

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SANDRA K. DOMINQUEZ

APPELLANT

VS.

CASE NO.: 2006-CA-01752

JEFF PALMER

APPELLEE

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

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED


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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Appellant, SANDRA K. DOMINQUEZ, 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:

1. SANDRA K. DOMINQUEZ, Appellant
2. THOMAS GARNER, Appellant
3. JEFF PALMER, Appellee
4. WES BREWER, Appellee
5. MORTGAGE EQUITY LENDING, INC., Appellee
6. AL SHIYOU, ESQ., Attorney for Appellants
4. MICHAEL S. ADELMAN, ESQ., Attorney for Appellees
5. HON. BOB HELFRICH, Circuit Judge of Forrest County, Mississippi



AL SHIYOU, Attorney for Appellant

TABLE OF CONTENTS

	<u>PAGE</u>
1. CERTIFICATE OF INTERESTED PARTIES.....	2
2. TABLE OF CONTENTS.....	3
3. TABLE OF AUTHORITIES.....	4
4. STATEMENT OF THE ISSUES.....	5
5. STATEMENT OF THE CASE AND COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE CASE IN THE COURT BELOW.....	6-7
6. STATEMENT OF THE FACTS.....	7-13
7. SUMMARY OF ARGUMENT.....	13-18
7. ARGUMENT.....	18-33
I. STANDARD OF REVIEW-DE NOVO.....	18-19
II. THE CONTRACT WHICH EXISTED BETWEEN PLAINTIFFS AND DEFENDANTS WAS NOT "VAGUE, INDEFINITE AND AMBIGUOUS" BUT WAS AN IMPLIED ORAL BROKERAGE CONTRACT WHOSE TERMS WERE "CERTAIN AND DEFINITE".....	19-22
III. PLAINTIFFS HAVE PRESENTED EVIDENCE THAT DEFENDANTS FAILED TO USE REASONABLE CARE IN SEEKING A LOAN ON THEIR BEHALF.....	22-24
IV. PLAINTIFFS HAVE PRESENTED EVIDENCE THAT DEFENDANTS COMMITTED A BREACH OF FIDUCIARY DUTY, FRAUD AND A VIOLATION OF THE MISSISSIPPI CONSUMER LOAN BROKER ACT.....	24-28
V. PLAINTIFFS HAVE PRESENTED EVIDENCE THAT DEFENDANTS VIOLATED THE MISSISSIPPI DECEPTIVE TRADE PRACTICES ACT.....	28-29
VI. PLAINTIFFS HAVE PRESENTED EVIDENCE THAT DEFENDANTS SHOULD REIMBURSE PLAINTIFFS FOR THE INSUFFICIENT FUNDS CHECKS WRITTEN BY DEFENDANT, WES BREWER.....	29-30
VII. PLAINTIFFS HAVE PRESENTED EVIDENCE THAT THE ACTIONS OF DEFENDANTS CAUSED PLAINTIFFS TO SUFFER EMOTIONAL DISTRESS, AND HAVE PRESENTED EVIDENCE OF NEGLIGENT SUPERVISION AND BASIS FOR PIERCING THE CORPORATE VEIL.....	30-33
8. CONCLUSION.....	34
9. CERTIFICATE OF SERVICE.....	35
10. CERTIFICATE OF MAILING.....	36

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Hudson v. Courtesy Motors</u> , 794 So. 2d 999 (Miss. 2001)	13,17
<u>Pope v. Schroeder</u> , 512 So.2d 905 (Miss. 1987)	17
<u>Ratliff v. Ratliff</u> , 500 So. 2d 981, (Miss. 1986)	13,17
<u>Carmichael v. Agur Realty Co., Inc.</u> 574 So. 2d 603 (Miss. 1990)	19,20
<u>Stringer v. Bufkin</u> , 465 So. 2d 331 (Miss. 1985)	22-23
<u>Lowery v. Guaranty Bank and Trust Co.</u> 592 So. 2d 79 (Miss. 1991)	22
<u>Memphis Hardwood Flooring Co. v. Daniel</u> 771 So. 2d. 924 (Miss. 2000)	23
<u>Great Southern National Bank v. McCullough Environmental Services, Inc.</u> 595 So.2d 1282 (Miss. 1992)	24
<u>University Nursing Assoc. v. Phillips</u> , 842 So. 2d 1270 (Miss. 2003)	25
<u>Gamble v. Dollar General Corp.</u> 852 So. 2d 5 (Miss. 2003)	28
<u>Lawrence v. Virginia Ins. Reciprocal</u> 979 F. 2d 1053 (5 th Cir. 1992)	28
<u>Cockrell v. Pearl River Valley Water Dist.</u> , 865 So. 2d 357 (Miss. 2004)	28
<u>Favre v. Wal-Mart Stores</u> , 820 So. 2d 771 (Miss. App. 2002)	29
<u>Chandler v. Coleman</u> , 759 So. 2d 459 (Miss. App. 2000)	29
<u>Hardy v. Brock</u> , 826 So. 2d 71 (Miss. 2002)	30
<u>CODES</u>	
Mississippi Code Annotated §81-19-23 (1) (g) (h) (Code of 1972, Rev. April 20, 2004)	24
Mississippi Code Annotated §75-24-1 (2)(i) (Code of 1972)	26
<u>OTHER AUTHORITIES</u>	
12 American Jurisprudence 2d Brokers §84 (1964)	22

STATEMENT OF THE ISSUES

- I. **Standard of Review- De Novo**
- II. **The contract which existed between Plaintiffs and Defendants was not “vague, indefinite and ambiguous” but was an implied oral brokerage contract whose terms were “certain and definite”.**
- III. **Plaintiffs have presented evidence that Defendants failed to use reasonable care in seeking a loan on their behalf, and Defendants have not submitted any proof that they used their “best efforts” to secure a loan for Plaintiffs.**
- IV. **Plaintiffs have presented evidence that Defendants committed a breach of fiduciary duty, fraud and a violation of the Mississippi Consumer Loan Broker Act.**
- V. **Plaintiffs have presented evidence that Defendants violated the Mississippi Deceptive Trade Practices Act.**
- VI. **Plaintiffs have presented evidence that Defendants should reimburse Plaintiffs for the Insufficient Funds Checks written by Defendant, WES BREWER, and Defendants have produced no evidence to the contrary.**
- VII. **Plaintiffs have presented evidence that the actions of Defendants caused Plaintiffs to suffer emotional distress, and have also presented evidence of negligent supervision and a basis for piercing the corporate veil.**

