrix, manager of the Shopping Center, entered into and both parties signed the Memorandum of Agreement (MOA) that referenced a business lease made on or about September 9, 2006. That MOA recited "[w]hereas the Business Lease provided that Lessee [Burns] would make monthly rental & CAM payments in the amount of $900.00 per month . . ." This MOA added a payment by Burns of $583.91 for a total payment of $1483.91 per month towards the balance on arrearages "until such time as the existing business loan at the Citizens Bank was paid in full, approximately 27 months or November, 2011. A that time, the balance of arrearages will be reamortized for higher payments beginning December 1, 2011 at which time a new Memorandum of Agreement will be signed." Additionally, this MOA states "the Lessor [Tribe] reserves the right to adjust the rent according to the Choctaw Shopping Center Board of Directors consideration." All of the above are further indicia of an ongoing agreement and understanding of the contractual arrangement.

    Hendrix testified that he had approval from the Shopping Center Board to enter into the Memorandum of Agreement (2009). However, Burns testified that there was no September 9, 2006 Business Lease entered into by the parties, but that Burns had a valid lease for the property, and made payments to the tribe that were in accordance with the terms of 2005 lease agreement, but did not knowingly waive her rights to due process as granted in the MBCI constitution.

11. Burns wrote a letter dated August 17, 2011 to Miko Beasley Denson referencing the 2009 MOA in which Burns agreed to pay an additional $583.91 each month towards

delinquent back rent. Burns requested to re-negotiate her new contract so as to not have an increase in payments and for a reduction in interest rate. On this letter, there appears a handwritten note signed "Beasley" that states "negotiate with DeeSandra & she needs to report back to me[.]" Also, typed at the bottom of the letter is a statement signed by Dee Sandra Ben, CSCE, and John Hendrix, CSCE General Manager.[1]

12. Burns drafted a statement signed by both Miko Denson and herself on September 30, 2011 referencing payment of "her regular rent in the amount of $900 per month" as noted in the 2009 MOA plus an additional $585.55 per month toward back rent.

13. On March 21, 2012 DeeSandra Ben on behalf of the CSCE sent a Notice of Termination of Tenancy and Notice to vacate the premises at 300 Choctaw Town Center, #108 MBCI d/b/a CSCE to Burns stating that the "month-to-month tenancy of MJ's Coffee & More would terminate effective at midnight on Sunday, April 22, 2012. The reason for this termination is that you are currently in arrears for rent in the amount of $32,060.69 through March 16, 2012." John Hendrix, Manager of CSCE, sent letters to Burns providing notice of default "according to Section 19 your Lease Agreement" in 2006, 2007, and 2008. Section 19 is the "Default by Lessee" provision under the 2005 Lease Agreement. The April 22 and August 4, 2011 notices of default sent by Hendrix to Burns make reference to the terms of "your Memorandum of Agreement."

14. Ms. Burns acknowledges that she signed the 2005 business lease drafted and presented to her by the tribe, and that she was obligated to make and did make payments to the tribe in amounts that were in conformity with the terms of the lease agreement, but that she did not knowingly agree to the waiver of her due process rights.

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[1] That statement reads: "IN RESPONSE TO MARY'S REQUEST FOR A LOWER INTEREST RATE, ALL TENANTS PAY 1.5% MONTHLY OR 18% ANNUALLY ON PAST DUE AMOUNTS AS STATED IN THEIR ORIGINAL LEASE AGREEMENT. I HAVE DISCUSSED THIS WITH JOHN HENDRIX & HE SAID THAT WE WOULD HAVE TO GET THIS APPROVED BY THE CSCE BOARD IN ORDER TO LOWER THE INTEREST RATE."

15. The 2005 Lease contains a holdover clause within paragraph 3 "Term" which provides that "during a holdover tenancy, Lessee will be bound by all of the terms, conditions and covenants of this Business Lease Agreement.

It is undisputed that Burns was the only party to sign the 2005 Lease, however, it is apparent in the record that there was mutual assent in the formation of the 2005 business lease agreement due to the actions of both Burns and the CSCE. Further, CSCE was authorized by tribal council resolution to enter into the 2005 lease with Burns. Since Burns signed the lease and she is the party against whom the lease is being enforced, the Mississippi statute of frauds, Miss. Code Ann. Sec. 15-3-1, is not violated. See, *Davis v. Stegall*, 151 So.2d 813 (Miss.1963).

