

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SANDRA K. DOMINQUEZ

APPELLANT

VERSUS

CASE NO. 2006-CA-01752

JEFF PALMER

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellee, JEFF PALMER, et al., certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal:

SANDRA K. DOMINQUEZ

APPELLANT

THOMAS GARNER

APPELLANT

JEFF PALMER

APPELLEE

WES BREWER

APPELLEE

MORTGAGE EQUITY LENDING, INC.

APPELLEE

AL SHIYOU, ESQUIRE

ATTORNEY FOR APPELLANTS

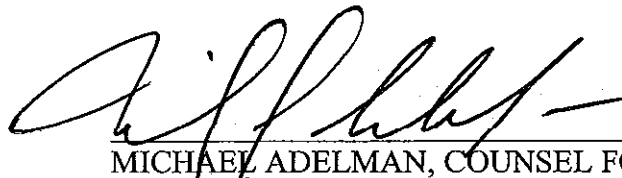
MICHAEL ADELMAN

ATTORNEY FOR APPELLEES

HONORABLE BOB HELFRICH

CIRCUIT JUDGE OF FORREST COUNTY,
MISSISSIPPI

Appellee
Brief



MICHAEL ADELMAN, COUNSEL FOR
APPELLEES

TABLE OF CONTENTS

	PAGE
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES	v
STATEMENT OF THE CASE	
A. Procedural History.....	1
B. Facts	1
SUMMARY OF ARGUMENT	4
ARGUMENTS	
I. STANDARD OF REVIEW	5
II. PLAINTIFFS FAIL TO ESTABLISH A CONTRACT BETWEEN PLAINTIFFS AND ONE OR MORE OF THE DEFENDANTS	7
III. PLAINTIFFS PRESENT NO EVIDENCE TO ESTABLISH THAT DEFENDANTS FAILED TO USE REASONABLE CARE IN SEEKING A LOAN ON THEIR BEHALF	9
IV. PLAINTIFFS HAVE NOT PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A GENUINE ISSUE AS TO A MATERIAL FACT REGARDING THEIR CLAIMS OF BREACH OF FIDUCIARY DUTY, FRAUD OR A VIOLATION OF THE MISSISSIPPI CONSUMER LOAN BROKER ACT.....	11
A. BREACH OF FIDUCIARY DUTY	11
B. FRAUD	12
C. THE MISSISSIPPI CONSUMER LOAN BROKER ACT	13

V. PLAINTIFFS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES UNDER THE MISSISSIPPI DECEPTIVE TRADE PRACTICES ACT AND FURTHER PRESENTED NO EVIDENCE IN SUPPORT OF A CLAIM THAT DEFENDANTS VIOLATED THIS ACT.....	14
VI. PLAINTIFFS' CLAIM REGARDING INSUFFICIENT FUND CHECKS WAS CORRECTLY DISMISSED BY THE LOWER COURT	15
VII. PLAINTIFFS DID NOT PRESENT EVIDENCE SHOWING THAT THE ACTIONS OF DEFENDANTS CAUSED PLAINTIFFS TO SUFFER EMOTIONAL DISTRESS, AND ALSO FAILED TO PRESENT EVIDENCE OF NEGLIGENT SUPERVISION OR ANY BASIS FOR PIERCING THE CORPORATE VEIL.....	16
CONCLUSION	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>Carmichael v. Agur Realities Co.</i> , 574 So.2d 603 (Miss. 1990)	8
<i>Chandler v. Coleman</i> , 759 So.2d 459 (Miss. App. 2000)	18
<i>Cockrell v. Pearl River Valley Water Dist.</i> , 865 S.2d 357 (Miss. 2004)	18
<i>Coleman, et al. v. Blackwell Chevrolet, et al.</i> , 981 F.Supp. 990 (S.D. Miss. 1997)	13
<i>Favre v. Wal-Mart Stores</i> , 820 So.2d 771 (Miss. App. 2002)	18
<i>Gamble v. Dollar General Corp.</i> , 852 So.2d 5 (Miss. 2003)	17
<i>Great Southern National Bank v. McCullough Environmental Services, Inc.</i> , 595 So.2d 1282 (Miss. 1992)	12
<i>Hardy v. Brock</i> , 826 So.2d 71 (Miss. 2002)	18, 19
<i>Massengill v. Guardian Management Company, et al.</i> , 19 F.3d 196 (5 th Cir. 1994)	8
<i>Merchants and Planters Bank v. Williamson</i> , 691 So.2d 398. 404 (Miss. 1997)	11
<i>Minor v. State</i> , 904 So.2d 1164, par.6 (Miss. App. 2004)	7
<i>Price v. Purdue Pharma Co.</i> , 920 So.2d 479 (Miss. 2006)	10
<i>Randolph v. Lambert</i> , - So.2d - (Miss. App. 2006)	17
<i>Stringer v. Bufkin</i> , 465 So.2d 331 (Miss. 1985)	10
<i>University Nursing Assoc. v. Phillips</i> , 842 So.2d 1270 (Miss. 2003)	14
 <u>CODES:</u>	
Mississippi Code of 1972:	
Section 75-24-1	14
Section 75-24-15(2)	14
Section 75-14-15(2)	15

