

**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT**

**RIVERBOAT CORPORATION OF MISSISSIPPI**

**PLAINTIFF**

**VS.**

**CAUSE NO. ~~A~~2402-14-198**

**CITY OF BILOXI, MISSISSIPPI and  
DELBERT HOSEMANN, in his Official  
Capacity as Mississippi Secretary of State**

**DEFENDANTS**

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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**THIS CAUSE**, having come on to be heard September 24, 2015, on Riverboat Corporation of Mississippi's ("Riverboat") Motion for Partial Summary Judgment on its breach of contract and declaratory judgment claims (Docket No. 18) and The City of Biloxi and Secretary of State of the State of Mississippi's Motion for Summary Judgment on Riverboat's breach of contract and declaratory judgment claims (Docket No. 20), and the Court having reviewed the filings of the parties and heard oral argument, does hereby find the Defendants' arguments, findings of fact and conclusions of law persuasive.

1. The facts relating to this breach of contract case are not in dispute. The City of Biloxi and the State of Mississippi (hereinafter collectively "Defendants") own certain property located at what is generally known as Point Cadet in eastern Biloxi. On, or about, August 15, 2002, Defendants, as lessors of the property, and Riverboat as lessee entered into the "Biloxi Waterfront Project Garage-Podium Lease and Easement ("the Podium Lease"). This dispute concerns the interpretation of the Podium Lease.

The parties agree that the Podium Lease is unambiguous and the Court, after having reviewed the Podium Lease, finds that it is unambiguous.<sup>1</sup> Because the Podium Lease is unambiguous “[q]uestions concerning construction [of the Podium Lease] are questions of law.” *Chapel Hill LLC v. Soiltech Consultants Inc.*, 112 So.3d 1097, 1099 (¶10) (Miss. Ct. App. 2013). “Further, ‘[w]hen a contract is clear and unambiguous, this Court is not ‘concerned with what the parties may have meant or intended but rather with what they said, for the language employed in a contract is the surest guide to what was intended. (quoting *Shaw v. Burchfield*, 481 So.2d 247, 252 (Miss.1985))’” *Highland Colony Land Company LLC v. Gouras*, 2015 Miss. App. Lexis 329 ¶8 (Miss. Ct. App. 2015) Mississippi law requires the Court to “read [the Podium Lease] as a whole, as to give effect to all of its clauses.” *Royer Homes of Miss. Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (¶10) (Miss. Ct. App. 2009) citing *Brown v. Hartford Ins. Co.*, 606 So.2d 122, 126 (Miss. 1992).

2. The Podium Lease defines “facilities” as “Phase I of the Facilities, Phase II of the Facilities and Phase III of the Facilities, as the case may be or collectively.” *Podium Lease*, pg. 2. “Phase I of the Facilities” is defined as “a public parking garage consistent with the terms allowed in the Settlement Agreement to be constructed on New Tract “A.”” *Id.* at pg. 3. “Phase II of the Facilities” is defined as “a hotel proposed to be built on New Tract “B”, containing at least two hundred (200) rooms, or (ii) two (2) or more restaurant facilities containing at least two hundred (200) seats in the aggregate.” *Id.* “Phase III of the Facilities” is defined as a “hotel proposed to be built on the garage podium to be constructed on New Tract “A.”” *Id.* “Phase I”, “Phase II” and “Phase III” are common terms used throughout the Podium Lease to describe

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<sup>1</sup> Although the parties disagree about the meaning of the Podium Lease, their disagreement does not render it ambiguous. *See U.S. Fid. & Guar. Co. v. Martin*, 998 So. 2d 956, 963 (Miss. 2008) (“[A]mbiguities do not exist simply because two parties disagree over the interpretation of a policy.”)

both development and phases of rent.

3. Paragraph I.4(b) describes Riverboat's liability for rent:

Upon the Execution Date, [Riverboat] shall be liable for payment of all sums and charges which become due hereunder including but not limited to Guaranteed Rent Amounts (which shall progressively become due as set out in Section 3.1), percentage rent, additional rent and all other sums and charges which are required to be paid by Tenant hereunder. All sums payable hereunder other than Guaranteed Rent Amounts shall be due and payable upon receipt of an invoice as provided for herein or as otherwise specified.

