IN THE SUPREME COURT OF MISSISSIPPI
NO. 2005-IA-00311-SCT

CITIFINANCIAL MORTGAGE COMPANY, INC., FORMERLY KNOWN AS ASSOCIATES HOME EQUITY SERVICES, INC., FORMERLY KNOWN AS FORD CONSUMER FINANCE COMPANY, INC., HARE MORTGAGE, INC. AND JOHN DOES A-Z

APPELLANTS/DEFENDANTS

VS.

ROSIE WASHINGTON AND CATHERLEAN CRAFT

APPELLEES/PLAINTIFFS

ON INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL DISTRICT, JASPER COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT CITIFINANCIAL MORTGAGE COMPANY, INC. (ORAL ARGUMENT REQUESTED)

H. Mitchell Cowan, MB[redacted]
Laura Limerick Gibbes, MB[redacted]
Christopher R. Shaw, MB[redacted]
WATKINS LUDLAM WINTER & STENNIS, P.A.
Post Office Box 427
Jackson, Mississippi
Telephone: (601) 949-4900
Facsimile: (601) 949-4804

Robert D. Gholson, MB[redacted]
Burr & Forman LLP
535 N. 5th Avenue
Post Office Box 6523
Telephone: (601) 425-0400
Facsimile: (601) 649-0088

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INTRODUCTION

Plaintiffs' entire case rests upon the premise that a lender has a duty to offer a borrower the "best" loan available. Thus, in order to affirm the trial court's denial of CitiFinancial's Motion for Summary Judgment on any of Plaintiffs' theories of liability, this Court must find that a lender could be liable for failing to offer a borrower a "better" loan than the one to which she agreed. In this case, Plaintiffs say CitiFinancial had a duty to offer them a loan for which they did not even qualify. Such a notion is baseless and unprecedented. As a matter of policy, imposing such a duty would have detrimental implications for lenders in Mississippi, as well as any competitive business in this state. Fortunately, the Court need not even ponder the policy considerations, since courts applying Mississippi law have specifically rejected claims that a lender has a duty to put a borrower in the most favorable loan that the lender offers. Plaintiffs have conveniently chosen to ignore this established rule of law and are now requesting this Court do the same.

Plaintiffs also ask this Court to find that CitiFinancial had a duty to tell Plaintiffs that the payment of an additional forty-two dollars per month ($42.00) would have paid the loan off earlier than scheduled under the terms of the contract. Mississippi law does not recognize a duty, fiduciary or otherwise, that would require lenders to advise customers of the effect of literally hundreds of various amortization and payment scenarios. The promissory note at issue informed Plaintiffs of the circumstances under which the loan could be prepaid without penalty. CitiFinancial satisfied its duty of disclosure under Mississippi law.

Plaintiffs' claims also are barred by the statute of limitations. The subject loan

transaction occurred in November of 1995. Despite being provided documentation clearly disclosing the terms of their loan, including the balloon feature that is the basis of all of Plaintiffs' claims, this lawsuit was not filed until six years later. Plaintiffs have failed to show: (1) any act by CitiFinancial designed to prevent them from discovering their purported claims, and (2) that that they acted with reasonable diligence in discovering those claims. Thus, the statute of limitations has not been tolled and Plaintiffs' lawsuit should be dismissed for failure to timely prosecute a claim.

Finally, in connection with the settlement of claims against a CitiFinancial affiliated company, Plaintiffs settled and released their claims against CitiFinancial prior to filing this action. That settlement agreement clearly and unambiguously precludes Plaintiffs from bringing their claims in this case. Plaintiffs should not be allowed to breach the terms of that agreement and continue to pursue the claims asserted here.

ARGUMENT

I. The fact that Mississippi law does not provide a duty to offer borrowers the "best" loan available extinguishes all of Plaintiffs' claims.