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SANDRA K. DOMINQUEZ

APPELLANT

VERSUS

CASE NO. 2006-CA-01752

JEFF PALMER

APPELLEE

STATEMENT OF ISSUES

1. What is the appropriate standard of review?
2. Whether the Plaintiffs failed to establish a contract between Plaintiffs and one or more of the Defendants?
3. Whether Plaintiff presented any evidence to establish that Defendants failed to use reasonable care in seeking a loan on their behalf?
4. Whether Plaintiffs failed to present sufficient evidence to establish a genuine issue as to a material fact regarding their claims of breach of fiduciary duty, fraud or violation of Mississippi Consumer Loan Broker Act?
5. Whether Plaintiffs failed to exhaust administrative remedies under the Mississippi Deceptive Trade Practices Act, and further failed to present evidence in support of a claim that Defendants violated this act?
6. Whether Plaintiffs' claim regarding insufficient fund checks was correctly dismissed by the lower Court?
7. Whether Plaintiffs failed to present evidence showing that the actions of Defendants caused Plaintiffs to suffer emotional distress, and also failed to present evidence of negligent supervision or any basis for piercing the corporate veil?

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SANDRA K. DOMINQUEZ

APPELLANT

VERSUS

CASE NO. 2006-CA-01752

JEFF PALMER

APPELLEE

BRIEF OF APPELLEE

STATEMENT OF THE CASE¹

A. Procedural History

Plaintiffs brought their lawsuit against Jeff Palmer, individually, Mortgage Equity Lending, Inc., Wes Brewer d/b/a Wes Brewer Cattle Company and Wes Brewer individually. (R.E. TAB 2). After the depositions of both Plaintiffs, Defendants filed their Motion for Summary Judgment, Statement of Undisputed Facts, and supporting Memorandum (TAB 4). The Circuit Court entered its Findings of Fact and Conclusions of Law on September 15, 2006 (TAB 9), granting Defendants' Motion for Summary Judgment and dismissing Plaintiffs' cause of action with prejudice (R.E. 231, TAB 9). Plaintiffs filed a timely Notice of Appeal on October 9, 2006, and this matter is now pending before the appellate Court (TAB 10).

B. Facts²

¹ While Plaintiffs' Record Excerpts appear to be complete, the pagination is not consecutive or consistent. Therefore, Defendants will cite to the relevant TAB within Plaintiffs' Record Excerpts and the pages set forth within each tab.

² Defendants' Statement of Facts is based on the Circuit Court's Findings of Fact (R.E. 221-223, TAB 9).

Plaintiffs brought their lawsuit against Defendants, claiming that Defendants promised Plaintiffs that they could secure a home equity loan on Plaintiffs' behalf. Plaintiffs have no documents to support their alleged contract.

After several months, Plaintiff Sandra K. Dominquez (hereinafter "Dominquez"), sold her home to Plaintiff, Thomas Garner (hereinafter "Garner"), for one hundred twenty-seven thousand dollars (\$127,000.00). Dominquez executed a Warranty Deed to Garner stating that Garner is a "single person" and signed a Request for Verification of Rent or Mortgage stating the property in question on July 30, 2002 was rental property. Both the Warranty Deed and Request for Verification were misrepresentations by Dominquez. Dominquez and Garner were married at the time of Dominquez' conveyance and the property was their primary residence on July 30, 2002.

Prior to seeking a mortgage equity loan from Defendant Mortgage Equity Lending, Inc., Dominquez had sought financing from Southeastern Financing Company and was turned down. Plaintiffs admit that they were not, at any time during their dealings with Defendants, prevented from seeking financing from an alternative source. Also, Plaintiffs are unable to point to any benefit that Defendants received from allegedly delaying their attempts to obtain a loan for Plaintiffs.

The record establishes that Defendants did seek loans on behalf of Plaintiffs, including a loan for Dominquez that was turned down by Decision One Mortgage Company, L.L.C. because of Dominquez' low credit score as revealed by all three (3) of the National Credit Reporting Agencies, Transunion, Experian and EquiFax Credit Information Services, and a loan was granted to Plaintiff Garner by Creve Core Mortgage Company to enable him to purchase Dominquez' property for one hundred twenty-seven thousand dollars (\$127,000.00).

Plaintiffs have produced no evidence that Defendants, Jeff Palmer and Mortgage Equity

Lending, Inc., issued or were somehow involved in issuing “worthless checks” to Plaintiffs or on behalf of Plaintiffs. The checks appeared to be issued by Defendant Brewer as payment for work performed by Garner for Brewer outside of Brewer’s employment relationship with Mortgage Equity Lending, Inc.. No evidence was produced that any of these checks were issued for any other purpose. All checks were written either by “Wes Brewer” or “Wes Brewer Cattle Company.” None bear the name “Mortgage Equity Lending, Inc.” or “Jeff Palmer.” In addition, all of the checks in question were covered by Defendant Brewer. Plaintiffs could point to no remaining insufficient checks which were outstanding.