STATEMENT OF THE CASE

Plaintiffs and Appellants herein, SANDRA K. DOMINQUEZ and THOMAS GARNER, appeal from an Order granting a Motion for Summary Judgment filed by Defendants and Appellees herein, JEFF PALMER, INDIVIDUALLY, and MORTGAGE EQUITY LENDING, INC., WES BREWER D/B/A WES BREWER CATTLE COMPANY, AND WES BREWER, INDIVIDUALLY, entered on September 15, 2006, by the Circuit Court of Forrest County in its Findings of Fact and Conclusions of Law, said Order having the effect of dismissing all of the claims asserted in Plaintiffs' Complaint, said claims being breach of contract, tortious breach of contract, breach of duty of good faith and fair dealing, negligence, gross negligence, tortious interference with contract, breach of fiduciary duty, fraud, violation of the Mississippi Consumer Loan Broker Act, violation of the Mississippi Deceptive Trade Practices Act, Insufficient Funds Checks, emotional distress and negligent supervision, all of which were asserted by Plaintiffs against Defendants in the context of a series of various attempts, alleged misrepresentations and consequent failures by Defendants to secure a home equity loan for Plaintiffs, such failures causing emotional, marriage and financial damages to Plaintiffs.

COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE CASE IN THE COURT BELOW

On April 9, 2003, Appellants and Plaintiffs, SANDRA K. DOMINQUEZ and THOMAS GARNER, filed their Complaint in the Circuit Court of Forrest County, Mississippi, against Appellees and Defendants, JEFF PALMER, INDIVIDUALLY, MORTGAGE EQUITY LENDING, INC., WES BREWER, d/b/a WES BREWER CATTLE COMPANY, and WES

BREWER, INDIVIDUALLY, alleging breach of contract, tortious breach of contract, breach of duty of good faith and fair dealing, negligence, gross negligence, tortious interference with contract, breach of fiduciary duty, fraud, violation of the Mississippi Consumer Loan Broker Act, violation of the Mississippi Deceptive Trade Practices Act, Insufficient Funds Checks, emotional distress and negligent supervision. **(R.E. 3-24)**

On April 30, 2003, Defendants filed their Answer and Affirmative Defenses to Complaint. **(R.E. 25-32)**

On May 19, 2004, Defendants filed their Motion for Summary Judgment seeking to have all of Plaintiffs' claims dismissed. **(R.E. 33-127)** On July 20, 2004, Plaintiffs filed their Response to Defendants' Motion. **(R.E. 128-163)** On July 23, 2004, Defendants filed their Reply Memorandum in support of Motion for Summary Judgment. **(R.E. 164-173)** On July 27, 2004, Plaintiffs filed their Rebuttal to Defendants' Reply Memorandum. **(R.E. 174-186)**

After the Court heard oral arguments from both sides and reviewed all supporting documents and applicable law, the Court issued, on September 15, 2006, its Order granting Defendants' Motion for Summary Judgment in its Findings of Fact and Conclusion of Law, which had the effect of dismissing all of the claims asserted in Plaintiffs' Complaint. **(R.E. 190-200)** From this Order, Plaintiff appealed to the Supreme Court of Mississippi, said Notice of Appeal being timely filed on October 9, 2006. **(R.E. 201-202)**

STATEMENT OF THE FACTS

In the fall of 2001, Plaintiffs and Appellants herein, SANDRA K. DOMINQUEZ and THOMAS GARNER ("Plaintiffs"), **husband and wife**, sought to obtain an equity loan against their home through the services of the Defendant and Appellees herein, MORTGAGE EQUITY

LENDING, INC. The primary agent of MORTGAGE EQUITY LENDING, INC. with whom they dealt was WES BREWER. The Plaintiffs met with WES BREWER at the offices of MORTGAGE EQUITY LENDING, INC. in Forrest County, Mississippi, and discussed the transaction. On the day of the initial meeting, BREWER, acting within the course and scope of his position with, MORTGAGE EQUITY LENDING, INC., executed a MORTGAGE EQUITY LENDING, INC. loan application with the Plaintiffs. At this meeting, BREWER, discussed the terms of the financing, said terms to be "8 % fixed", with the Plaintiffs at the office of MORTGAGE EQUITY LENDING, INC.

Subsequent to the initial meeting, BREWER advised the Plaintiffs that MORTGAGE EQUITY LENDING, INC. could obtain the promised financing for Plaintiffs and that the loan would close before Thanksgiving of 2001. Just prior to the closing, BREWER advised the Plaintiffs that the closing check had not come in and that it was being wired from California. The Plaintiffs continued to inquire about a closing date and continued to wait for the closing to occur; all to no avail. During this period of time, Defendant, BREWER, constantly assured the Plaintiffs that the loan would be closing "soon", and continued to give them several closing dates, only to change it on or before the date arrived.

In January, 2002, Defendant, BREWER, finally admitted to the Plaintiffs that he could not get them the \$40,000.00 loan they had requested, even though he had represented to the Plaintiffs that they had been approved for the loan on several occasions. He advised them he could get Plaintiffs a loan for \$25,000.00. The Plaintiffs agreed to the terms of this \$25,000.00 loan and the process began all over again. Defendant, BREWER, continued to promise Plaintiffs that he would get the loan for them, and that they (Plaintiffs) had been approved for the loan, but

he (BREWER) continued to “put them off” as to a closing date. However, the actions of BREWER began to create financial hardships for Plaintiffs.

During this time, Plaintiffs discussed with BREWER, their need for the requested loan as they were paying off certain credit cards. Defendants, BREWER, and JEFF PALMER, president of MORTGAGE EQUITY LENDING, INC., both assured the Plaintiffs that they did not need to worry about anything, and that they (BREWER and PALMER) “had everything together” and that they “could get them a better deal” from the credit card companies. Further, BREWER, advised Plaintiffs not to pay their bills until he got the loan completed.

Due to the advice of BREWER to the Plaintiffs for them not to pay their bills and that he “had everything together” for them, Plaintiffs found themselves in a severe financial “bind”. BREWER then began to write checks to the Plaintiffs to assist them “until the loan comes through.”