The Court need only consider one issue in deciding the validity of Plaintiffs' entire case: whether Mississippi law requires lenders to offer borrowers a "better" loan than the one they obtained. It clearly does not. *See Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F. Supp. 2d 894, 899 (S.D. Miss. 1998); *Gholston v. Ford Motor Credit Co.*, No. 4:04cv265 D-B, 2005 WL 2254075, at *3 (N.D. Miss. Sept. 14, 2005). Though CitiFinancial raised *Baldwin* in its Brief of Appellant, the Brief of Appellees completely ignores it. Plaintiffs make no attempt to even distinguish *Baldwin*, much less refute its holding. Instead, Plaintiffs have provided the Court with their thoughts and ideas about why they are right, without citing any applicable law. The problem for Plaintiffs is that

all of their claims are extinguished absent a ruling by this Court that *Baldwin* and its progeny are not good law. Simply put, Plaintiffs' claims for fraud, negligence, and breach of the duty of good faith and fair dealing are all contingent on the creation of a duty that does not exist under Mississippi law, or the law of any other state for that matter. *See, e.g., Cable & Assoc. Ins. Agency, Inc. v. Commercial Nat'l Bank of Pennsylvania*, 875 A.2d 361, 364 (Pa. 2005) (a party proceeding on theory that lender violated duty of good faith and fair dealing must demonstrate more than fact that lender negotiated terms of a loan which are favorable to itself); *Flowers v. Ford Motor Credit Co.*, 959 F. Supp. 1467, 1470-71 (M.D. Ala. 1997) (financing company not liable for fraudulent suppression absent representation to buyer that dealer undertook to obtain best financing available).

Without such a duty, Plaintiffs cannot succeed under any of their theories. There is certainly no misrepresentation, as Plaintiffs do not dispute that: (1) the loan terms were disclosed to them, and (2) they were offered – and accepted – the only loan for which they qualified. (R. 380-382, 386-387, 390-404, 955-957, 971-973, 994-1002; R.E. 75-82, 85-102). Because the loan terms were "properly disclosed in the contract, [the Plaintiffs], not the [D]efendants, retained the duty to take independent steps to assure that [they] were getting the best terms possible." *Baldwin*, 32 F. Supp. 2d at 900. Moreover, CitiFinancial had no duty to provide Plaintiffs "with the best terms available in order to comport with the duty of good faith and fair dealing." *Baldwin*, 32 F. Supp. 2d at 899. Indeed, the duty of good faith and fair dealing applies to the performance of a contract, not the negotiation of terms leading to the agreement. *Cenac v. Murray*, 609 So. 2d 1257, 1272 (Miss. 1992). Under this premise, a party that acts in accordance with the

express terms of a contract cannot be found to have violated the covenant of good faith and fair dealing. *Baldwin*, 32 F. Supp. 2d at 898 (*citing Cenac*, 609 So. 2d at 1272). Plaintiffs do not allege that CitiFinancial failed to comply with the express terms of its loan agreement with Plaintiffs. Instead, Plaintiffs' claims are an attempt to "vilify [their] lender merely because [they have] discovered that through greater diligence [they] might have obtained a better bargain from another lender." *Baldwin*, 32 F. Supp. 2d at 898 (*citing Blan v. Bank One, Akron, N.A.*, 519 N.E.2d 363, 368 (Ohio 1988)).

Plaintiffs also allege CitiFinancial had a duty to disclose to Plaintiffs that their loan could have been paid off sooner by making additional payments during the term of the loan. Again, Mississippi law provides that a borrower should not assume that any given loan is the best possible arrangement "without doing her homework." *Id.* at 898. This Court and others applying Mississippi law have repeatedly held that facts similar to those presented here are insufficient as a matter of law to establish a fiduciary relationship or other duty to disclose information beyond the terms of the contract at issue. *See, e.g., AmSouth Bank v. Gupta*, 838 So. 2d 205, 216 (Miss. 2002) (fiduciary relationship does not automatically exist in a commercial loan transaction); *Peoples Bank & Trust Co. v. Cermack*, 658 So. 2d 1252, 1358 (Miss. 1995) (no presumption under Mississippi law of a fiduciary relationship between a debtor and a creditor); *General Motors Acceptance Corp. v. Baymon*, 732 So. 2d 262, 270 (Miss. 1999) (same); *Booker v. American General Life and Accident Ins. Co.*, 257 F. Supp. 2d 850, 861-62 (S.D. Miss. 2003) (arms length business transaction does not create a fiduciary relationship). Plaintiffs only argument that a fiduciary relationship existed between Plaintiffs and CitiFinancial is that Co-Defendant Rhonda Hare, who is not a CitiFinancial employee,