Plaintiffs have produced no evidence of a power of attorney or any other document giving any one or more of the Defendants fiduciary or special authority to act on Plaintiffs’ behalf.

Plaintiffs produced no evidence that they made a reasonable attempt to resolve their claims in an informal dispute settlement program approved by the Attorney General for the State of Mississippi.

As noted, each of the checks alleged to be insufficient in Plaintiffs’ complaint was ultimately covered by Defendant Brewer, and each such check was paid to Plaintiff Garner or on behalf of Garner, for work Garner performed for Mr. Brewer, individually. Such checks were not offered nor were they part of any dealings with the Plaintiffs and Defendants Palmer and Mortgage Equity Lending, Inc..

Plaintiffs are unable to establish any damages that are causally related to their allegations against Defendants. Plaintiffs were unable to specify any monetary losses as a result of any actions by Defendants, and they certainly were unable to prove any personal injuries which would be compensable under Mississippi Law.

SUMMARY OF THE ARGUMENT

Plaintiffs submit that the Court was correct in granting Summary Judgment. Plaintiffs' entire case turns on their allegation that there was an implied oral brokerage contract which required Defendants to obtain a loan transaction for Plaintiffs within thirty (30) days at a promised rate. However, the evidence does not support this allegation and, thus, Plaintiffs' cause of action was correctly dismissed.

Plaintiffs' breach of contract claim fails because the record evidence does not sufficiently establish a contract or a breach of contract. Plaintiffs' negligence claims fails because Plaintiffs cannot show that the Defendants did anything wrong. There is not sufficient evidence on the record to establish a genuine issue of material fact as to Plaintiffs' claim of negligence, let alone gross negligence.

Plaintiffs' claims of breach of a fiduciary duty, fraud or a violation of the Mississippi Consumer Loan Broker Act fail for essentially the same reasons as their claims of breach of contract and negligence, i.e., the evidence does not support these claims.

Plaintiffs' claim under the Mississippi Deceptive Trade Practices Act was correctly dismissed because Plaintiffs failed to exhaust their administrative remedies under that act and, further, once again there is no evidence to support this claim.

Plaintiffs' claim regarding insufficient fund checks was correctly dismissed by the lower Court. Plaintiffs could not identify the checks in question and neither Plaintiff could give any information regarding these checks. At a minimum, it is apparent that these checks were paid to Thomas Garner, or on behalf of Thomas Garner, for work Thomas Garner performed for Defendant

Brewer separate from Mr. Brewer's association with Defendant Palmer and Mortgage Equity Lending, Inc.. These checks pertain to dealings between Brewer and Garner and have no relevance whatsoever to Plaintiff Dominquez or Defendants Palmer and Mortgage Equity Lending, Inc.. Further, Plaintiffs have failed to establish that any of the alleged insufficient checks were not covered by Defendant Brewer.

As to Plaintiffs' claims of emotional distress, these claims were correctly dismissed by the Circuit Court. Since the Court was of the opinion that none of Plaintiffs' substantive claims regarding liability could withstand Defendants' Motion for Summary Judgment, there was no basis for an award of damages whether based on emotional distress or any other factor. Also, Plaintiffs failed to prove any the most basic elements necessary to establish emotional distress.

The Circuit Court's dismissal of Plaintiffs' negligent supervision claim was correct based on the facts and the law. Since there was no negligence on the part of any of the Defendants, there was no basis for a claim of negligent supervision. Likewise, Plaintiffs failed to present sufficient evidence for the Circuit Court to consider piercing the corporate veil.

ARGUMENT

I. STANDARD OF REVIEW

Defendants agree that the Standard of Review for a Motion for Summary Judgment is a *de novo* standard. However, Defendants submit that under this standard, the Circuit Court was correct in granting Summary Judgment in this case. As Plaintiffs note, the official comment to Rule 56 of the Mississippi Rules of Procedure states that a Motion for Summary Judgment "is well adapted to expose sham claims. . ." If ever a lawsuit was replete with "sham claims," this is that lawsuit. The claim of an "implied oral brokerage contract" is without record support. In fact, it stretches the

limits of credulity for Plaintiffs to contend that on one hand there is an implied contract, and on the other that this implied contract has specific terms such as performance within thirty (30) days “at the promised rate.” Significantly, Plaintiffs are unable to point to any evidence which establishes the alleged thirty (30) day period for performance or the alleged promised rate, nor do they ever reference “the promised rate.” Plaintiffs have never offered evidence of a promised rate. In addition, Plaintiffs have no evidence that the Defendants did anything wrong or that the Plaintiffs suffered any real damages. Most importantly, Plaintiffs committed fraud when they executed documents in connection with the loan and the sale of property from Plaintiff Dominquez to Plaintiff Garner. As the Circuit Court held, they should not benefit from their dishonesty.