On or about February 14, 2002, BREWER, in the course and scope of his employment, wrote a check in the sum of \$1,400.00 on the account of WES BREWER, d/b/a WES BREWER CATTLE COMPANY, to Union Planters on behalf of the Plaintiffs, and on or about March 15, 2002, BREWER, in the course and scope of his employment, wrote a second check in the sum of \$668.00 on the account of WES BREWER, d/b/a WES BREWER CATTLE COMPANY, to Union Planters on behalf of the Plaintiffs. Both of these checks were returned by BREWER’S bank due to the account being closed.

In March, 2002, the Defendant, BREWER, advised the Plaintiff, DOMINQUEZ, to file bankruptcy to give him more time to get their loan approved. On or about May 30, 2002, June 3, 2002, and June 21, 2002, BREWER, in the course and scope of his employment, wrote three (3)

checks, each in the sum of \$450.00 on the account of WES BREWER, to the Plaintiff, GARNER. All three (3) of these checks were returned by BREWER'S bank due to insufficient funds. Plaintiffs had deposited some of said bad checks into their account at Union Planters Bank. As a result of the insufficient fund checks and the other checks written on closed accounts, Plaintiffs, in reliance thereon, wrote checks to their creditors and others, thereby incurring bank overdraft charges and fees.

As time went on, the Plaintiffs continued to rely upon the representations made to them by Defendants and were repeatedly assured by BREWER that their loan would be or had been approved. During this time, Plaintiffs' financial situation continued to decline, thus causing emotional stress on the Plaintiffs. Defendant, BREWER, even called some of the Plaintiffs' creditors and assured them that they were on the payoff list and would be paid.

In the later part of the summer of 2002, BREWER told the Plaintiffs that he would not be able to obtain the \$25,000.00 loan for them, and that instead he (BREWER) could obtain a loan for the Plaintiff, GARNER, the husband, to "purchase" their home from Plaintiff, DOMINQUEZ, the wife. At this point, the loan on the Plaintiffs' home had gone into foreclosure. Apparently, in order to avoid the three day "right to rescind" regulation, Defendants then produced a loan application which reflected that GARNER was a single person who was purchasing a home from DOMINQUEZ, whom the Defendants represented was also single. During this time, Defendants possessed full knowledge that the Plaintiffs were married. Further, on the loan application produced by Defendants, the Defendants showed that the Plaintiff, GARNER, had money in Union Planters Bank, which he did not have. Defendant, PALMER, assured the Plaintiffs that "everything was taken care of."

On or about August 1, 2002, due to the continued deterioration of the state of the finances, Plaintiff, DOMINQUEZ, was forced to "sell" her home to the Plaintiff, GARNER. Defendant, MORTGAGE EQUITY LENDING, INC., who could not obtain a \$40,000.00 loan for the Plaintiffs, was somehow able to obtain a \$88,900.00 loan for the Plaintiff, GARNER.

At the closing, Defendant, MORTGAGE EQUITY LENDING, INC., by and through its agents, JEFF PALMER and WES BREWER, or in their individual capacities, proffered a check on behalf of GARNER in the sum of \$30,910.77. This was necessary to make it appear that GARNER had the funds necessary to be approved for the loan, make his down payment and pay any fees associated with the closing. Then at the closing, MORTGAGE EQUITY LENDING, INC., by and through its agents, JEFF PALMER and WES BREWER, or in their individual capacities, received the exact same amount by requiring the Plaintiff, DOMINQUEZ, to endorse to MORTGAGE EQUITY LENDING, INC., the check which represented her "equity" in the property. Defendant, MORTGAGE EQUITY LENDING, INC., also required the Plaintiff, GARNER, to execute to his wife, Plaintiff, DOMINQUEZ, a promissory note and deed of trust for \$12,700.00.

With Defendants failing to follow through with the assertions, promises, representations, fraudulent misrepresentations, and guarantees made by them to Plaintiffs, the Plaintiffs had no choice but to seek financing from other lenders. Unfortunately, they were unable to get approval because of the financial status in which Defendants had placed the Plaintiffs, by their inducing Plaintiffs to proceed with the financial transaction as previously set forth herein. Further, the Plaintiff, DOMINQUEZ, was forced to sell her home and the Plaintiff, GARNER, was forced to accept a higher rate on his mortgage than that to which he initially agreed. The Plaintiffs also

incurred unnecessary bank and merchant fees for the “NSF” checks and checks on closed accounts which they received from BREWER.

As stated herein, on April 9, 2003, Plaintiffs, SANDRA K. DOMINQUEZ and THOMAS GARNER, filed their Complaint in the Circuit Court of Forrest County, Mississippi, against Defendants, JEFF PALMER, INDIVIDUALLY, MORTGAGE EQUITY LENDING, INC., WES BREWER, d/b/a WES BREWER CATTLE COMPANY, and WES BREWER, INDIVIDUALLY, alleging breach of contract, tortious breach of contract, breach of duty of good faith and fair dealing, negligence, gross negligence, tortious interference with contract, breach of fiduciary duty, fraud, violation of the Mississippi Consumer Loan Broker Act, violation of the Mississippi Deceptive Trade Practices Act, Insufficient Funds Checks, emotional distress and negligent supervision. **(R.E. 3-24)**

On April 30, 2003, Defendants filed their Answer and Affirmative Defenses to Complaint. **(R.E. 25-32)**

On May 19, 2004, Defendants filed their Motion for Summary Judgment seeking to have all of Plaintiffs’ claims dismissed. **(R.E. 33-127)** On July 20, 2004, Plaintiffs filed their Response to Defendants’ Motion. **(R.E. 128-163)** On July 23, 2004, Defendants filed their Reply Memorandum in support of Motion for Summary Judgment. **(R.E. 164-173)** On July 27, 2004, Plaintiffs filed their Rebuttal to Defendants’ Reply Memorandum. **(R.E. 174-186)**

After the Court heard oral arguments from both sides and reviewed all supporting documents and applicable law, the Court issued, on September 15, 2006, its Order granting Defendants’ Motion for Summary Judgment in its Findings of Fact and Conclusion of Law, which had the effect of dismissing all of the claims asserted in Plaintiffs’ Complaint. **(R.E. 190-**

200) From this Order, Plaintiff appealed to the Supreme Court of Mississippi, said Notice of Appeal being filed on October 9, 2006. (R.E. 201-202)

SUMMARY OF ARGUMENT

I. Standard of Review- De Novo

The standard of review used by this Court in reviewing a Circuit Court's granting of a Motion for Summary Judgment is a *de novo* standard, and the evidence must be viewed in a light most favorable to the party against whom the motion has been made. Hudson v. Courtesy Motors, 794 So. 2d 999, 1002 (Miss. 2001) However, 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), and 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, but no extraneous affidavit testimony.

