

STATE OF ALABAMA)
)
SHELBY COUNTY) NOTICE OF LIS PENDENS

TO THE JUDGE OF PROBATE OF SHELBY COUNTY:

You are hereby notified that on the 9th day of April, 2004, suit was begun by the undersigned in the Circuit Court of Shelby County, Alabama, and that the following are the names of all parties to said suit:

Name of Plaintiff:

Southland Bank

Name of Defendants:

Birmingham Realty Company

In said suit, the following described real estate parcel, situated in Shelby County, Alabama, is involved, to-wit: Lot 4, Oak Mountain Commerce Place, as recorded in Map Book 18, page 58, in the Office of the Judge of Probate of Shelby County, Alabama, and which is also known by the property address 2258 Pelham Parkway, Pelham, Alabama 35124.

The kind of suit brought as above stated is set out in the Complaint for unjust enrichment/quasi-contract, equitable mortgage or lien, breach of contract, and misrepresentation and suppression, a copy of which Complaint, without exhibits, is attached hereto and made a part hereof as Exhibit A. The nature of the lien, right and interest enforced is fully and completely set out in Exhibit A attached hereto and made a part hereof.

This the 30th day of June, 2004.

Walston, Wells, Anderson & Bains, LLP

By: *Randall D. Wells*
Attorney for Southland Bank

Sworn to and subscribed before me on this 30 day of June, 2004.

Fred A. Johnson II
Notary Public

My Commission Expires 2-11-05

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

SOUTHLAND BANK,
an Alabama bank corporation,

Plaintiff,

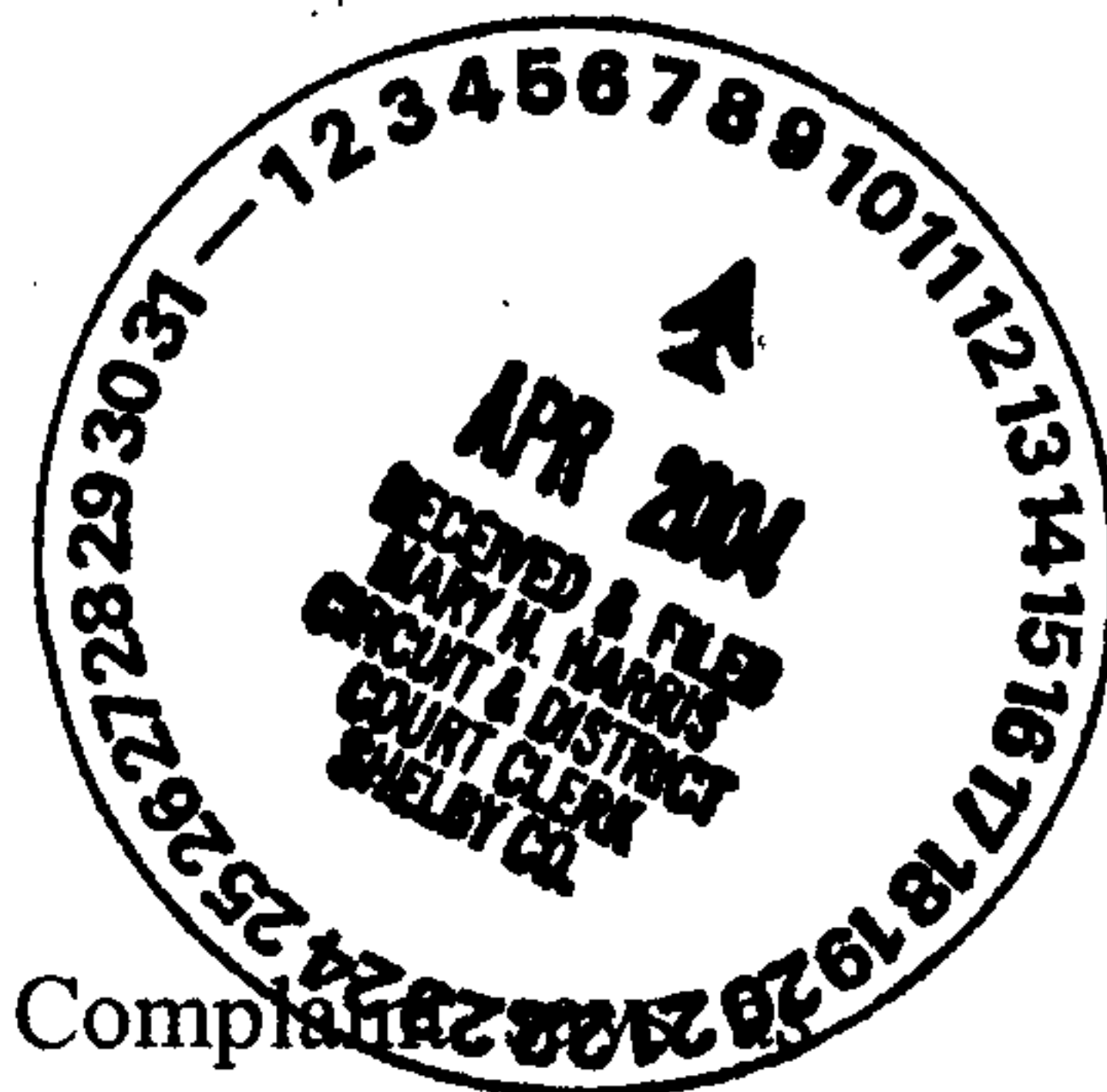
vs.