Finally, while Plaintiffs state the correct standard of review where the trial Court has granted a Motion for Summary Judgment, they misstate Rule 56 regarding what is necessary for a defendant to seek and ultimately obtain summary judgment. Rule 56(b) specifically states as follows:

“A party against whom a claim, counter-claim or cross-claim is asserted or declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.” (Emphasis supplied.)

Defendants in this case supported their Motion for Summary Judgment with numerous excerpts from the depositions of each Plaintiff, as well as those documents which establish Plaintiffs’ fraud in connection with the July 31, 2002 transaction between Plaintiff Garner and Plaintiff Dominquez. (R.E. 79-133, TAB 4). Deposition testimony is, if anything, more probative and reliable than affidavits which are not subject to cross-examination. Deposition testimony is taken under oath (Rule 30, Mississippi Rules of Civil Procedure) and, unlike affidavits, is often admissible at trial, either in whole or part (Rule 32, M.R.C.P).

Under the *de novo* standard of review, it should be apparent that Plaintiffs’ lawsuit was a

sham and that the Circuit Court correctly granted Defendants' Motion for Summary Judgment

II. PLAINTIFFS FAIL TO ESTABLISH A CONTRACT BETWEEN PLAINTIFFS AND ONE OR MORE OF THE DEFENDANTS

In their Brief, Plaintiffs correctly state that in its Findings of Fact and Conclusions of Law, the Circuit Court held that no contract existed between Plaintiffs and Defendants, and hence granted Summary Judgment for Defendants on Count 1 (Breach of Contract), Count 2 (Tortious Breach of Contract), and Count 5 (Breach of Duty of Good Faith and Fair Dealing) of Plaintiffs' Complaint (R.E. 221-231, TAB 9). As Plaintiffs note, the Circuit Court stated that "Plaintiffs have been unable to identify the terms of an alleged contract that are sufficiently definite as to be enforceable by this Court," and that "the alleged promises and performance in this case are too uncertain to be enforceable as a contract." (R.E. 225, TAB 9)

Plaintiffs now argue that "the contract in this case was an implied oral brokerage contract containing certain and definite terms." (Brief of Appellee, p. 19) They go on to argue that the "implied oral brokerage contract" included an agreement by Defendant Mortgage Equity Lending, Inc., through its agent, Wes Brewer, to obtain a loan transaction within thirty (30) days at a promised rate, although Plaintiffs provide no proof of the alleged "promised rate."

However, Plaintiffs are unable to identify any evidence in the record below which supports the allegation that there was an implied oral contract between the Plaintiffs and Defendants let alone were required performance within thirty (30) days at a promised rate. Rule 28(a)(6) of the Mississippi Rules of Appellate Procedure requires that Appellants' Brief not only contain the contentions of Appellant and the supporting authority, but also those "parts of the record relied on." In this case, there is no record support for Appellants' contentions. See *Minor v. State*, 904 So.2d 1164, par.6 (Miss. App. 2004). Plaintiffs have produced no evidence whatsoever, whether written

or oral, which supports their contention of an implied oral contract to be performed within thirty (30) days at a promised rate.

Regarding this argument, the one case relied upon by Plaintiffs, *Carmichael v. Agur Realities Co.*, 574 So.2d 603 (Miss. 1990) is completely distinguishable from the present case and does not support Plaintiffs' contentions. In *Carmichael*, the plaintiff was a broker who sought recovery of a commission from the customer for services that the broker had, in fact, provided. *Carmichael* does not support the existence of a contract in this case. Plaintiffs cannot prove that Defendants either gained anything or were in a position to do so by failing to obtain a loan for Plaintiffs or by delaying their efforts. Plaintiffs admit that they were always free to seek the services of another broker if they so desired. (R.E. 85, TAB 4)

Furthermore, the record establishes that Defendants did seek loans on behalf of Plaintiffs, including the loan for Plaintiff Dominquez that was denied by Decision One Mortgage Company, L.L.C. (TAB 8), and the loan that was granted to Plaintiff Garner by Creve Coeur Mortgage Company, to enable him to purchase Plaintiff Dominquez' property for one hundred twenty-seven thousand dollars (\$127,000.00). (R.E. 129-133, TAB 4) Plaintiffs have failed to establish how these Defendants acted any differently than Southeast Financing Company which was also unable to secure a loan for the Plaintiffs. (R.E. 83-84, TAB 4) Plaintiffs were in financial trouble at the time they approached Southeast Financing Company, and their financial situation, if anything, worsened by the time they approached Defendant Equity Mortgage Lending, Inc.. Certainly, Plaintiffs have not shown that the Defendants were responsible for their poor financial credit rating.

In *Massengill v. Guardian Management Company, et al.*, 19 F.3d 196 (5th Cir. 1994), the Court stated as follows:

“Mississippi law favors a determination that the terms of a contract are sufficiently definite so as to carry out the reasonable intentions of the parties. . . . However, Mississippi courts will refuse to enforce a contract that is ‘vague, indefinite and ambiguous’ Under Mississippi law, ‘vague, indefinite and uncertain’ agreements in which the promises and performances to be rendered by each party are not reasonably certain, are not enforceable as contracts.” (19 F.3d at 201)

The record in this case does not establish an enforceable contract.