testified in deposition that Plaintiffs should have been told of the availability of other loans. (R. 1088-89). Legal duties do not arise, however, simply because another independent party to the lawsuit says they do. They are a question of law for the court. *Belmont Homes, Inc. v. Stewart*, 792 So. 2d 229, 232 (Miss. 2001); *Donald v. Amoco Production Co.*, 735 So. 2d 161, 174 (Miss. 1999). *See also Nat'l Plan Administrators, Inc. v. Nat'l Health Ins. Co.*, 150 S.W. 3d 718, 730 (Tex. 2004) ("[w]hether a fiduciary duty exists is a question of law.").

Plaintiffs' Response also states – for the first time in this litigation – that the subject loan contract was unconscionable. Plaintiffs did not raise unconscionability in their Complaint, nor have they raised it at any other point in this lawsuit. (R. 1256-1264; R.E. 27-35). This issue is, of course, not a proper one for this Court. *See Crowe v. Smith,* 603 So.2d 301, 305 (Miss.1992) (new issues should not be raised on appeal, since to do so prevents the trial court from having an opportunity to address the alleged error); *Southern v. Miss. State Hosp.*, 853 So.2d 1212, 1214-15 (Miss.2003) (where a party fails to raise an issue before the trial court, the Mississippi Supreme Court is procedurally barred from considering that issue). Plaintiffs assert that their claims for rescission and cancellation of the subject loan agreement "necessarily incorporate all legal mechanisms for rescinding or canceling a contract, namely unconscionability." (Brief of Appellees, p. 7). As Plaintiffs well know, rescission and cancellation are simply legal remedies for when a contract is found to be unconscionable. For that reason, the trial court held in abeyance these issues until the issues of law were resolved. (R. 1254-1255; R.E. 5-6). The issues of rescission and cancellation, as well as unconscionability, are not issues

before this Court.[1]

II. Plaintiffs cannot prove fraudulent concealment necessary to toll the statute of limitations.

Plaintiffs have completely failed to meet their burden of establishing either of the requirements of fraudulent concealment. *See Sanderson Farms, Inc. v. Ballard*, 917 So. 2d 783, 789 (Miss. 2005) (burden of establishing fraudulent concealment rests with the party seeking to avoid the limitations period). First, the Brief of Appellees points to no affirmative conduct on the part of CitiFinancial, subsequent to the loan transactions, that was designed to prevent Plaintiffs from discovering the existence of any claims. *Stephens v. Equitable Life Assure Society of the U.S.*, 850 So. 2d 78, 83-84 (Miss. 2003) ("The affirmative act of concealment must have occurred after and apart from the discrete acts upon which the cause of action is premised."). Instead, Plaintiffs assert that their loan documents, received at the time of the loan, failed to disclose: (1) an alternative loan to the one Plaintiffs obtained, albeit one for which Plaintiffs did not even qualify, and (2) that Plaintiffs could have possibly paid off their loan earlier by submitting

