

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**SANDRA K. DOMINQUEZ**

**APPELLANT**

**VS.**

**CASE NO.: 2006-CA-01752**

**JEFF PALMER**

**APPELLEE**

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**APPEAL FROM THE CIRCUIT COURT  
OF FORREST COUNTY, MISSISSIPPI**

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**REPLY BRIEF OF APPELLANT**

**ORAL ARGUMENT NOT REQUESTED**

**AL SHIYOU  
SHIYOU LAW FIRM  
MS. BAR NO. [REDACTED]  
POST OFFICE BOX 310  
HATTIESBURG, MS. 39403-0310  
(601) 583-6040**

**Attorney for Appellant**

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## STATEMENT OF THE ISSUES

- I. Defendants' Motion for Summary Judgment Was Not Based On Evidence Sufficient to Enable Defendants to Meet Their Burden of Persuasion that No Genuine Issue of Material Fact Exists.**
- II. Defendants Have Not Provided Any Real Evidence to Counter Plaintiffs' Allegation That Defendants Should Reimburse Plaintiffs for the Insufficient Funds Checks Written by Defendant, WES BREWER.**

## ARGUMENT

- I. Defendants' Motion for Summary Judgment Was Not Based On Evidence Sufficient to Enable Defendants to Meet Their Burden of Persuasion that No Genuine Issue of Material Fact Exists.**

As was stated in Plaintiffs' original Brief, it is the rule in Mississippi that a motion for summary judgment which is unsupported by affidavits or any other sworn statements should not be granted since the non-moving party gets the benefit of the doubt. Ratliff v. Ratliff, 500 So. 2d 981, (Miss. 1986). Plaintiffs submit that the Circuit Court erred in granting Defendant's Motion for Summary Judgment, since the same was based only upon conclusory statements and was supported only by deposition excerpts and copies of documentary materials already a part of the evidence, and that Defendants failed to meet their burden of persuasion that no genuine issue of material fact existed. (See page 3 of Defendant's Motion for Summary Judgment, **R.E. 35.**)

A movant for summary judgment has the burden of persuading the court that there is no genuine issue of material fact and on the basis of the facts established, that he is entitled to judgment as a matter of law. Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988) Plaintiffs submit that Defendants have not met their burden of persuasion needed for summary judgment to be granted.

Defendants, in their Appellee's Brief, asserts that deposition testimony is "more probative and reliable than affidavits which are not subject to cross-examination" (Appellee's Brief, page 6). Whether or not this assertion is true, Plaintiffs do not deny the efficacy of deposition testimony whatever, but do deny that Plaintiffs' deposition testimony supports a summary judgment for Defendants. Defendants, in their Appellee's Brief, claim that neither Plaintiff has accurately identified "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," (Appellee's Brief, page 7). However, Plaintiffs have submitted the deposition testimony of Plaintiff, THOMAS GARNER, in which he explicitly describes Defendant, WES BREWER's actions of repeatedly telling both Plaintiffs that their loan had been approved and that he (BREWER) was waiting on the money to be wired to the bank and that it would be there when he (BREWER) had never even mentioned any of this to the bank in question. (R.E. 182) Although GARNER did not use the phrase, "implied oral contract", Plaintiff submits that this is exactly what it is since both parties obviously intended a "contract" in which BREWER, on behalf of MORTGAGE EQUITY LENDING, INC., attempted to have a loan approved for GARNER and DOMINQUEZ, for which compensation would be paid when (if) the approval was successful. Otherwise, Plaintiffs would not have continued to do business with Defendants in this manner.

Plaintiffs further submit that since their Complaint against Defendants involved fraud and misrepresentation as well as negligence and breach of contract, then summary judgment is inappropriate. Great Southern Natl. Bank v. McCullough Environmental Serv., 595 So. 2d 1282, 1289 As related in the original Brief, Plaintiff, GARNER, testified that BREWER made

assurances that their loan would close when BREWER knew this to be false. (Deposition of Thomas Garner, R.E. 184-186) Plaintiffs have shown the existence of many more misrepresentations made by BREWER concerning the promises to obtain financing for Plaintiffs, and these were all misrepresentations upon which Plaintiffs relied to their detriment, such as Plaintiff, GARNER's deposition testimony of BREWER's false assurance made, as described above.

All of the foregoing also applies to Plaintiffs' allegations that Defendants have not contradicted Plaintiff's deposition testimony that Defendant, BREWER, made various misrepresentations and displayed unprofessional behavior towards Plaintiffs in his promises repeatedly made and broken on various occasions, in these "attempts" to secure funding for them back at the time of the contracting.

In their original brief, Plaintiffs cited Stringer v. Bufkin, 465 So. 2d 331 (Miss. 1985), for the proposition that summary judgment was inappropriate where an insurance agent orally promised to bind insurance and failed to carry out that promise. Defendants, in their Appellee's Brief, assert that Stringer is inapplicable since, unlike an insurance agent, Defendants at issue had no control over the Plaintiffs' supposedly "poor financial credit ratings" and therefore, "it was difficult to obtain financing" for them, as promised. (Appellee's Brief, page 10). However, Plaintiffs have asserted not only that Defendants failed to provide a loan within a prescribed time period, (which may or may not be within Defendants' "control"), but also that Defendants failed to use their "best efforts" to do so, as promised, (a condition certainly within Defendants' "control") and therefore the Stringer ruling precluding summary judgment in a matter involving an oral promise, similar to fraud and misrepresentation, certainly applies in this case. Of utmost

importance is BREWER's repetitive representations that the loan had been approved (a false representation) when it had not and the Plaintiffs' reliance on this falsehood.