III. PLAINTIFFS PRESENT NO EVIDENCE TO ESTABLISH THAT DEFENDANTS FAILED TO USE REASONABLE CARE IN SEEKING A LOAN ON THEIR BEHALF

Count 3 of Plaintiffs’ Complaint alleges negligence and Count 4 alleges gross negligence.

Both Counts were dismissed by the Trial Court.

The allegations of negligence in this case fly in the face of the facts. Defendants not only obtained a loan on behalf of Garner, in order that he might purchase property from Plaintiff Dominquez, but Plaintiffs committed fraud in order to obtain this loan. Plaintiff Dominquez executed a Warranty Deed to Plaintiff Garner stating that Mr. Garner is a “single person.” (R.E. 132-133, TAB 4). She also signed a Request for Verification of Rent or Mortgage stating that the property in question on July 30, 2002, was rental property. (R.E. 129, TAB 4) Both the Warranty Deed and Request for Verification were misrepresentations by Plaintiff Dominquez. Dominquez and Garner were married at the time Plaintiff Dominquez conveyed the property, and the property was, in fact, their primary residence at that time. (R.E. 7-8; 103-107; 129-133, TAB 4) In dismissing these Counts, the Trial Court stated as follows:

“It is inconceivable to the Court that Plaintiffs’ admitted fraud can somehow be turned into an act of negligence on the part of Defendants.” (R.E. 227, TAB 9)

This Court has held that a plaintiff should not be able to recover because of his own

wrongdoing. *Price v. Purdue Pharma Co.*, 920 So.2d 479 (Miss. 2006) This concept is considered one of the most recognized and longstanding in Mississippi law. *Price* at 484.

In support of their argument on the issue of negligence, Plaintiffs cite *Stringer v. Bufkin*, 465 So.2d 331 (Miss. 1985). As Plaintiffs correctly note, in *Stringer*, the lower Court granted Summary Judgment. The issue was whether an insurance agency had orally promised to provide Plaintiff with an uninsured motorist policy. The Court held that under the facts, there was a genuine issue of material fact and reversed Summary Judgment. However, in *Stringer*, the defendant was in a position where he could provide what the plaintiff was seeking, i.e., an insurance policy. In this case, Defendants could not provide a loan or mortgage for the Plaintiffs. Defendants could only attempt to obtain a loan or mortgage on behalf of Plaintiffs. Further, as pointed out *supra*, Defendants did provide what the Plaintiffs sought, i.e., a loan for Plaintiff Garner. In this case, the Defendant had no control over the fact that Plaintiffs had poor financial credit ratings and it was difficult to obtain financing for either or both Plaintiffs.

In this case, in order to establish a genuine issue as to a material fact as to the existence of an enforceable contract, Plaintiffs would have to point to something concrete in the record to support the existence of such a contract. But, there is nothing. There is nothing in the record that supports the allegation that there was a contract, implied or otherwise, whereby Defendants agreed to secure a loan for Plaintiffs within thirty (30) days at a promised rate. This bold allegation should not be misconstrued as evidence. The statements of counsel in Appellants' Brief are not evidence and in this case, they are not supported by any existing evidence in the record.

For these reasons, the Trial Court was absolutely correct in dismissing both Count 3 and Count 4 of Plaintiffs' Complaint.

IV. PLAINTIFFS HAVE NOT PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A GENUINE ISSUE AS TO A MATERIAL FACT REGARDING THEIR CLAIMS OF BREACH OF FIDUCIARY DUTY, FRAUD OR A VIOLATION OF THE MISSISSIPPI CONSUMER LOAN BROKER ACT.

The Circuit Court dismissed Plaintiffs' claims of breach of fiduciary duty (Count 7), fraud (Count 8), and violation of the Mississippi Consumer Loan Broker Act (Count 10), holding that the Plaintiffs did not present sufficient evidence to establish a genuine issue as to material fact regarding any of these claims.

A. BREACH OF FIDUCIARY DUTY

Count 7 (Breach of Fiduciary Duty) was dismissed by the lower Court on the grounds that the Plaintiffs failed to provide sufficient evidence to support their allegation that Defendants owed Plaintiffs a fiduciary duty. The lower Court was correct.