[1] Even if the issue of unconscionability were properly before the Court, Plaintiffs cannot show that the subject loan agreement was either procedurally or substantively unconscionable. Plaintiffs make no claims that the subject loan violated any laws, including usury laws. Indeed, despite citing pages of Mississippi law stating the considerations for procedural unconscionability, Plaintiffs argue in their brief only that the subject loan agreement was a contract of adhesion because Plaintiffs "were never presented any other contract options." (Brief of Appellees, p. 10). However, failure to present multiple contract options does not make the contract that was offered unconscionable. Furthermore, Plaintiffs have offered no evidence, and can point to none in the record, that they did not have the option to simply decline the loan. However, even if the subject loan agreement was one of adhesion, such contracts are not, without more, automatically void. *Vicksburg Partners, L.P. v. Stephens*, 922 So. 2d 507, 518 (Miss. 2005). On the issue of substantive unconscionability, Plaintiffs again recite what they consider to be unfair loan terms. Mississippi law, however, is clear that parties are responsible for reading and understanding all documents they sign. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 726 (Miss. 2002). Plaintiffs do not dispute that they were free to accept or reject the subject loan agreement. They chose to accept it and its terms.

additional payments. (Brief of Appellee, pp. 14-17) (R. 380-382, 386-387, 390-404, 955-957, 971-973, 994-1002; R.E. 75-82, 85-102). The Brief of Appellee cites to no conduct by CitiFinancial – or any other defendant for that matter – subsequent to the subject loan transaction that was designed to conceal Plaintiffs' claims from them.[2]

Indeed, the only action CitiFinancial ever took with respect to Plaintiffs subsequent to the subject loan transaction was providing Plaintiffs with their loan documents. CitiFinancial's delivery of loan documents to Plaintiffs clearly was not an act designed to prevent Plaintiffs from discovering their purported claims. These documents gave Plaintiffs, at a minimum, constructive knowledge of the facts giving rise to their purported claims. *See Cunningham v. Mass. Mut. Life Ins. Co.*, 972 F. Supp. 1053, 1054 (N.D. Miss. 1997). *See also Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 725 (Miss. 2002) ("In Mississippi, a person is charged with knowing the contents of any document that he executes."); *Evans v. Horace Mann Life Ins. Co.*, 946 So. 2d 410, 413 (Miss. App. 2006) ("[A] person is under an obligation to read a contact prior to signing it, and will not be heard to complain of an oral misrepresentation which would have been corrected by reading the contract."). In fact, Plaintiffs confess that it was a third party's review of these very same loan documents which put them on notice of their purported claims. (R. 972-973; R.E. 101-102). These are the same documents Plaintiffs admit to having received and taken home with them after the loan. (R. 380-382, 386-387,

[2] Though CitiFinancial has chosen to address Plaintiffs' argument regarding statute of limitations, the Court need not even reach this issue. As discussed, *supra*, and in the Brief of Appellants, Plaintiffs did not qualify for any loan other than the subject loan. But even if they did, CitiFinancial had no duty to provide Plaintiffs with an arguably "better" loan or alert Plaintiffs that an alternative loan was available. Furthermore, CitiFinancial had no legal duty to "do the math" for Plaintiffs by showing them alternative payment scenarios that could have paid off the loan earlier. Simply put, there was no cause of action to fraudulently conceal, as CitiFinancial had no duty to make such disclosures.

390-404, 955-957, 971-973, 994-1002; R.E. 75-82, 85-102).

Plaintiffs have also failed to establish the second element of fraudulent concealment, which requires that a plaintiff act with reasonable diligence in attempting to discover her claim but still be unable to do so. *Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss. 2000). The Brief of Appellees states that the issue regarding reasonable diligence is not whether Plaintiffs had notice through the loan documents that a balloon payment was required, but rather "were the Plaintiffs on notice that for an additional $42 per month the loan could have been paid in full with no balloon payment." (Brief of Appellees, p. 17). It is undisputed that Plaintiffs' loan documents clearly disclosed all of the loan terms from which they could have gleaned alternative payment scenarios. In analyzing this element of fraudulent concealment, the relevant inquiry is not when a plaintiff actually learns of the facts supporting her claims, but when she should have learned of the those facts in the exercise of reasonable diligence. *See First Trust Nat'l Assoc. v. First Nat'l Bank of Commerce*, 220 F. 3d 331, 336-37 (5th Cir. 2000). Here, there is no dispute that Plaintiffs knew the terms of the loan on the day of the loan closing and that they were provided loan documents to take with them disclosing all of the terms. If Plaintiffs had issues with the terms of the loan – such as the ones that now form the bases of their claims – they clearly had sufficient knowledge to put them on notice of their claims.