II. The contract which existed between Plaintiffs and Defendants was not "vague, indefinite and ambiguous" but was an implied oral brokerage contract whose terms were "certain and definite".

In its Findings of Fact and Conclusions of Law ("Findings"), 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. 203-205) In support of its holding, 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 performances in this case are too uncertain to be enforceable as a contract.” (R.E. 204-205)

Plaintiffs submit however, the contract in this case was an oral brokerage contract containing certain and definite terms: In the fall of 2001, Defendant, MORTGAGE EQUITY LENDING, INC., through its agent, WES BREWER, agreed with Plaintiffs to obtain a loan transaction for them within thirty (30) days at the promised rate, but failed to perform this obligation, and hence, the contract was breached. The terms of the contract at issue were that Defendants promised to use their best efforts to obtain financing for the Plaintiffs in return for a brokerage fee and cooperation by Plaintiffs for same. Defendants did not use their best efforts to obtain financing for Plaintiffs within the time frame as agreed upon by both parties. For this reason, this Court should reverse the lower court’s granting of summary judgment on their contractual claim counts.

III. Plaintiffs have presented evidence that Defendants failed to use reasonable care in seeking a loan on their behalf, and Defendants have not submitted any proof that they used their “best efforts” to secure a loan for Plaintiffs.

The Circuit Court, in its Findings, holds that Defendants successfully sought a loan for Plaintiffs, which was turned down by Decision One Mortgage Company, L.L.C.. The Court further found that Plaintiffs ultimately received a loan based upon purported “fraud” regarding the reporting of the marital status of Plaintiffs, so therefore, their allegations of negligence and gross negligence must necessarily fail. However, Plaintiffs submit that showing that these two events occurred, are not proof that Defendants used their “best efforts” in securing a loan for Plaintiffs. Further, Defendants have not contradicted Plaintiff’s 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.

IV. Plaintiffs have presented evidence that Defendants committed a breach of fiduciary duty, fraud and a violation of the Mississippi Consumer Loan Broker Act.

The Circuit Court, in its Findings, holds that Plaintiffs have not presented any evidence to support their claims of breach of fiduciary duty, fraud and violation of the Mississippi Consumer Loan Broker Act. Plaintiffs submit that a fiduciary duty obviously existed between Defendant, WES BREWER, and both individual Plaintiffs, since neither Plaintiff was familiar with the world of loans or mortgages and both reposed their complete trust and confidence in BREWER as well as Defendant, JEFF PALMER, that Defendants would obtain the financing as agreed upon. Further, Plaintiffs submit that this duty was breached, and consequently, summary judgment would be improper since genuine issues of material fact exist on this Count.

Further, based on all of the evidence and testimony as alleged to date, there is much to suggest that Defendants acted fraudulently in their dealings with Plaintiffs, and there is also much evidence that Defendants violated the Consumer Loan Broker Act and Plaintiffs submit that there exist genuine issues of material fact which preclude a granting of summary judgment on both of these counts.

V. Plaintiffs have presented evidence that Defendants violated the Mississippi Deceptive Trade Practices Act.

The Circuit Court held that Plaintiffs failed to meet the requirements of §75-24-1 (2) of the Mississippi Deceptive Trade Practices Act in that no effort was made to seek the assistance of the Attorney General prior to filing their Complaint. However, Plaintiffs submit that by

Defendants' actions of actively participating in the Discovery process, including the taking of the depositions of both Plaintiffs and submitting written Discovery to the Plaintiffs, Defendants should be deemed to have waived their right to compel any sort of informal dispute settlement as to this issue, thus creating an equitable exception to the statutory exhaustion requirement.

Further, as to the violation of the Act itself, Plaintiffs submit that all of the actions of BREWER in misleading Plaintiffs into believing that he would obtain a loan for them within the terms as agreed, and that never happening during the course of several months along with the rest of the misrepresentations and false assurances made, certainly constitute a violation of this Act.

VI. Plaintiffs have presented evidence that Defendants should reimburse Plaintiffs for the Insufficient Funds Checks written by Defendant, WES BREWER, and Defendants have produced no evidence to the contrary.

Contrary to the Circuit Court's assertion that "(t)he overwhelming evidence establishes that these checks were paid to Thomas Garner or on behalf of Thomas Garner, for work he performed for Defendant, Wes Brewer.....", Plaintiffs submit that these insufficient funds checks have been clearly presented as insufficient fund checks written both to Plaintiff, GARNER, *and* to Union Planters Bank *on behalf of both Plaintiffs*.

These checks all bounced and were not made good by BREWER, despite his personal assurances to do so. Further, Plaintiffs have asserted that none of these checks (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"), have ever been paid or made good by Defendant, BREWER, and Defendants offer no proof whatever, that any of the checks at issue have been made good by Defendants. Plaintiffs submits that all these

checks were written, as alleged, as advances to Plaintiffs during the year 2002, in lieu of the promised loans which were not being secured, as contracted.

For this reason alone, it is obvious that a genuine issue of material fact exists which should preclude summary judgment on the issue as to whether BREWER, as Defendant, should be required to reimburse Plaintiffs for the insufficient fund checks.

VII. Plaintiffs have presented evidence that the actions of Defendants caused Plaintiffs to suffer emotional distress, and have also presented evidence of negligent supervision and a basis for piercing the corporate veil.

Although the Circuit Court summarily dismissed Plaintiffs' emotional distress claim, due to the granting of Defendants' Motion for Summary Judgment on their other counts, Plaintiffs assert herein, that the Circuit Court's granting of Summary Judgment on those claims is improper, hence, Plaintiffs' emotional distress claim is proper and should not be dismissed for that reason alone, on summary judgment.