BIRMINGHAM REALTY COMPANY,
an Alabama corporation,

Defendant.

CIVIL ACTION NO.

CV 04-427



COMPLAINT

Comes now plaintiff, Southland Bank ("Southland"), and for its Complaint follows:

PARTIES

1. Southland is an Alabama bank corporation.
2. Defendant Birmingham Realty Company ("Birmingham Realty") is an Alabama corporation that owns and leases commercial real estate in Shelby County, Alabama, and other locations. Birmingham Realty does business in Shelby County, and this action pertains to a lease of certain commercial property in Shelby County owned by Birmingham Realty.

BACKGROUND FACTS

3. This action arises from Birmingham Realty's misconduct and breach of contract in connection with a lease agreement for real property in Pelham that was used for several years for the operation of a restaurant. Southland provided financing to the tenant for construction of a building and other property improvements required by Birmingham Realty. After the tenant ceased doing business and Southland foreclosed on its leasehold mortgages, Birmingham Realty induced Southland to continue paying rent pursuant to the lease by representing that the lease

EXHIBIT A

could be transferred to another tenant if one could be located to operate a specific restaurant franchise. At the same time, Birmingham Realty refused to cooperate with Southland in its attempt to locate prospective tenants who might have been willing to assume the lease for purposes other than operating that specific restaurant franchise. Ultimately, Birmingham Realty refused to discuss or agree to a transfer of the lease to a prospective tenant who proposed to operate the restaurant franchise on which Birmingham Realty had earlier insisted. Birmingham Realty has declared the lease to be terminated, and, consequently, Southland has been damaged as stated in this Complaint.

The Lease

4. Birmingham Realty is the owner of property described as Lot 4, Oak Mountain Commerce Place (hereinafter, the "Lot"). The Lot, located in a shopping center development, contains approximately 33,000 square feet of land.

5. On or about December 5, 1997, Birmingham Realty entered into a Lease with Spectrum Enterprises, Inc. ("Spectrum"), for what was then the unimproved Lot. As subsequently supplemented and amended, the Lease provided for a term of 15 years running from June 4, 1998, through May 31, 2013. The Lease also provided for up to two extensions of five years each. True and correct copies of the Lease, the Addendum 1 to Lease Between Birmingham Realty Company and Spectrum Enterprises, Inc. (the "Addendum"), and the First Amendment to Lease (the "Amendment") are attached hereto as Exhibits A, B and C, respectively.