The Court finds that at the time the Podium Lease was executed, the parties agreed to progressively increasing Guaranteed Rent Amounts to be due from Riverboat. This finding is made clear by the rental provisions of the Podium Lease.

4. Section III.1 is the Guaranteed Rent section of the Podium Lease. Section III.1(a) is the "Interim Floor Rent Guaranty" wherein Riverboat guaranteed to the Defendants the payment of \$2,500,000.00 for the time frame of the "lease year ending July 31, 2003 (and thereafter for each Lease Year until the Floor Rent Guaranty provided in subsection 3.1(b) takes effect"). The "Floor Rent Guaranty" is found in Section III.1(b) and by its express terms took effect "[b]y August 31 following the earlier of either the opening of Phase I of the Facilities or eighteen (18) months from the Execution Date." The guaranteed rental amount under the Floor Rent Guaranty is \$2,733,000.00, an increase of \$233,000.00 over the Interim Floor Rent Guaranty.

5. After the Floor Rent Guaranty took effect, increased rentals were to be paid by Riverboat to Defendants as "Phases" of "facility" development took place or as specific dates were reached. Neither party contests this interpretation of the Podium Lease.

Section III.1(c) is labeled "Phase I Supplemental Guaranteed Rent" and by the unambiguous terms of the lease it took effect "by August 31 following the earlier of either the

opening of Phase I of the Facilities, or eighteen (18) months from the Execution Date.” *Id.* Under Phase I Supplemental Guaranteed Rent, Riverboat’s rent increased to \$3,233,000.00. *Id.* The parties do not dispute this unambiguous term of the Lease.

Section III.1(d) is labeled “Phase II Supplemental Guaranteed Rent.” This is the first provision that the parties have a disagreement as to meaning and accordingly, the Court sets forth the disputed portion thereof:

In addition to the rent guaranty provided in subsection (b)<sup>2</sup> (and as a successor guaranty to the Phase I Supplemental Guaranteed Rent formula), on the earlier of either the August 31 following the opening of Phase II of the Facilities or August 31, 2005, the Tenant guaranties . . . .”

Neither Riverboat nor Defendants contest that the Phase II Supplemental Guaranteed Rent took effect on August 31, 2005. Further, neither Riverboat nor Defendants contest that under the Phase II Supplemental Guaranteed Rent Riverboat was to pay Defendants the sum of \$3,483,000.00 per Lease Year during this phase of supplemental guaranteed rent.

Instead, Riverboat and Defendants’ dispute begins with the use of the phrase “and as a successor guaranty to the Phase I Supplemental Guaranteed Rent formula” found in Sections III.1(d) and (e) of the Podium Lease. Riverboat contends that this “successor” language does not terminate the Phase I Supplemental Guaranteed Rent but instead “supplements the first market adjustment provision” found in Section III.1(f)(1). *Riverboat’s Rebuttal Memorandum* (Docket No. 30), pg. 8. Defendants contend that the phrase means the Phase II Supplemental Guaranteed Rent formula “takes the place of” the Phase I Supplemental Guaranteed Rent formula. Black’s Law Dictionary, pg. 1431 (6<sup>th</sup> Ed. 1998). The Court finds that reading the provisions of the Podium Lease as a whole, the Phase II Supplemental Guaranteed Rent formula took the place of the Phase I Supplemental Guaranteed Rent formula.

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<sup>2</sup> The Floor Rent Guaranty of \$2,773,000.00

Riverboat and Defendants' dispute continues into Section III.1(e) of the Podium Lease. Section III.1(e) is the Phase III Supplemental Guaranteed Rent. In relevant part III.1(e) provides, "In addition to the rent guaranty provided in subsection (b) (and as a successor guaranty to the Phase II Supplemental Guaranteed rent formula, and subject further to the operation of subsection 3.1(f)), on the earlier of either the August 31 following the opening of Phase III of the Facilities, or August 31, 2008 . . . ." Neither Riverboat nor Defendants contest that as of August 31, 2008, under the plain, unambiguous terms of the Podium Lease, Riverboat owes Defendants the sum of \$3,733,000.00 in Guaranteed Rent per Lease Year. Once again the parties disagree as to the effect of the phrase "as a successor guaranty to the Phase II Supplemental Guaranteed rent formula" with the parties respective positions being set forth above. The Court finds that as a matter of law under the unambiguous terms of the Podium Lease as of August 31, 2008 the Phase III Supplemental Guaranteed rent formula took the place of the Phase II Supplemental Guaranteed rent formula.