Plaintiffs produced no evidence of a power of attorney or other document giving any one or more of the Defendants special authority to act on Plaintiffs' behalf. (R.E. 113-115; 123, TAB 4) In *Merchants and Planters Bank v. Williamson*, 691 So.2d 398. 404 (Miss. 1997), the Mississippi Supreme Court held that the relationship between a mortgagor and a mortgagee is not a fiduciary one as a matter of law. Plaintiffs admitted at numerous times in their depositions that they were not at any time during their dealings with Defendant Brewer prevented from seeking financing from an alternative source. (R.E. 85; 86; 99, TAB 4) In fact, Plaintiffs sought financing from Southeast Financing Company and were turned down prior to seeking a mortgage equity loan from Defendant Equity Mortgage Lending, Inc.. (R.E. 83-84, TAB 4). Obviously, Plaintiffs' financial record was such that at best it would be difficult to obtain a loan on their behalf. They can point to no benefit that any one of the Defendants received from allegedly falsely stating that he or they could obtain a loan for Plaintiffs. (R.E. 92-96; 125, TAB 4) If anything, the record demonstrates time and time

again, Defendant Wes Brewer intervened on Plaintiffs' behalf to prevent an adverse action against the Plaintiffs (R.E. 87; 91; 94-95; 96; 125, TAB 4). In the end, they did not lose their marital home and Plaintiff Dominquez sold her double-wide trailer property for a profit (R.E. 96; 108, TAB 4). Both as to the double-wide trailer property and the three (3) acres that were ultimately lost through foreclosure according to Plaintiff Dominquez, Plaintiff Dominquez could not state when she went into arrears with either of these properties, the amount of the arrearage, if any, the amount of the loan, the amount of her monthly payments or the number of payments she was behind at any given point (R.E. 99; 100-101, TAB 4).

These facts establish that even if there was a fiduciary relationship, there is no evidence whatsoever that Defendants violated a fiduciary duty. Certainly, none is identified in Appellants' Brief.

A fiduciary relationship is not created every time one party to a transaction has superior knowledge. If that were the case, a fiduciary relationship would be created when a buyer purchases a lawnmower or a ham sandwich. To establish a fiduciary relationship, there must be the element of "dominion and control." *Williamson* at 404. Here, there was no evidence of "dominion and control" or any other facts that would establish a fiduciary relationship. As noted repeatedly, Plaintiffs were always free to seek the services of another mortgage loan broker if they were dissatisfied with Defendants.

B. FRAUD

In support of their argument regarding fraud, also dismissed by the lower Court, Plaintiffs simply cite and rely upon the Mississippi Supreme Court's decision in *Great Southern National Bank v. McCullough Environmental Services, Inc.*, 595 So.2d 1282 (Miss. 1992) and the general

concepts set forth by the Mississippi Supreme Court in that case. A similar approach was followed by the plaintiffs in *Coleman, et al. v. Blackwell Chevrolet, et al.*, 981 F.Supp. 990 (S.D. Miss. 1997), and soundly rejected by United States District Judge Tom S. Lee. In granting defendants' Motion for Summary Judgment as to plaintiffs' fraud claim, Judge Lee stated as follows:

“Even assuming Plaintiffs had adequately set forth a claim of fraud in their Complaint, Plaintiffs' failure, in response to GM's Motion, to identify any misrepresentation upon which they detrimentally relied dooms this claim.”(992)

Likewise, in the present case, Plaintiffs similarly failed to identify in response to Defendants' Motion for Summary Judgment any misrepresentation upon which they claim they detrimentally relied. They did not identify any such misrepresentation, because there were no misrepresentations. Furthermore, there was no detrimental reliance. Plaintiffs ultimately obtained a loan, they did not lose their marital home, Plaintiff Dominquez sold her double-wide trailer for a profit, and perhaps most importantly, neither Plaintiff can show any concrete monetary damage or any personal injury.

C. THE MISSISSIPPI CONSUMER LOAN BROKER ACT

The lower Court dismissed Count 10 of the Complaint alleging a violation of the Mississippi Consumer Loan Broker Act.

As with Plaintiffs' fraud allegations, Plaintiffs were unable to identify any misrepresentations upon which they supported their claim of a violation of the Mississippi Consumer Loan Broker Act in response to Defendants' Motion for Summary Judgment. In their present Brief, other than general allegations of “false promises,” Plaintiffs again fail to identify any specific violations of the Mississippi Consumer Loan Broker Act. Their allegation that Defendants promised that they would obtain a loan within thirty (30) days is an allegation without evidentiary support in the record.

V. PLAINTIFFS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES UNDER THE MISSISSIPPI DECEPTIVE TRADE PRACTICES ACT AND FURTHER PRESENTED NO EVIDENCE IN SUPPORT OF A CLAIM THAT DEFENDANTS VIOLATED THIS ACT.

The Court below dismissed Count 9 of Plaintiffs' Complaint, alleging a violation of the Mississippi Deceptive Trade Practices Act, Section 75-24-1, *et seq.* of the Mississippi Code of 1972, as amended. Section 75-24-15(2) specifically provides as follows:

"In any private action brought under this chapter, the plaintiff must first have made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the attorney general."

Plaintiffs admit that they made no effort to exhaust this requirement.

As the Court below noted, the language of Section 75-24-15(2) is clear, unambiguous and unequivocal. Plaintiffs cite no cases which provide an exception to the requirements of Section 75-24-15(2).