Plaintiffs have alleged that the actions of Defendant, BREWER certainly constituted offensive, outrageous and malicious behavior, and Plaintiffs therefore submit that summary judgment is be improper as to the count of damages for emotional distress, due to fact that genuine issues of material fact exist as to the nature of Defendants' actions.

As to the issue(s) of negligent supervision and piercing the corporate veil, Plaintiffs submit that assuming that there is a basis for wrongdoing on the part of Defendant, BREWER, then Defendant, JEFF PALMER, should be found liable for negligent supervision, or at least a genuine issue of material fact exists regarding this issue. Further, since Defendant, JEFF PALMER is the CEO and only person on the Board of Directors, and is a 100% shareholder, it is at least a question of fact whether PALMER could reasonably be said to be the "alter ego" of

Defendant, MORTGAGE EQUITY, and consequently this issue is one for the jury to decide, and summary judgment is improper on this issue as well.

ARGUMENT

I. Standard of Review: De Novo

The standard of review used by this Court in reviewing a Circuit Court's granting of a Motion for Summary Judgment is a *de novo* standard, and the evidence must be viewed in a light most favorable to the party against whom the motion has been made. Hudson v. Courtesy Motors, 794 So. 2d 999, 1002 (Miss. 2001) Further, the Official Comment to Rule 56 of the Mississippi Rules of Civil Procedure, as stated in Mississippi Rules Annotated, explains that:

A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues....although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.

Comment, Rule 56, M.R.C.P., Mississippi Rules Annotated (1991)

This Court has further stated that "summary judgment should not be used to snuff out a litigant's right to a trial unless it is appropriate under the rule. The requirement of Rule 56 (c)...represents a procedural safeguard to prevent the unjust deprivation of a litigant's Constitutional right to a jury trial." Pope v. Schroeder, 512 So.2d 905, 908 (Miss. 1987).

Further, 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, but no

extraneous affidavit testimony. (See page 3 of Defendant's Motion for Summary Judgment, R.E. 35.)

Plaintiff submits that upon *de novo* review of the Circuit Court's ruling, this Court should reverse each and every count of summary judgment granted for Defendants, for the reasons as given herein, since Defendants did not provide any extraneous affidavit testimony in support of their Motion, regarding any of Plaintiffs' claims.

II. The contract which existed between Plaintiffs and Defendants was not "vague, indefinite and ambiguous" but was an implied oral brokerage contract whose terms were "certain and definite".

In its Findings of Fact and Conclusions of Law ("Findings"), 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. 203-205) In support of their holding, 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 performances in this case are too uncertain to be enforceable as a contract." (R.E. 204-205)

However, Plaintiffs submit that the contract in this case was an implied oral brokerage contract containing certain and definite terms: In the fall of 2001, Defendant, MORTGAGE EQUITY LENDING, INC., through its agent, WES BREWER, agreed with Plaintiffs to obtain a loan transaction for them within thirty (30) days at the promised rate, but failed to perform this obligation, and hence, the contract was breached. The terms of the contract at issue were that Defendants promised to use their best efforts to obtain financing for the Plaintiffs in return for a

brokerage fee and cooperation by Plaintiffs for same. Defendants did not use their best efforts to obtain financing for Plaintiffs within the time frame as agreed upon by both parties.

The Circuit Court states in its' Findings that "the record establishes that Defendants did seek loans on behalf of Plaintiffs, including the loan for Dominguez that was denied by Decision One Mortgage Company, L.L.C., and the loan that was granted to Garner by Creve Coeur Mortgage Company to enable him to purchase Dominguez's property for \$127,000.00. Plaintiffs have failed to establish how these Defendants acted any differently than Southeast Financing Company which also was unable to secure a loan for Plaintiffs." (R.E. 194) However, Plaintiffs submit that these two loan attempts as made, were done long after the 30 day deadline for performance of the contract by Defendants as agreed upon. (See R.E. 106-107- the HUD settlement statement concerning the Creve Coeur Mortgage application dated July 31, 2002, as well as the Decision One Mortgage Statement of Credit Denial, Termination, or Change, dated December 31, 2001, and done outside of the initial 30 day agreed upon contracting period.) (R.E. 189).

Plaintiffs respectfully submit the fact that Defendants finally, after several months of delays and putting Plaintiffs off as referenced herein, secured the \$88,900.00 loan from Creve Coeur Mortgage, an amount well over twice the amount of an earlier "attempted" loan, and obtained only when the Plaintiffs were forced to sell their home, is not proof of the "best efforts" of Defendants. Plaintiffs also submit that the issue concerning anything which Southeastern Financing Company, an unrelated third party to the case at hand, may or may not have done concerning attempting to secure a loan for Plaintiffs, is irrelevant to the present issue, and should not have been considered by the Circuit Court.

Further, as to the issue of whether a valid contract was formed, this Court found the existence of a valid implied brokerage contract in Carmichael v. Agur Realty Co., Inc. 574 So. 2d 603, 606-07(Miss. 1990), where a real estate brokerage agreed to assist a purchaser in the purchase of a hotel, and the purchaser refused to pay the commission on the grounds that although there was a signed Commission Agreement, there was no written brokerage contract specifically binding the purchaser to the broker. This Court upheld the lower court's ruling that a valid implied brokerage contract existed and the purchaser owed the broker the agreed-upon commission for the broker's services. The Court held that "such a contract will be implied if (the broker) acted with the loyalty a broker owes his principal and performed services for (the principals) under circumstances giving (the principals) reason to think that the services were not gratuitous but were provided with the expectation of compensation and, further, if it may be said that those services were beneficial to (the principals)." Carmichael, at 609.

Plaintiffs submit that there exists the same sort of implied contract with definite terms of promise in this case as in Carmichael. In this case, Plaintiffs would have certainly owed Defendants a commission or a fee for services based upon mortgage financing obtained for Plaintiffs if such had been actually obtained (as was contracted for) at the bargained rate. Defendants did not use their "best efforts" to obtain financing for Plaintiffs, but kept "putting them off" continually during the fall of 2001, after the contract was entered into, even attempting to change the terms of the contract by offering a much lower loan amount in January, 2002. (See Statement of the Facts, pp. 7-8 *supra*) Plaintiffs relied to their detriment upon Defendant's continued representations and mis-representations as to when the loan would "come through", and suffered economic losses by doing so.