6. In the Lease, Birmingham Realty required Spectrum, as tenant, would construct a restaurant building (the "Restaurant") on the Lot for the purpose of operating "a Delicatessen restaurant operating under the name of 'Schlotzsky's Deli.'" The Restaurant was to have

approximately 3,000 square feet of space. The Lease also contained other provisions governing the construction of the Restaurant, landscaping and other improvements to the Lot.

Payment for Improvements

7. The original Lease stated that Birmingham Realty would provide an improvement allowance for construction of the Restaurant and other improvements. The Addendum required Birmingham Realty, as Landlord, to provide Spectrum with an allowance of up to \$280,000 for site work, building construction and architectural fees. The Addendum further provided: “All improvements shall be *for the Landlord’s account and shall be owed by the Landlord.*” (Emphasis added.)

8. The parties later agreed that Birmingham Realty would substantially decrease Spectrum’s monthly rent under the Lease rather than pay the \$280,000 improvement allowance for the Restaurant and other improvements as described in the preceding paragraph of this Complaint. Under the Amendment, Birmingham Realty agreed to a total rent reduction of \$504,000 over the 15-year Lease to offset the cost of the improvements.

9. Spectrum constructed the Restaurant and otherwise improved the Lot as required by Birmingham Realty under the Lease. Spectrum then operated a “Schlotzsky’s Deli” in the Restaurant for approximately five years as a franchisee of Schlotzsky’s, Inc. (“Schlotzsky’s”).

Birmingham Realty’s Inducement of Southland to Provide Financing

10. Southland provided financing for Spectrum’s construction of the Restaurant and other improvements. In connection with that financing, Spectrum granted to Southland a Leasehold Mortgage and Second Leasehold Mortgage, pursuant to which Southland was the “Leasehold Mortgagee.”

11. To induce Southland to provide financing to Spectrum, Birmingham Realty executed, among other instruments, a Landlord's Subordination and Non-Disturbance Agreement (the "Subordination Agreement"). Section 3 of the Subordination Agreement provided, in pertinent part:

Subordination. Notwithstanding anything in the Ground Lease which may be construed to the contrary, the Fee Owner [Birmingham Realty] hereby subordinates to the Leasehold Mortgagee, for the benefit of the Leasehold Mortgagee under the Leasehold Mortgage and the Second Leasehold Mortgage . . . , its statutory landlord's lien and all other liens, claims, demands or rights, however arising, including the right to levy, distrain, sue, execute or sell for unpaid rent, which the Fee Owner now has or may hereafter acquire with respect to any or all of the Leasehold Estate, Equipment or other property utilized in the operation of a Schlotzsky's Deli on the Leased Premises

(Emphasis added.) The Subordination Agreement's description of the "Leasehold Estate" included the improvements.

Birmingham Realty's Lack of Cooperation

12. Various provisions of the Lease and Addendum permitted the assignment of the Lease or subletting of the leased premises. Section 23 of the Lease provided generally for assignment and subletting. Section V of the Addendum (Exhibit B hereto) stated as follows:

Notwithstanding any provision in this Lease to the contrary, Tenant may assign this Lease with Landlord's prior approval, which shall not be unreasonably withheld, to a qualified Schlotzsky's, Inc. franchisee. However, Tenant and Guarantors shall remain liable for all terms and conditions of the Lease including rental and other payments.

13. Additionally, Section 5 of the Subordination Agreement provided for the assignment of the Lease by Southland with Birmingham Realty's prior written consent, "which consent shall not be unreasonably withheld." The Subordination Agreement was executed by Birmingham Realty with Spectrum and Southland. A true and correct copy of the Subordination Agreement is attached hereto as Exhibit D.

14. Following Spectrum's default in repayment of its loans from Southland, Southland foreclosed its mortgages on the leasehold estate and received title thereto by a Mortgage Foreclosure Deed dated October 27, 2003.

15. Southland paid or tendered to Birmingham Realty all rent that was due on the leased premises as of March 1, 2004. Southland also paid real estate taxes assessed against the premises and maintained casualty insurance on the improvements. Birmingham Realty returned a check for the March 2004 rent but retained all other payments from Southland.