In their Brief, the only case cited by Plaintiffs in support of their contention regarding this issue is the same case cited below, *University Nursing Assoc. v. Phillips*, 842 So.2d 1270 (Miss. 2003). The Court below correctly distinguished *Phillips* from the circumstances in this case. As noted by the lower Court, *Phillips* was a case which dealt exclusively with arbitration provisions and provides that if a party seeking to invoke arbitration, "actively participates in litigation," then that party has waived the right to invoke arbitration. However, *Phillips* has no application to the Mississippi Trade Practices Act. Defendants have never waived their opposition to Count 9 of the Complaint and specifically interposed the following defense as part of the their Answer and Affirmative Defenses to Complaint:

"Defendants pray that Count 9 of the Complaint be dismissed, said Count having been filed under the Mississippi Deceptive Trade

Practices Act, for Plaintiffs' failure to comply with the requirements of Section 75-14-15(2)" (R.E. 31, , TAB 4)

Section 75-14-15(2) contains the requirement that in order to bring a private action under this statute, the Plaintiff must first have made a reasonable attempt to resolve his claim through an informal dispute settlement program approved by the Attorney General.

Further, Rule 12(b) allows a legal defense such as failure to exhaust administrative remedies to be asserted in the Defendants' responsive pleading rather than by separate motion. Defendants did not and have not waived this defense, and their participation in this case through depositions and by filing a Motion for Summary Judgment certainly does not constitute a waiver of this defense.

VI. PLAINTIFFS' CLAIM REGARDING INSUFFICIENT FUND CHECKS WAS CORRECTLY DISMISSED BY THE LOWER COURT.

Plaintiffs' claim regarding insufficient fund checks, Count 12 of the Complaint, was dismissed by the lower Court, and correctly so.

Plaintiffs' testimony regarding the checks is nothing short of astounding. Each Plaintiff testified that the other Plaintiff had the requisite knowledge as to: a) the purpose for which the checks were written, and b) whether Defendant Brewer had covered the returned checks by paying Plaintiffs cash. During her deposition, Plaintiff Dominquez testified as follows:

"(Adelman) All right. In terms of so that leaving aside the loan process as you described. You said that Wes wrote checks. Those checks were not loans, were they?

A. Those checks were written to Thomas and he can answer that, I really don't know 100 percent what each check was for. No sir." (R.E.87)

In his deposition, Garner testified as follows:

"Q. (Adelman) And given that, isn't it correct that all these checks were made good by Mr. Brewer?

A. I don't know. My wife handles that." (R.E. 123)(Emphasis

original)

In response to Defendants' Motion for Summary Judgment, Plaintiffs came forward with no evidence whatsoever to establish that the checks in question were authorized or a part of any dealings between the Plaintiffs and Defendants Palmer and Mortgage Equity Lending, Inc.. The overwhelming evidence establishes that these checks were paid to Thomas Garner, or on behalf of Thomas Garner, for work Thomas Garner performed for Defendant Wes Brewer separate from Mr. Brewer's association with Defendant Palmer and Mortgage Equity Lending, Inc..

Finally, from the record below, Plaintiffs cannot establish any alleged insufficient checks that were not covered by Defendant Brewer. Again, the checks pertained to dealings between Brewer and Garner and have no relevance whatsoever to either Plaintiff Dominquez or Defendants Palmer and Mortgage Equity Lending, Inc..

VII. PLAINTIFFS DID NOT PRESENT EVIDENCE SHOWING THAT THE ACTIONS OF DEFENDANTS CAUSED PLAINTIFFS TO SUFFER EMOTIONAL DISTRESS, AND ALSO FAILED TO PRESENT EVIDENCE OF NEGLIGENT SUPERVISION OR ANY BASIS FOR PIERCING THE CORPORATE VEIL.

Plaintiffs' claims of emotional distress and negligent supervision, as well as their attempt to pierce the corporate veil are essentially moot, since Plaintiffs cannot establish a genuine issue as to any material fact regarding any of their underlying claims, e.g., negligence or breach of contract. Nevertheless, Defendants will briefly address each of these claims.

A. Emotional Distress

Plaintiffs correctly note that the lower Court dismissed Count 11 of the Complaint (emotional distress), finding that Count 11 was not a cause of action, but an element of damages. Since the Court below was of the opinion that Defendants' Motion for Summary Judgment should be granted

as to Counts 1 through 10 and Counts 12 and 13, there was no basis for an award of damages whether based on emotional distress or any other factor.

Further, Plaintiffs failed to prove even the most basic elements necessary to establish emotional distress. Neither Plaintiff received medical or any other treatment for emotional injuries, nor can they establish any other basis for this element of damages. Plaintiffs' reliance on *Gamble v. Dollar General Corp.*, 852 So.2d 5 (Miss. 2003), is totally misplaced. In *Gamble*, the plaintiff alleged that when accused of shoplifting, the store's employee grabbed the plaintiff by her underwear. In short, in *Gamble*, there was an actual physical touching. In *Gamble* the Court stated as follows:

“The conduct in the present case was confrontational, physical, demeaning, and embarrassing enough such that compensatory damages were appropriately considered by the jury.” (11)

In the present case, Plaintiffs presented no evidence that Defendants acted in a manner which was confrontational, physical, demeaning or embarrassing. The facts in this case are miles apart from those in *Gamble*.