Regarding all three of Plaintiffs' contract claims (breach, tortious breach and breach of duty of good faith and fair dealing), Plaintiffs submit that the Circuit Court erred in granting summary judgment on these counts since genuine issues of material fact exist herein.

III. Plaintiffs have presented evidence that Defendants failed to use reasonable care in seeking a loan on their behalf, and Defendants have not submitted any proof that they used their "best efforts" to secure a loan for Plaintiffs.

The Circuit Court, in its Findings, holds that Defendants successfully sought a loan for Plaintiffs, which was turned down by Decision One Mortgage Company, L.L.C.. The Court further found that Plaintiffs ultimately received a loan based upon purported "fraud" regarding the reporting of the marital status of Plaintiffs, so therefore, their allegations of negligence and gross negligence must necessarily fail. However, Plaintiffs submit that showing that these two events occurred, are not proof that Defendants used their "best efforts" in securing a loan for Plaintiffs. Further, Defendants have not contradicted Plaintiff's 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.

This Court has held that the question of whether an insurance agent orally promised to bind insurance presented a genuine issue of material fact, and summary judgment was inappropriate. Stringer v. Bufkin, 465 So. 2d 331 (Miss. 1985). In Stringer, the plaintiff had testified that in February, 1973, his insurance agent told him orally that he had uninsured motorist insurance and further, that coverage was "extended immediately". Stringer, at 332. A few months later, in April, 1973, the plaintiff was injured in an automobile accident, and found out that he was uninsured. Stringer, at 332. In reversing a summary judgment for Plaintiff's

insurance agent who was sued for negligence, this Court held that an oral promise to provide insurance was binding on the agent, and that a genuine issue of material fact existed as to whether plaintiff's earlier (in 1969) written rejection of uninsured coverage constituted a waiver of the requirement that the agent be provided with a written request for uninsured coverage. Stringer, at 333-334.

Here, Plaintiffs submit a parallel exists in this case, in that 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 instance, Plaintiff, GARNER, in his deposition, plainly relates Defendant, BREWER's actions of repeatedly telling 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) Further, as to the allegations of gross negligence, Plaintiff, DOMINQUEZ, in her deposition states, in response to the question by counsel for Defendants whether she thought that the Defendants' misrepresentations were done "by mistake or intentional," responded "intentional" to this disjunctive question. (R.E. 183)

Plaintiffs also submit that in August, 2002, Plaintiff, DOMINQUEZ, was forced to sell her home to Plaintiff, GARNER, and at that point, Defendant, MORTGAGE EQUITY, who could not previously obtain the \$40,000.00 loan from Decision One, had no trouble in obtaining the \$88,900.00 loan from Creve Coeur Mortgage. (R.E. 9) Defendants offer no proof whatever as

to the reasons for the continued delay and inability to obtain the first loan throughout 2001 and into 2002, and then the incongruous obtaining of a loan for over twice the amount only when the Plaintiffs were forced to “sell” their home, an idea hatched by the Defendants. Since a movant for summary judgment has the burden of proving his case by affidavits and sworn statements, as stated *supra* (Ratliff, at 981), Defendant’s Motion on the issue of whether their “best efforts” were used in attempting to obtain a loan for Plaintiffs should not be granted since they have not provided any real evidence to counter Plaintiffs’ allegation that they were negligent in their continued delay for several months after Plaintiffs relied upon them to obtain their contracted-for loan.

Plaintiffs submit that the issue of whether Defendant, BREWER, breached his duty of care to Plaintiffs in his actions and caused damage to them, including whether he acted intentionally and with gross negligence, is one which should be resolved by the trier of fact, and not disposed of on a motion for summary judgment, since Defendants have not met their burden of proof to show that there is no genuine issue of material fact.

IV. Plaintiffs have presented evidence that Defendants committed a breach of fiduciary duty, fraud and a violation of the Mississippi Consumer Loan Broker Act.

The Circuit Court, in its Findings, holds that Plaintiffs have not presented any evidence to support their claims of breach of fiduciary duty, fraud and violation of the Mississippi Consumer Loan Broker Act.

A. Breach of Fiduciary Duty- As to breach of fiduciary duty, the Circuit Court dismissed this claim summarily without giving reasons for their dismissal. However, Plaintiffs submit that a fiduciary relationship was created between Plaintiffs and Defendants. In his

capacity as a mortgage loan broker attempting to obtain financing for Plaintiffs, Defendant, BREWER, possessed a fiduciary duty to Plaintiffs since in most cases, a broker is a fiduciary, and is required to exercise fidelity and good faith toward his principal in all matters within the scope of his employment. (12 Am Jur 2d Brokers §84) Further, this Court has clearly defined the nature of a “fiduciary relationship”:

“Fiduciary relationship” is a very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another. Black’s Law Dictionary 564 (5th Ed. 1979). A fiduciary relationship may arise in a legal, moral, domestic, or personal contest, where there appears “on the one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed.” *Miner v. Bertasi*, 530 So. 2d 168, 170 (Miss. 1988); *Matter of Estate of Haney*, 516 So. 2d 1359 (Miss. 1987.)

Additionally, a confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger. *Nicholson v. Ash*, 800 P.2d 1352, 1355 (Colo.Ct.App. 1990)

Lowery v. Guaranty Bank and Trust Co. 592 So. 2d 79, 83 (Miss. 1991) A fiduciary relationship may also arise between parties to a contract where the parties share a mutual interest in obtaining the results called for in the contract. Memphis Hardwood Flooring Co. v. Daniel 771 So. 2d. 924, 930 (Miss. 2000)

Plaintiffs submit that a fiduciary duty obviously existed between Defendant, WES BREWER, and both individual Plaintiffs, since neither Plaintiff was familiar with the world of loans or mortgages and both reposed their complete trust and confidence in BREWER as well as Defendant, JEFF PALMER, that Defendants would obtain the financing as agreed upon. Surely, each and every one of the Defendants would have “shared a mutual interest in obtaining the results called for in the contract” Memphis Hardwood Flooring Co. v. Daniel 771 So. 2d.

924, 930 (Miss. 2000) Further, Plaintiffs submit that this duty was breached, and consequently, summary judgment would be improper since genuine issues of material fact exist on this Count.