As stated before, since most of the actions of Defendant loan broker, BREWER, involved oral promises and other negligent statements made orally to Plaintiffs regarding a loan which he would obtain for them, then a genuine issue of material fact exists as to these various oral statements, upon which Plaintiffs justly relied, and which should preclude any grant of summary judgment.

For these reasons, Plaintiffs submit that Defendants have not met their initial burden of persuasion that no genuine issue of material fact existed for a granting of summary judgment on Defendants' behalf, and that nothing in Plaintiffs' deposition testimony proves otherwise, for the reasons as asserted herein.

**II. Defendants Have Not Provided Any Real Evidence to Counter Plaintiffs' Allegation That Defendants Should Reimburse Plaintiffs for the Insufficient Funds Checks Written by Defendant, WES BREWER.**

As to the issue of Plaintiffs' claim regarding the insufficient fund checks, Defendants continue to press the fact that since neither Plaintiff answered the questions posed by counsel for Defendants in their respective depositions as regards the nature and purpose of the checks, to counsel's satisfaction, then summary judgment on this issue is proper. However, Plaintiffs submit that Defendants have not provided any evidence whatever that the insufficient funds checks were made good by Defendant, WES BREWER. As stated earlier, the initial burden of persuasion in a summary judgment motion is on the movant, Fruchter, at 198, and it is submitted that Defendants have not met this burden of persuasion, and the burden of proof has not yet shifted to Plaintiffs to prove otherwise.

As stated in Plaintiffs' Brief, the checks at issue, Checks No. 1135 (\$450.00), 1137 (\$600.00), and 1139 (\$450.00) written on Wes Brewer's personal account, as well as Checks No. 1464 (\$668.00) and No. 1477 (\$1,400.00) written on the "Wes Brewer Cattle Company" account, (Check No. 1477 being made for "Sandra & Thomas Garner") were all written, as alleged, as advances to Plaintiffs during the year 2002, in lieu of the promised loans which were not being secured, as contracted. **(R.E. 23-24)** Contrary to Defendants' assertion otherwise, the foregoing constitutes much evidence that "the checks in question were authorized or a part of any dealings between the Plaintiffs and Defendants Palmer and Mortgage Equity Lending" since Defendant, WES BREWER, was at all times acting as agent and employee for Defendant, MORTGAGE EQUITY LENDING, and by implication, Defendant, JEFF PALMER, since he participated in the fraudulent assertions made by Defendant, BREWER and ratified such assertions when he told Plaintiffs to not worry about the attempts to obtain financing and that it would all be done. (See Deposition of Sandra Dominguez, p. 62, at **R.E. 137-138**)

For the foregoing reasons, Plaintiffs submit that summary judgment on the issue of the insufficient fund checks should not have been granted as a genuine issue of material fact exists as to whether Defendant, WES BREWER, should be required to reimburse Plaintiffs for said checks.

### CONCLUSION

Appellants and Plaintiffs herein submit that the Circuit Court improperly granted summary judgment on all of the foregoing counts of Plaintiffs' Complaint, since a genuine issue of material fact exist as to each and every one of the counts, and Defendants have not offered any proof, or affidavits in support of their Motion as required by Rule 56, to the contrary.

Plaintiffs respectfully submit therefore, that the decision of the Circuit Court should be reversed and remanded for the reasons as set forth herein.

RESPECTFULLY SUBMITTED, this the 2<sup>nd</sup> day of April, 2007.

SANDRA K. DOMINQUEZ, Appellant  
THOMAS GARNER, Co-Appellant

BY: 

AL SHIYOU, Attorney for Appellants

**CERTIFICATE OF SERVICE**

I, AL SHIYOU, do hereby certify that I have this date, mailed via United States mail,  
postage prepaid, first class, a true and correct copy of this Reply Brief of Appellant to:


Hon. Michael S. Adelman  
Adelman & Steen  
P. O. Box 368  
Hattiesburg, MS 39403-0368  
Attorney for Defendants/Appellees

Hon. Bob Helfrich, Judge  
Circuit Court of Forrest County  
P.O. Box 309  
Hattiesburg, MS 39403

Ms. Sandra Dominquez  
665 River Rd.  
Hattiesburg, MS 39401-8130

Mr. Thomas Garner  
665 River Rd.  
Hattiesburg, MS 39401-8130

This the 2nd day of April, 2007.

  
\_\_\_\_\_  
AL SHIYOU

**CERTIFICATE OF MAILING**

I, Al Shiyou, do certify that I have this date, mailed or caused to be mailed via United States mail, postage prepaid, first class, an original and three (3) copies of this Reply Brief of Appellant to the Clerk of the Supreme Court and this Reply Brief and copies therein are being deposited into the United States Mail on this, the <sup>2nd</sup>---- day of April, 2007, as required by M.R.A.P. Rule 25 (a) for filing of same to be deemed as of this date.

This the <sup>2nd</sup>-----day of April, 2007.

  
\_\_\_\_\_  
Al Shiyou