Delivery

Burns further argues on appeal that the 2005 Agreement is unenforceable due to the failure of the Tribe to deliver a signed copy of the Lease to her. Burns incorrectly relied upon a New York state case, *219 Broadway Corp. v. Alexander's Inc*, 46 N.Y.2d 506, 512, 387 N.E. 2d 1205, 414 N.Y.S. 2d 889 (1979), to assert that the absence of actual physical delivery of the signed Lease by CSCE to Burns rendered the Lease ineffective as a matter of law. However, the Lease at paragraph 17 states the governing law: "This agreement ...shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the State of Mississippi (pursuant to § 1-1-4, Choctaw Tribal Code.)." Therefore, Burns' reliance on *219 Broadway* is not only incorrect, but it is also misplaced and, in any case, outside the choice of law provisions of the Lease.

In this jurisdiction, there is no physical delivery requirement underpinning whether or not a lease is rendered ineffective as a matter of law. Burns testified that she signed the 2005 Lease, intended to enter into the Lease, and she knew she would have an obligation to pay rent as long as she occupied space in the Choctaw Shopping Center. Indicia again of a mutuality of intent to enter into their 2005 Lease.

Due Process Waiver: Burns argues that even if the Court upholds the existence of a valid business lease, "[t]he issue before this Court on appeal is the waiver of the due process rights of Appellant Burns and any waiver of notice and/or due process under the lease agreement between the parties." Appellant maintains that her due process rights were violated by the tribe when her business was closed without prior notice and an opportunity to be heard.

The 2005 Lease signed by Burns is clear in regard to the waiver of notice in the case of default in payment due under the lease. The Lease states:

> 19. **Default by Lessee.** The happening of any one or more of the following listed events … shall constitute a breach of this Lease agreement on the part of the Lessee.
>
> ....
>
> B. The failure of Lessee to pay any rent or other payment due under this Lease agreement and the continued failure to pay the same for thirty (30) days or more.
>
> ....
>
> Upon the happening [of] any event of default, ... (3) Lessor, or any other person by its order, may with demand or notice to Lessee, reenter the premises, without process of law, and without being liable for any prosecution therefrom, and may either elect to terminate this Lease or, if the Lessor desires, not terminate the Lease, but terminate the right to possession and occupancy and relet the said premises to any person, firm or corporation, as the agent of the Lessee or otherwise, for whatever rent it shall obtain, applying the avails of such letting first to the payment of such expenses as the Lessor may incur in the reentering and reletting of same, and then to the payment of the rent or any other payments or amounts due hereunder and the fulfillment of the Lessee's covenants, and paying over to the Lessee the balance, if any; and in case of any deficiency, the Lessee shall remain liable. ***Lessee waives service of any demand for payment of rent or notice to terminate or demand for possession of the premises, including any and all other forms of demand and notice prescribed by applicable law***. (emphasis and italics added).

* * * * *

> Lessee acknowledges that any payments accepted by Lessor while Lessee is in default are accepted with full reservation of all rights hereunder by Lessor.

Burns' primary argument challenging the enforceability of paragraph 19 titled "Default by Lessee" is that she was presented with the lease agreement and was told to sign it by a tribal employee without being informed that the lease as written would waive her due process rights of notice and hearing in the event of default under the terms of the lease. Burns claims that because the tribal employee was in a rush and told her to sign the lease, she did not voluntarily sign away her rights of notice and an opportunity to be heard afforded under the MBCI constitution. Regardless of the claimed circumstances, "[i]t is well settled under Mississippi law that a contracting party is under a legal obligation to read a contract before signing it." *McKenzie Check Advance of Miss., LLC v. Hardy*, 866 So.2d at446, 455 (Miss., 2004) (citing *First Family Financial Services, Inc. v. Fairley*, 173 F. Supp.2d 564, 570 S.D.Miss.2001). Burns is clearly a business woman of considerable experience as shown by the fact that by 2012 Burns had owned MJ's Coffee & More for over 7 years.