16. Following the foreclosure, Southland continued to attempt to locate potential tenants to assume the Lease. Birmingham Realty, however, unreasonably and without justification insisted that it would accept only a Schlotzsky's franchisee as a replacement for Spectrum. Birmingham Realty's insistence that only a Schlotzsky's would be acceptable was contrary to the terms of the Lease and Subordination Agreement.

17. In a letter to Southland dated February 24, 2004, Birmingham Realty declared that the Lease would be terminated "effective fifteen (15) days from the receipt of this notice" because Spectrum had discontinued its business in the Restaurant. The fifteenth day following Southland's receipt of the aforementioned letter was March 12, 2004.

18. On March 10, 2004, while the Lease was undeniably in effect, Southland notified Birmingham Realty that a Schlotzsky's franchisee had been located to assume the Lease and operate the Restaurant as a Schlotzsky's. Additional information was provided to Birmingham Realty the following day, March 11.

19. Birmingham Realty would not agree to or even discuss the proposal for the new Schlotzsky's restaurant. Instead, on or about March 18, 2004, Birmingham Realty commenced an action in the District Court of Shelby County, Alabama, demanding possession of the premises and alleging certain monetary damages.

20. Birmingham Realty's refusal to cooperate with Southland in obtaining a replacement tenant, its insistence on only a Schlotzsky's franchisee as a tenant, and its ultimate refusal to accept even a Schlotzsky's franchisee as a replacement tenant, damaged Southland by preventing the bank from transferring the Lease and obtaining value for the Restaurants and other improvements. Moreover, Birmingham Realty is attempting to obtain a windfall by seizing possession of the Restaurant and improvements that were constructed at its direction and for which it promised to provide value. The reduction in rent charged for the premises has not offset the fair market value of the Restaurant and other improvements, and Birmingham Realty has not otherwise provided compensation for the Restaurant and other improvements.

COUNT ONE -- BREACH OF CONTRACT

21. Southland adopts by reference the averments of paragraphs 1-20, as if set out here in full.

22. Birmingham Realty unreasonably withheld its consent to an assignment of the Lease in violation of the Lease, Addendum and Subordination Agreement.

23. Birmingham Realty impliedly covenanted, as a matter of Alabama law, that it would not do anything to destroy or injure the contractual rights of Spectrum or Southland, as successor to Spectrum's rights under the Lease. Birmingham Realty, however, breached the covenant by failing to cooperate with, and by rebuffing, Southland's attempts to locate a replacement tenant.

24. The breach by Birmingham Realty has damaged Southland. Southland's damages include, but are not necessarily limited to, loss of the value of the Restaurant and improvements and loss of compensation that would have been received pursuant to an assignment of the Lease.

COUNT TWO--MISREPRESENTATION AND SUPPRESSION

25. Southland adopts by reference the averments of paragraphs 1-24, as if set out here in full.

26. Birmingham Realty, which wanted the leased premises back without a replacement tenant, knew at all pertinent times that it would reject any proposed tenant that Southland proposed. Under the circumstances, Birmingham Realty owed a duty to Southland to disclose that information. Nevertheless, Birmingham Realty suppressed that material information from Southland and affirmatively misrepresented to Southland that a Schlotzsky's franchisee would be acceptable.

27. Southland relied to its detriment on Birmingham Realty's suppression and misrepresentation of material facts by, among other things, continuing to pay rent, taxes and insurance expenses for the premises while searching for a replacement tenant.

28. Southland was injured and incurred damages as a proximate result of Birmingham Realty's suppression and misrepresentation of material facts.

29. The misrepresentation and suppression by Birmingham Realty were intentional, reckless, negligent or innocent, and they constituted fraud, deceit and fraudulent suppression within the meaning of sections 6-5-100 through -104 of the Code of Alabama (1993) and/or Alabama common law.

COUNT THREE--UNJUST ENRICHMENT/QUASI-CONTRACT

30. Southland adopts by reference the averments of paragraphs 1-29, as if set out here in full.

31. Birmingham Realty has been unjustly enriched at the expense of Southland. Southland provided funds for the construction by Spectrum of the Restaurant and other improvements on the Lot. Birmingham Realty was aware of Southland's financing for the improvements. Birmingham Realty has claimed and accepted the benefit of Southland's loans and the improvements without providing adequate compensation for the same. Consequently, Birmingham Realty is liable to Southland for the fair value of the improvements made.