Further, in *Randolph v. Lambert*, - So.2d - (Miss. App. 2006), the Mississippi Court of Appeals held that the plaintiff in that case could not recover for emotional distress damages resulting from ordinary negligence “without proving some sort of physical manifestation of injury or demonstrable harm.” The Court further held that evidence that the plaintiff was very depressed and very upset was insufficient to sustain damages for mental anguish. In this case, Plaintiffs presented no evidence whatsoever of physical injury or demonstrable harm.

In this case, Plaintiffs provided no testimony to support their claim for emotional damages.

B. Negligent Supervision

The Circuit Court's dismissal of Plaintiffs' negligent supervision claim was correct based on the facts and law. The cases cited by Plaintiffs do not support their claim of negligent supervision. In *Cockrell v. Pearl River Valley Water Dist.*, 865 S.2d 357 (Miss. 2004), summary judgment was actually affirmed. There was no discussion of negligent supervision in *Cockrell*. The only issue was whether the alleged sexual harassment arose outside of the scope of employment. The Mississippi Supreme Court found that it did. Likewise, in *Favre v. Wal-Mart Stores*, 820 So.2d 771 (Miss. App. 2002), summary judgment was affirmed. In *Chandler v. Coleman*, 759 So.2d 459 (Miss. App. 2000), the Court of Appeals actually reversed an award of damages for negligent supervision.

Once again, Plaintiffs were unable to provide evidence to support their claim of negligent supervision or show that there were any genuine issues as to material facts regarding that allegation.

Finally, we turn to the issue as to whether or not Defendant Jeff Palmer can be held liable individually for the actions of either Wes Brewer or Mortgage Equity Lending, Inc.. In short, Plaintiffs have sought to pierce the corporate shield in order to hold Defendant Palmer personally liable.

However, in the very case cited by Plaintiffs, *Hardy v. Brock*, 826 So.2d 71 (Miss. 2002), the Mississippi Supreme Court stated as follows:

“In order to pierce this corporate shield, the homeowners must prove the following: (i) some frustration of contractual expectations regarding the party to whom you look for performance; (ii) the flagrant disregard of corporate formalities by the defendant corporation and its principals; (iii) a demonstration of fraud or other equivalent malfeasance on the part of the corporate shareholder.”
(Par. 20)

In her deposition, Plaintiff Dominquez testified regarding one transaction with Defendant

Palmer during which he assured Plaintiffs that Mr. Brewer was doing everything he could on their behalf (R.E. 110; 116, TAB 4). She could provide no other evidence as to any malfeasance or misfeasance on the part of Defendant Palmer.

Certainly, the fact that Defendant Palmer is the sole shareholder and sole owner of Defendant, Mortgage Equity Lending, Inc., should not result in the piercing of the corporate shield. If that were the case, there would be no point in an individual obtaining corporate status.

Once again, Plaintiffs have come forth with virtually no evidence that would fulfill the mandate set forth by the Mississippi Supreme Court in *Hardy v. Brock*. There is no basis for piercing the corporate veil in this case. The lower Court dismissed all of the allegations against Defendant Brewer and Defendant Mortgage Equity Lending, Inc., and this Court should uphold that dismissal. Likewise, any allegations against Defendant Palmer and any attempt to pierce the corporate veil should continue to be rejected.

CONCLUSION

For the reasons set forth above, Defendants submit that the decision of the Circuit Court should be affirmed in its entirety.

Respectfully submitted this, the 20~~th~~ day of March, A.D., 2007.

JEFF PALMER, ET AL., APPELLEES

BY: 

MICHAEL ADELMAN

MICHAEL ADELMAN, ESQUIRE
ADELMAN & STEEN, L.L.P.
POST OFFICE BOX 368
224 SECOND AVENUE
HATTIESBURG, MS 39403-0368

(601) 544-8291; (601) 544-1421 - FAX
MS STATE BAR NO. 1153

COUNSEL FOR APPELLEES

CERTIFICATE OF SERVICE

I, Michael Adelman, counsel for Appellees herein, do hereby certify that I have this day served by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing Brief of Appellees to the following:

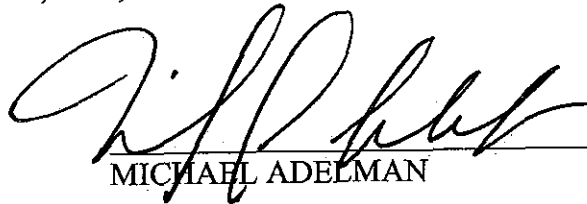
Al Shiyou, Esquire
Shiyou Law Firm
Post Office Box 310
Hattiesburg, MS 39403-0310

Counsel for Appellants

Honorable Bob Helfrich
Circuit Court of Forrest County
Post Office Box 309
Hattiesburg, MS 39403-0309

Circuit Court Judge

THIS, the 20th day of March, A.D., 2007.



MICHAEL ADELMAN