Furthermore, Burns never alleged being forced to sign the Lease under duress or that she requested and was denied any opportunity for additional time to read the Lease prior to her signing. The record shows that Burns entered into two prior leases in 2004 that contained the same terms waiving her due process rights of notice in the event of her default on the Lease terms. Burns' statement that she signed the Lease without reviewing also appears disingenuous because Burns most likely would have confirmed that the rental rate was actually reduced from $12.00/sq. ft. in the 2004 Lease down to $4.00/sq. ft. in the 2005 Lease. The Court notes that the waiver language contained in the paragraph 19 titled "Default by Lessee" in the 2005 Lease is the same language used in the 2004 Lease signed by Burns and the Tribe.

Further, the two 2004 Leases that were fully executed by the parties and the 2005 Lease signed only by Burns contain the following identical holdover provision:

> 4. **Term**
>
> * * * *
>
> **Holdover**: Any holdover at the expiration of this Lease Agreement shall be as a Lessee at will. During such holdover tenancy, Lessee will be bound by all the terms conditions and covenants of this Business Lease Agreement. Any holdover tenancy may be terminated by either party pursuant to the laws of the Mississippi Band of Choctaw Indians and the State of Mississippi (pursuant to Section 1-1-4, Choctaw Tribal Code).

Having determined that there was mutuality of assent in the formation of the 2005 Lease and acceptance by the trial court of Burns' testimony that there was never a 2006 Lease, the holdover provision in paragraph 4 of the 2005 Lease converts the one-year lease to a month-to-month lease. Burns is bound by all the terms, conditions, and covenants of the 2005 Lease, including the waiver of her due process rights upon default on the terms of the lease.

Burns erroneously raises several other challenges to the enforceability of the 2005 Lease. She relies on Mississippi residential-landlord tenant law, and arguments alleging unequal bargaining power, neither of which this Court finds compelling in this commercial business lease. This Court found mutual agreement of the parties through their words and actions to enter into the 2005 Lease and its December 9, 2005 Addendum. Additionally, the MOA signed on August 24, 2009 by both parties and referencing payment terms of a 2006 lease agreement which Burns testified never existed, but whose payment terms of $900 per month for monthly rental and CAM payments are identical to the 2005 Lease payment terms and its Addendum, but these agreements provide additional support for the existence of a month-to-month holdover Lease and its binding terms. The letters of default issued by John Hendrix, Manager of CSCE, to Burns in 2007, 2008, 2011, and 2012 also serve to support mutual assent to enter into the 2005 lease. The Court finds no clear error in the trial judge's finding of a valid, enforceable 2005 lease between the parties.

Further, Burns' claims that the trial court erred in awarding judgment for the MBCI, et al and against Burns on the monies due under the Lease. The only argument made by Burns to support her contention of error is the argument that the lease is invalid. Therefore, since this Court upholds the trial court's finding of a valid 2005 lease, the trial court's judgment for the tribe with Burns taking nothing is upheld.

Validity of 2011 Purported "Amendment": Burns relies erroneously on the September 30, 2011 document signed by Miko Denson and herself to authorize the non-payment of rent under the 2005 Lease from October 1, 2011 forward. Burns' contentions rely upon the general law of "apparent authority" involving private parties, not on the law involving governmental entities which actually apply. "In respect to public contracts 'where a particular manner of contracting is prescribed, the manner is the measure of power and must be followed to create a valid contract." *Bruner v. University of Southern Mississippi*, 501 So. 2d 1113, 1115 (Miss. 1987) (quoting Donelly on the Law of Public Contracts, 1922 Ed., Sec. 5, p.7).

The MBCI law is clear, Ordinance No. 56 authorizes the CSCE Board to enter into lease agreements with third parties:

> 11.**(c) Contracting and Operational Authority**
> Each tribal business enterprise shall be operated by and overseen by an enterprise board which shall exercise the powers herein enumerated. * * * * The authorized purpose and any special powers or duties of each new Tribal enterprise shall be as set out in the future resolution authorizing such new enterprise. No contract entered into in violation of the provisions of this Ordinance shall be binding upon the Mississippi Band of Choctaw Indians unless thereafter expressly ratified by resolution of the Tribal Council.

The CSCE Operational Policies and Procedures, authorized by Resolution CHO 02-085, expressly provide that the CSCE Board of Directors "act" through a majority of the CSCE Board members and does not authorize any one member to act on behalf of the Board.