B. Fraud- Plaintiff's fraud claim is likewise summarily dismissed by the Circuit Court. However, Plaintiffs submit that based on all of the evidence and testimony as alleged so far, there is much to suggest that Defendants acted fraudulently in their dealings with Plaintiffs. Contrary to the Circuit Court's holding that Plaintiffs have "failed to identify any misrepresentation upon which they claim they detrimentally relied", both Plaintiffs repeatedly testified that Defendant, BREWER, made all sorts of promises and assertions and never fulfilled any of them. **(R.E. 197)** For instance, 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**) All of the representations made by BREWER concerning the promises to obtain financing for Plaintiffs are misrepresentations upon which Plaintiffs relied to their detriment and the state of mind (scienter) of BREWER as to knowledge of these statements' truth or falsity are questions of fact which should not be disposed of by summary judgment. Further, this Court has held that cases which involve issues of contractual ambiguity and interpretation as well as allegations of fraud or misrepresentation generally are inappropriate for disposition at the summary judgment stage. Great Southern National Bank v. McCullough Environmental Services, Inc. 595 So.2d 1282, 1289 (Miss. 1992).

Since allegations of fraud involve the issue of scienter, or whether the fraud was made knowingly, or with knowledge of its falsity, therefore the state of mind of Defendant, BREWER, at the time of the making of his assertions is relevant and constitutes a genuine issue of material fact which exists, and summary judgment is improper as to Plaintiffs' claim of fraud.

C. Mississippi Consumer Loan Broker Act- Plaintiffs claim of violation of the Mississippi Consumer Loan Broker Act (the “Consumer Loan Broker Act”) is also summarily dismissed by the Circuit Court, purportedly because “the evidence shows that Defendants did in fact seek to obtain loans on behalf of Plaintiffs.” (R.E. 197) Plaintiffs submit that Defendants’ half-hearted, late actions of doing anything resembling fulfilling the terms of their implied brokerage contract, as in the allegations of fraud and breach of fiduciary duty, do not preclude a finding for Plaintiffs on their claim of violation of the Act.

The Mississippi Consumer Loan Broker Act (Mississippi Code Annot. §81-19-23) provides that:

- (1) No consumer loan broker may:
 - (g) Make a false promise in order to influence or induce a person to use the consumer loan broker's services, whether made through agents, employees, advertising or otherwise;
 - (h) Misrepresent or conceal essential or material facts regarding the consumer loan broker's services on any transaction under this chapter;
- Mississippi Code Annotated §81-19-23 (1) (g) (h) (Code of 1972, App. April 20, 2004)

Plaintiffs have alleged throughout that Defendant, MORTGAGE EQUITY LENDING, INC., through their agent, BREWER, repeatedly made false promises in order to influence or induce Plaintiffs to use their services. Further, Plaintiffs have alleged that Defendants misrepresented and concealed essential or material facts concerning their services, namely that they either knew of Plaintiffs’ alleged poor (assuming *arguendo*) credit history and represented that they could get them a loan within the 30 day promised period anyway, or that they had no intention of securing the promised loan in the first place. Either way, Plaintiffs submit that there

is plenty of evidence that Defendants violated the Consumer Loan Broker Act and that there are genuine issues of material fact which preclude a granting of summary judgment on this count.

V. Plaintiffs have presented evidence that Defendants violated the Mississippi Deceptive Trade Practices Act.

The Circuit Court, in its Findings, holds that Plaintiffs failed to meet the requirements of §75-24-1 (2) of the Mississippi Deceptive Trade Practices Act in that no effort was made to seek the assistance of the Attorney General prior to filing their Complaint. (R.E. 198) Further, the Court holds that the principle of “active participation in litigation” by a party seeking to avoid arbitration as constituting a waiver of enforcement of arbitration, as set forth in University Nursing Assoc. v. Phillips, 842 So. 2d 1270 (Miss. 2003) does not apply since technically, “arbitration” is not at issue here, but a statutory requirement to first have the dispute resolved by the Attorney General. (R.E. 198) Plaintiffs, however, submit that a parallel can be drawn between an arbitration clause and the informal dispute settlement program statutory requirement. By actively participating in the Discovery process, including the taking of the depositions of both Plaintiffs and submitting written Discovery to the Plaintiffs, it is submitted that Defendants should be deemed to have waived their right to compel any sort of informal dispute settlement as to this issue, thus creating an equitable exception to the statutory exhaustion requirement. Further, as to the violation of the Act itself, Plaintiffs submit that all of the actions of BREWER in misleading Plaintiffs into believing that he would obtain a loan for them within the terms as agreed, and that never happening during the course of several months along with the rest of the misrepresentations and false assurances made, certainly constitute a violation of this Act.

More particularly, §75-24-5 (2) (i) specifically provides:

(2) the following unfair methods of competition and unfair or deceptive trade practices or acts in the conduct of any trade or commerce are hereby prohibited:

(i) Advertising goods or services with intent not to sell them as advertised.

Mississippi Code Annotated §75-24-1 (2)(i) (Code of 1972)

Plaintiffs submit that this provision was clearly violated when Defendants advertised their services of obtaining financing for Plaintiffs at a time when Defendants possessed full intent not to sell their services (obtain financing as promised) as advertised. Based on the foregoing, Plaintiffs submit that a genuine issue of material fact exists as to this issue and summary judgment would be improper.

VI. Plaintiffs have presented evidence that Defendants should reimburse Plaintiffs for the Insufficient Funds Checks written by Defendant, WES BREWER, and Defendants have produced no evidence to the contrary.

Contrary to the Circuit Court's assertion that "(t)he overwhelming evidence establishes that these checks were paid to Thomas Garner or on behalf of Thomas Garner, for work he performed for Defendant, Wes Brewer.....", Plaintiffs submit that these insufficient funds checks have been clearly presented as insufficient fund checks written both to Plaintiff, GARNER, *and* to Union Planters Bank *on behalf of both Plaintiffs*. (See exhibits to Plaintiffs' Complaint, R.E. 23-24.) There is no evidence whatever for the assertion that the checks at issue were for any sort of work performed by GARNER for BREWER, although it is admitted that GARNER had done some prior fencing work for BREWER. 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)

Plaintiffs have asserted that none of these checks have ever been paid or made good by Defendant, BREWER, and Defendants offer no proof whatever, that any of the checks at issue have been made good by Defendants.

These checks all bounced and were not made good by BREWER, despite his personal assurances to do so. For these reasons, Plaintiffs submit that a genuine issue of material exists as to whether BREWER, as Defendant, should be required to reimburse Plaintiffs for the insufficient fund checks.