COUNT FOUR -- EQUITABLE MORTGAGE OR LIEN

32. Southland adopts by reference the averments of paragraphs 1-31, as if set out here in full.

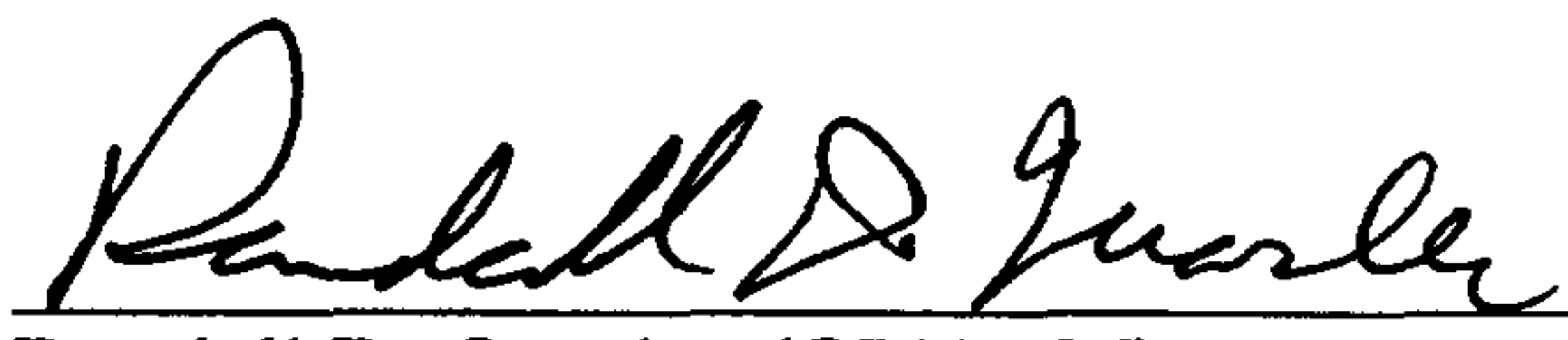
33. Spectrum, with loan proceeds from Southland, made improvements to the Lot as required by Birmingham Realty. Birmingham Realty agreed to compensate Spectrum for the

improvements, initially by providing in the Lease and Addendum for an improvement allowance, and subsequently by agreeing to reduce the rent under the Lease by a total of \$504,000. As of March 12, 2004, however, the rent reduction had not offset the total cost of the improvements.

34. Southland provided funds for the construction of the improvements, and it also is the successor by foreclosure deed to Spectrum's rights under the Lease. Under the circumstances of this case, Southland is entitled to an equitable mortgage or lien on the Lot and the improvements thereon.

PRAYER FOR RELIEF

WHEREFORE, the premises considered, Southland demands judgment against Birmingham Realty for compensatory damages in an amount to be established at trial, including, but not necessarily limited to, Southland's consequential and incidental damages; damages for unjust enrichment; punitive damages; the declaration and enforcement of an equitable lien or mortgage against the improvements on the Lot and the improvements thereon; prejudgment interest at the legal rate, costs of court; attorneys' fees; and such other and different relief as the Court may deem just.


Randall D. Quarles (QUA006)


Attorney for Plaintiff Southland Bank

OF COUNSEL:

WALSTON, WELLS, ANDERSON
& BAINS, LLP
One Federal Place
1819 Fifth Avenue North, Suite 1100
Birmingham, AL 35203
Telephone: (205) 244-5200
Telecopier: (205) 244-5400

JURY DEMAND

The plaintiff demands a trial by struck jury.


OF COUNSEL

Plaintiff's Address:

Southland Bank
3299 Ross Clark Circle NW
Dothan, AL 36303

Please Serve Defendants by Certified Mail as Follows:

Birmingham Realty Company
3119 First Avenue North
Birmingham, AL 35203