6. Riverboat and Defendants' core disagreement is over the application of Section III.1(f) to the operation of the Podium Lease's Phase III Supplemental Guaranteed Rent formula. All parties agree that under Phase III Supplemental Guaranteed Rent Riverboat owes Defendants \$3,733,000.00. However, this rental amount is subject to certain market condition adjustments. Section III.1(f)(2) provides:

Beginning one year after the Phase III Supplemental Rent Guaranty becomes applicable,<sup>3</sup> in any Lease Year in which both: i) the overall gaming market in the combined Harrison County/Hancock County market falls below \$1,250,000,000.00 (according to the aggregate of all gross gaming revenue reported to the Mississippi Gaming Commission for that period); and ii) the gross gaming revenue of [Riverboat] from its Biloxi property (according to gross gaming revenues reported to the Mississippi

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<sup>3</sup> No one disputes that the Phase III Supplemental Rent Guaranty became applicable on August 31, 2008 and accordingly, under the plain terms of the Podium Lease, the market adjustment provision found in III.1(f)(2) did not become applicable until August 30, 2009.

Gaming Commission for that period) falls below \$100,000,000.00 **but is not less than \$90,000,000.00** [emphasis added]; then the Phase III Supplemental Rent Guaranty shall not be applicable but the Phase II Supplemental Rent Guaranty shall be applicable.

The parties agree that for the Lease Years 2009 through 2015 the overall gaming market in the combined Harrison County/Hancock County gaming market was less than \$1,250,000,000.00 each Lease Year. Further, the parties agree that Riverboat's gross gaming revenues from its Biloxi property were less than \$90,000,000.00 for each Lease Year.

7. Riverboat contends that when gross gaming revenues from its Biloxi property are less than \$90,000,000.00, it is entitled to pay the Phase I Supplemental Guaranteed Rent of \$3,233,000.00. Riverboat contends that it is not "reasonable" that if its revenues should decline below \$90,000,000 it should pay more in rent. Under Riverboat's position, the Court should determine which market adjustment most closely matches Riverboat's revenue and then determine what phase of rent Riverboat should pay.

8. Defendants contend that after August 31, 2008 (the date the Phase III Supplemental Guaranty took effect), Riverboat is obligated to pay \$3,733,000.00 and there can be no market adjustment because under the express, unambiguous terms of the Podium Lease, Riverboat's gross gaming revenues must **not be** less than \$90,000,000.00. *See* Podium Lease III.1(f)(2). Riverboat agrees that its gross gaming revenues are less than \$90,000,000.00 for each Lease Year after August 31, 2008 and therefore, Defendants contend Riverboat has not satisfied a condition precedent to a market adjustment in the Phase III rent.

9. The Court finds that the express terms of Section III.1(f)(2) became applicable "one year after the Phase III Supplemental Rent Guaranty [became] applicable" *i.e.* August 30, 2009. The unambiguous terms of the Lease require that once the Phase III Supplemental Rent Guaranty becomes applicable, Riverboat is only entitled to a market adjustment in years in which



the overall Hancock/Harrison County gaming market is less than \$1,250,000,000.00 and Riverboat's gross gaming revenues "falls below \$100,000,000.00 but is not less than \$90,000,000.00." III.1(f)(2) (emphasis added). The express condition to any market adjustment to the Phase III rent is that Riverboat's gross gaming revenues must not be less than \$90,000,000.00.