VII. Plaintiffs have presented evidence that the actions of Defendants caused Plaintiffs to suffer emotional distress, and have also presented evidence of negligent supervision and a basis for piercing the corporate veil.

A. Emotional Distress

The Circuit Court's summarily dismissed Plaintiffs' emotional distress claim, due to the granting of Defendants' Motion for Summary Judgment on their other counts. (R.E. 199) However, assuming that as Plaintiffs assert herein, that the Circuit Court's granting of Summary Judgment on those claims is improper, then Plaintiffs' emotional distress claim is proper and should not be dismissed on summary judgment.

Plaintiffs submit that the actions of Defendant, BREWER as discussed herein, constituted such recklessness and disregard for the Plaintiffs, that damages for emotional distress and mental anguish are justified in this case. In cases in which there is evidence, as here, of willful, wanton, malicious, outrageous or intentional wrongs, and where mental or emotional stress is a foreseeable result of the conduct of the defendant, a court can assess damages for mental and

emotional distress. Gamble v. Dollar General Corp. 852 So. 2d 5, 11 (Miss. 2003) Further, in Mississippi law, damages for “mental anguish” can be awarded upon a finding of simple negligence in a breach of contract. Lawrence v. Virginia Ins. Reciprocal 979 F. 2d 1053, 1057 (5th Cir. 1992) Nonetheless, this particular issue presents a credibility issue for the jury to assess with regards to the offensive, outrageous or malicious nature of the Defendants’ actions. (See Gamble at 12.) As Plaintiffs have alleged, the actions of Defendant, BREWER certainly constituted offensive, outrageous and malicious behavior. (See R.E. 182-186) Hence, Plaintiffs submit that summary judgment is be improper as to the count of damages for emotional distress, due to fact that genuine issues of material fact exist as to the nature of Defendants’ actions.

B. Negligent Supervision

The Circuit Court’s also summarily dismissed Plaintiffs’ negligent supervision claim against Defendant, JEFF PALMER, likewise due to the fact that “the Court finds no basis for any allegation of wrongdoing on the part of those whom Defendant, Palmer, would supervise.” (R.E. 199) Plaintiffs submit that assuming that there is a basis for wrongdoing on the part of Defendant, BREWER, then Defendant, JEFF PALMER, should be found liable for negligent supervision, or at least a genuine issue of material fact exists regarding this issue.

Plaintiffs submit that all of the actions performed by Defendant, BREWER, in his dealings with Plaintiffs as mentioned herein, were performed on behalf of his employer, Defendant, MORTGAGE EQUITY. This Court has held that an activity of an employee must be made in furtherance of the employer’s business for it to be found within the scope and course of employment for purposes of *respondeat superior*. Cockrell v. Pearl River Valley Water Dist., 865 So. 2d 357, 361-62 (Miss. 2004) Further, the test used for determining whether an

employee's tortious act is within the scope of his employment is whether it was done in the course of and as a means to the accomplishment of the purposes of the employment and therefore in furtherance of the master's business. Favre v. Wal-Mart Stores, 820 So. 2d 771 (Miss. App. 2002)

Plaintiffs submit that the actions of Defendant, BREWER were done as a means to the accomplishment of the purposes of Defendant, MORTGAGE EQUITY and respondeat superior clearly applies, therefore Defendant, MORTGAGE EQUITY exercised some degree of control over the actions of Defendant, BREWER, as its employee.

An actionable claim of negligent supervision, as in all negligence claims, requires that the Plaintiff establish the existence of a duty of care, a breach of that duty, proximate causation, and compensable damages. Chandler v. Coleman, 759 So. 2d 459 (Miss. App. 2000) Plaintiffs submit that Defendant, MORTGAGE EQUITY as the employer of Defendant, BREWER, had a duty to supervise the actions of Defendant, BREWER, as an employee under respondeat superior, and breached its duty by failing to do so, and such breach caused the damages complained herein to Plaintiffs. (See R.E. 182-186) Plaintiffs further submit that whether MORTGAGE EQUITY negligently supervised the actions of BREWER presents genuine issues of material fact for a jury to decide, and summary judgement would be improper on this issue.

Finally, as to the issue of piercing the corporate veil, Plaintiffs submit that Defendant, JEFF PALMER, should be held liable for the actions of Defendant, BREWER, and hence those of Defendant, MORTGAGE EQUITY, in his individual capacity as owner of MORTGAGE EQUITY since his status as 100 % owner of the stock of MORTGAGE EQUITY, and his absolute control over the dealings of the company itself should give rise to the "piercing of the

corporate veil” in this circumstance. (See Defendant Jeff Palmer’s Answer to Interrogatory No. 1 and 2 at **R.E. 141-142**, where it is stated that PALMER is the CEO and only person on the Board of Directors, and is a 100% shareholder.)

In determining when the corporate entity should be disregarded in a lawsuit against the corporation and its’ shareholders as defendants, this Court has held that it must be proved: some frustration of contractual expectations regarding the party looked to for performance, the flagrant disregard of corporate formalities by the defendant corporation and its principals, and a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder. Hardy v. Brock, 826 So. 2d 71, 75 (Miss. 2002)

Here, it is undisputed that Defendant, JEFF PALMER 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**) Further, since Defendant, JEFF PALMER is the CEO and only person on the Board of Directors, and is a 100% shareholder, it is at least a question of fact whether PALMER could reasonably be said to be the “alter ego” of Defendant, MORTGAGE EQUITY, and consequently one for the jury to decide, therefore summary judgment is improper on this issue as well.

CONCLUSION

Plaintiffs 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 14th day of March, 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 Brief of Appellant to:

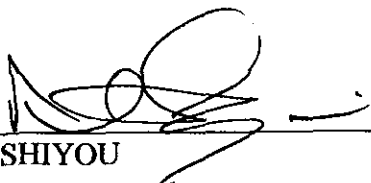
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This the 14th day of March, 2007.


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 Brief of Appellant to the Clerk of the Supreme Court and this Brief and copies therein are being deposited into the United States Mail on this, the 14th day of March, 2007, as required by M.R.A.P. Rule 25 (a) for filing of same to be deemed as of this date.

This the 14th day of March, 2007.


Al Shiyou