III. Plaintiffs have released all of their claims against CitiFinancial.

Plaintiffs' attempt to limit the scope of the release they voluntarily signed is meritless. The "Releasees" include CitiFinancial and any affiliated companies, including Ford Consumer Finance Company, a predecessor of CitiFinancial which actually made the loan, (R. 1011-1023; R.E. 207-219). Furthermore, the subject release clearly applies

to any and all causes of action Plaintiffs might have against the "Releasees," and not simply "flipping and packing" cases as Plaintiffs argue. (R. 1011-1023; R.E. 207-219).

As for Plaintiffs' argument that the subject release was not properly explained or that they did not understand what they were signing, Mississippi law is clear that parties are responsible for reading and understanding all documents they sign. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 726 (Miss. 2002). *See also First Family Fin. Serv., Inc. v. Fairley*, 173 F. Supp. 2d 565, 570 (S.D. Miss. 2001) ("It is well settled under Mississippi law that a contracting party is under a legal obligation to read a contract before signing it."). Mississippi law provides that parties to a contract have an inherent duty to read the terms of a contract prior to signing and "may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it." *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167, 177 (Miss. 2006). Plaintiffs' claim that they did not understand the significance of the settlement agreement is further undercut by the fact that they were represented by counsel in making this agreement. (R. 1011-1023; R.E. 207-219). Plaintiffs' convenient assertion now that they did not understand the effects of the subject release has no bearing on the agreement's enforceability.

CONCLUSION

The trial court erred in denying CitiFinancial's Motion for Summary Judgment. No genuine issue of material fact exists as to any of the claims asserted in Plaintiffs' Complaint. Plaintiffs' latest theory that a "better" loan should have been offered to them does not state a viable claim under Mississippi law. Moreover, Plaintiffs' claims are

barred by the statute of limitations and have otherwise been settled and released. Accordingly, the trial court's Order should be reversed and a judgment rendered in favor of CitiFinancial on all claims asserted against it in this proceeding.

This, the 7th day of March, 2007.

Respectfully submitted,

CITIFINANCIAL MORTGAGE COMPANY, INC.

By Its Attorneys
WATKINS LUDLAM WINTER & STENNIS, P.A.

By: _____
CHRISTOPHER R. SHAW

H. Mitchell Cowan, MB [redacted]
Laura Limerick Gibbes, MB [redacted]
Christopher R. Shaw, MB [redacted]
WATKINS LUDLAM WINTER & STENNIS, P.A.
Post Office Box 427
Jackson, Mississippi
Telephone: (601) 949-4900
Facsimile: (601) 949-4804

Robert D. Gholson, MB [redacted]
Burr & Forman LLP
535 N. 5th Avenue
Post Office Box 6523
Laurel, Mississippi 39205-0427
Telephone: (601) 425-0400
Facsimile: (601) 649-0088

CERTIFICATE OF SERVICE

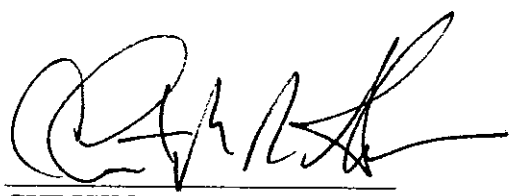
I hereby certify that a true and correct copy of the above and foregoing document has been this day served via United States Mail, postage prepaid, to the following:

Christopher R. Fitzgerald, Esq.
Garrison Scott Gamble & Rosenthal, P.C.
2113 Government Street, D-3
Ocean Springs, MS 39564

W. Lewis Garrison, Esq.
Garrison Scott Gamble & Rosenthal, P.C.
2224 1st Ave. N.
Birmingham, AL 35293

Rhonda Hare
Hare Mortgage Company
2315 Highway 39 N
Meridian, MS 39301-2604

This the 7th day of March, 2007.



CHRISTOPHER R. SHAW