10. The Court is not persuaded by Riverboat's argument that in any Lease Year in which its gross gaming revenues are less than \$90,000,000.00, the Phase I Supplemental Rent Guaranty applies. In essence, Riverboat's position is that the market adjustment provision supersedes the clearly defined progressive rent phases. The plain and unambiguous language of the Podium Lease provides no support for this reading. The market adjustment provision operates on the effective rent phase. Indeed, the conditions precedent for a market adjustment during Phase III and Phase II are mutually exclusive. During Phase III, Riverboat may only receive a market adjustment downward to Phase II rent if its gross gaming revenues are not less than \$90,000,000.00. Thus, meeting the condition precedent for a market adjustment from Phase III downward to Phase II rent would necessarily preclude a second adjustment downward to Phase I rent. To hold otherwise, the Court would have to ignore the plain language of the Podium Lease that creates three distinct phases of Supplemental Guaranteed Rent that increase over time.

11. Riverboat's contention that it is not "reasonable" that it pay "more" rent in down years is not prevailing. First, Riverboat is not paying "more" rent. It is paying the exact amount agreed upon for Phase III. Second, even if Riverboat were paying "more" rent, the Court finds that under the rules for contract construction where the contract is unambiguous, the Court "is not concerned with what the parties may have meant or intended but rather with what they said,

for the language employed in the contract is the surest guide to what was intended.” *Highland Colony*, 2015 Miss. App. at ¶8. The clear terms of Section III.1(f)(2) demonstrates the parties agreed that during the term of the Phase III Supplemental Guaranteed Rent, Riverboat is only entitled to a market adjustment if Riverboat’s gross gaming revenues falls below \$100,000,000.00 but not less than \$90,000,000.00. Accordingly, under the plain terms of the Podium Lease Riverboat is not entitled to a market adjustment as its revenues are less than \$90,000,000.00 for each Lease Year.

Here, the express terms of section III.1(f)(2) requires that for a market adjustment to the Phase III Supplemental Rent Guaranty, Riverboat’s gross gaming revenue must not be less than \$90,000,000.00. Whether or not Riverboat believes this to be reasonable, it is the language Riverboat agreed to when it executed the Podium Lease. Under “[P]eople are free to enter into [contracts]-even unfavorable ones. We will not disturb such agreements simply because an agreement is not necessarily in one’s best interest.” *Williams v. Williams*, 37 So.3d 1196, ¶9 quoting *De St. Germain*, 977 So.2d 412, 420 (Miss. Ct. App. 2008).

The Court makes no ruling on that portion of Defendants’ Motion for Summary Judgment asserting that portions of Riverboat’s breach of contract claims are time barred as it is unnecessary for the Court to reach this argument.

Accordingly, the Court does hereby:

**DENY** Riverboat’s Motion for Partial Summary Judgment (Docket No.18); and

**GRANT** Defendants’ Motion for Summary Judgment (Docket No. 20) on Riverboat’s breach of contract and declaratory judgment claims.

The Court does hereby enter the following declaratory judgment of the Podium Lease. Pursuant to the unambiguous terms of the Podium Lease the Court does hereby:

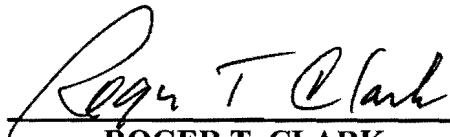


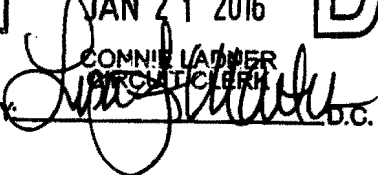
**ORDER AND ADJUDGE** that, pursuant to Section III.1(e) and III.1(f)(2) of the Podium Lease, when the overall gross gaming revenues from the combined Harrison County/Hancock County Gaming Market are less than \$1,250,000,000.00 and Riverboat's gross gaming from its Biloxi property are less than \$90,000,000.00, Phase III Supplemental Guaranteed rent in the amount of \$3,733,000.00 is due and payable to Defendants without market adjustment downward to the Phase II or Phase I Supplemental Guaranteed Rent.

The Court does hereby:

**ORDER AND ADJUDGE** that Riverboat's claims for breach of the Podium Lease are hereby dismissed with prejudice.

**SO ORDERED AND ADJUDGED** this the 19 day of January, 2016

  
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**ROGER T. CLARK**  
**CIRCUIT COURT JUDGE**

**FILED**  
JAN 21 2016  
CONNIE LANNER  
CIRCUIT CLERK  
BY:  D.C.