> 4.8 **Manner of Acting.** An act of a majority of the members present at a meeting at which a quorum is present shall be an act of the Enterprise Board. . . .

The document drafted by Burns and signed by Denson and Burns was never reviewed or approved by the CSCE Board prior to or following Burns' submission of the document on January 20, 2012 to CSCE. The Denson/Burns document dated September 30, 2011 attempted to establish new payment terms for Burns in regard to the lease of Shopping Center space, requiring payments to be made by the 20th of each month instead of by the 10th, and delaying by three months payments due under the 2005 lease until January 2012, neither of which can be done by an individual member of the CSCE Board. The Denson/Burns document fails as an enforceable contract because Denson has no more authority than would have had any other member of the CSCE Board to independently take such action. All CSCE Board members are prevented from acting individually on behalf of the Board. "[A] person who contracts with a governmental agency must, at his peril, know the extent of the power of its officers to make the contract." *Bruner v. University of Southern Mississippi*, 501 So.2d 113, 1115 (Miss. 1987) (quoting Donelly on the Law of Public Contracts, 1922 Ed., Sec. 5, p. 7).

Contempt: On appeal, Burns argues that the lower court erred by not holding MBCI in contempt for evicting Burns and by not making an express holding in regard to her motion to hold the Tribe in contempt for damaging her property during the time period she was locked out of her business. This Court finds no error by the trial court in failing to hold MBCI in contempt for evicting Burns. A review of the record abundantly supports the trial judge's findings that the totality of circumstances support his finding that the Lease holdover clause shielded the Tribe's self-help lockout of Burns. According to the holdover clause, "During such holdover tenancy, Lessee will be bound by all the terms conditions and covenants of this Business Lease Agreement." Therefore, the self-help action by the Tribe was lawful.

Further, this Court finds that the trial court's silence in regard to Burns' request for a tribal contempt citation for failing to return her personal property and equipment as it existed on February 10, 2012 is harmless error under Rule 61. Rule 61 in pertinent part states, ". . . no

error in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."

Notwithstanding, the Court further finds that the express Indemnification term in the 2005 Lease actually required that Burns as "hold Lessor harmless from . . . any and all liabilities, claims, losses, damages, costs, and expenses, . . . and which arise out of or result from connection with: (i) … any default of this Lease by Lessee; … [or] (iii) any failure by Lessee to pay . . . any liability or obligation of Lessee." Burns being in default, the trial court did not err in not citing MBCI for contempt. The Court thereby implicitly denied Burns' motion for contempt. No express, magic words, or wording was required and nothing in the judge's order was inconsistent with the administering of substantial justice in relation to his handling of the contempt motion.

Other Damages: The Court needs give only brief further discussion to Burns' claim for monetary damages beyond what the lower court's opinion opined on this issue. Speaking earlier to the matter, that court said "there is no authority . . . without strict compliance with the . . . [Torts Claim Act] of the Choctaw Code."

This Court agrees and therefore affirms that ruling. Moreover, we also hold that under the language of the contract, Burns is required to hold the Tribe harmless for damages resulting from her default.

Notwithstanding the express terms of the 2005 Lease, however, the trial court nonetheless awarded Burns $2,000.00 as a set-off against rent due and payable during the second part of the bifurcated trial. Although the $2,000.00 set-off appears to be on the high side, this Court defers to the judgment of the trial court. Once again, per Rule 61, "no error in any ruling or order or anything done or omitted by the court . . . is inconsistent with substantial justice." In this instance appellant was the beneficiary of the trial court's discretion.

Ejectment & Replevin & Counter-Claims: Burns argues that the trial court erred in dismissing her counter-claims in the replevin and ejectment actions. Burns maintains that "the MBCI, et al continued to punish Burns from challenging her due process rights; and in a case that has no precedent before the Choctaw Tribal Court sought damages and relief from Burns." However, Burns herself agrees in her briefs that "[a]ll of Burns [sic] lawsuits rose from a dispute over the MBCI business lease and the personal property and equipment that Burns procured in regard to the business owned and operated as MJ's Coffee & More located in the MBCI's Choctaw Shopping Center, Choctaw, Mississippi."

The trial court's actions in regard to its decisions in ejectment and replevin and the counter-claims therein are all based in fact on that same conclusion as espoused by Burns on appeal. The basis for the dismissal of the counter-claims relied upon the trial court's finding that the 2005 lease was still valid under the holdover terms in the lease, which included the authority of the MBCI to seek damages and relief from Burns.

Burns' argument on appeal in regard to the ejectment action are unfounded as Burns vacated the leased space on June 15, 2012 based on the existence of the 2005 Lease. The trial court did not commit error when granting the Tribe's motion to dismiss for mootness as Burns was no longer in possession of the property.

This Court rejects Burns' appeal on her counter-claims in the replevin and ejectment actions as they are barred by *res judicata.* "The doctrine of *res judicata*, or claim preclusion, operates as a bar to any subsequent attempt to litigate a claim already decided." *Beene v. Ferguson, Inc.,* 37 So. 3d 695, 698 (Miss. Ct. App. 2010) (citations omitted). "Causes of action are the same if they arise from the same 'transaction'; whether they are products of the same transactions is to be determined by giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Id. at 699 (quoting *Hill v. Carroll Cty.*, 17 So. 3d 1081, 1086 (Miss. 2009)). The 2005 Lease was found to be valid and enforceable as fully

adjudicated in the Injunction action dated March 8, 2012, and a final judgment was entered on August 21, 2012.

Further, Burns' claims that the trial court erred in awarding judgment for the MBCI, et al and against Burns on the monies due under the Lease. The only argument made by Burns to support her contention of error is the argument that the lease is invalid. Therefore, since this Court upholds the trial court's finding of a valid 2005 lease, the trial court's judgment for the tribe with Burns taking nothing is upheld. In regard to Burns' challenge of the trial court's order to have her return the collateral under the Choctaw Entrepreneurial Loan to the MBCI, again deferring to the trial court's finding of a valid 2005 Lease the court finds no error. However, in regard to both claims, this Court does again take notice of the terms of the Lease. Paragraph 20 entitled "Lessor's Lien" states that "[a]ll articles of personal property, except stock of merchandise sold in the normal course of business, owned by the Lessee and situated on the leased premises shall be subject to a lien in favor of the Lessor to secure the payment of rent and other charges for such premises . . . . Such lien shall be subject to all liens or other security interests perfected according to law. No such articles of personal property may be removed from the leased premises until such rent and other charges are paid except with the written consent of the Lessor."

Relief Under Rules 60 and 62: Finally, Burns challenges the trial court's decision to deny her efforts to seek post-trial relief pursuant to MBCI Rules of Civil Procedure Rule 60 and request for stay of the June 12, 2012 order under Rule 62. This Court finds no error in the denial of Burns' motion. Relief as requested under Rule 60 requires a showing of exceptional circumstances or clear error of law to justify or merit relief, none of which existed. Burns' use of Rule 60 to challenge the enforceability of the waiver of due process provisions and the self-help provisions in the 2005 Lease as invalid and unconscionable do not rise to meet the purpose of a Rule 60 challenge because no information not previously unavailable was presented. Instead, Burns continues to revisit the same arguments around the 2005 Lease which was found valid and enforceable.

Conclusion: The arguments raised on appeal are insufficient for this Court to disturb the trial court's finding of a valid and enforceable 2005 Lease. Burns' default on payments due under that lease triggered the Tribe's authority under the Lease to self-help. Also, under the express terms of the Lease, Burns agreed to hold the Tribe harmless for loss or damage resulting from action taken by the Tribe upon her default on any term of the lease. Therefore, Burns' appeal is denied in full.

WHEREFORE, premises considered, the decision of the lower court is hereby affirmed.

SO ORDERED, this the 19th day of March, 2019.

Chief Justice

Brenda Tonecta Preston
Associate Justice

Associate Justice

CERTIFICATE OF SERVICE

I, do hereby certify that I have this, the 19th day of March, 2019 caused to be forwarded by electronic mail, United States mail and/or hand delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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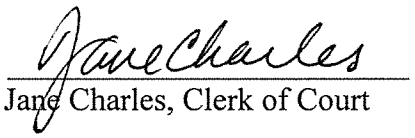

Jane Charles, Clerk of Court