IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPEAL NO. 2007-CA-00418

FLAGSTAR BANK, FSB **DEFENDANT/APPELLANT**

VS.

CALVIN AND JAMIE DANOS, ET AL. **PLAINTIFFS/APPELLEES**

On Appeal from the Circuit Court of Lamar County, Mississippi;
The Honorable R. I. Prichard, III, Circuit Judge, in *Calvin and Jamie Danos, et al. v. Allstate Property and Casualty Insurance, et al.*, Civil Action No. 2004-108P

BRIEF OF APPELLEES, CALVIN AND JAMIE DANOS, ET AL.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and the other judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Calvin and Jamie Danos, Picayune, MS and Lafitte, LA, Plaintiffs/Appellees, on behalf of themselves and their minor children,Lauren Matherne, Gavin and Marissa Danos.
3. Flagstar Bank, FSB, Detroit, Michigan, Defendants/Appellant
4. Michael Burks, Pass Christian, MS, Defendant
5. Catherine Jacobs, Ocean Springs, MS, Counsel for Plaintiffs/Appellees
6. Matthew Mestayer, Biloxi, MS, Counsel for Plaintiffs/Appellees
7. Camille Henick Evans, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, Jackson, MS, Counsel for Defendant/Appellant, Flagstar Bank, FSB

8. Christopher P. Palmer, ADAMS & EDEN, P.A., Brandon, MS, prior counsel for Defendant/Appellant, Flagstar Bank, FSB.

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8. Christopher P. Palmer, ADAMS & EDEN, P.A., Brandon, MS, prior counsel for Defendant/Appellant, Flagstar Bank, FSB.

9. Eric Wooten, Dickenson Law Firm

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

TABLE OF CONTENTS

STATEMENT OF THE ISSUES

1. Should this Court look beyond the issues and evidence presented to the Circuit judge in support of the Rule 60(b) Motion to Set Aside the Judgment when considering whether to set the judgment aside.
2. Is the Defendant's challenge to sufficiency of service of process supported by evidence sufficient to overcome the presumption that service was not valid.
3. When a Defendant receives notice of an adverse judgment less than ten (10) days after its entry, does its failure to file a Motion for *jnov* or new trial, or its failure to file a direct appeal, impact its ability to contest the judgment under the Rule 60(b) of the Mississippi Rules of Civil Procedure.

I. STATEMENT OF THE CASE

A. INTRODUCTION

In the court below, the Defendant Flagstar relied upon Rule 60(b) of the Mississippi Rules of Civil Procedure to challenge a default judgment entered against it after its attorneys failed to answer the Danos' Complaint. It received the adverse judgment from the Circuit Clerk in less than five days, but failed to file a motion for *jnov* or for a new trial. Although it entered an appearance in the case well in advance of the deadline for an appeal, Flagstar failed to avail itself of this remedy, and relied upon Rule 60 instead.

Even though it was given the opportunity, Flagstar presented no testimony to support its Rule 60(b) motion to set aside the verdict. Instead, it relied solely upon the exhibits attached to its motion, including an affidavit referencing a critical document which was not identified.

Flagstar has failed to give Judge Prichard the opportunity to rule upon issues presented for the first time on this appeal, including its allegation that the judge "mistakenly believed" that the circuit clerk had sent notice of the trial settings and docket calls to Flagstar. It challenges the damage award and the joint and several judgment for the first time here. In short, Flagstar has violated repeatedly our laws and procedures and exhibited a reckless disregard for the orderly processes of the Courts. Its conduct should not be tolerated, and this judgment should not be disturbed.

B. COURSE OF PROCEEDINGS BELOW

On March 22, 2004, the Plaintiffs, CALVIN and JAMIE DANOS, filed suit against Flagstar Bank, FSB, and others, alleging various improprieties and misrepresentations made during the course of obtaining a mortgage from the defendant Flagstar to finance their purchase of a tract of land with a mobile home. (R.13-34)

Flagstar, a foreign corporation without a registered agent in Mississippi, was served with a summons and complaint by certified mail, return receipt requested. (R.38) The summons and complaint were addressed to Albert Gladner, who in addition to being the designated agent in its Michigan home office for service of process, served as general counsel and senior vice president for Flagstar Bank. (R.1412) The Plaintiffs restricted delivery to Gladner as required. In due course, the green receipt proving that the Complaint had been served upon Gladner was returned to the office of Plaintiff's counsel with an illegible signature. A return was filed with the green card attached. (R.E.68-69) (R.111-12)

After service, all of the Defendants filed answers with the court except Flagstar Bank, FSB, and Michael Burks. Flagstar's legal department did, however, send a letter to Plaintiff's counsel, which provided:

> *Dear Ms. Jacobs:*
>
> *Flagstar Bank, FSB (Flagstar) is in receipt of the Summons regarding the above referenced matter. The loan account was sold on November 16, 2001, to Chase Manhatten Mortgage, Inc. You may contact them at the following address and phone number listed below. ..."*
>
> (R.E. 56, R.1402

The letter referenced *Calvin and Jamie Danos, et al. vs Allstate Property and Casualty Insurance, et al.,* Case No. 2004-108, it was signed by Robert K. Fleming, Legal Department, Operations Coordinator, and it was dated April 22, 2004. (*Id.*)

The Summons clearly stated that an answer needed to be filed with the Circuit Court of Lamar County. (R.112) However, Flagstar failed to file an answer or enter an appearance in this action. It failed to appear at the docket calls on the first Monday of each term of Court in Lamar

County, nor did it appear at the call of the trial dockets. During the course of the litigation, the Plaintiffs settled with several Defendants, agreed to dismiss others and summary judgment was granted in favor of Allstate on a different claim. The case was set for trial on September 21, 2006. (R.E.74, R.912)

On that day, the Plaintiffs appeared with their counsel and the case was called by the clerk. The Defendant Flagstar failed to answer or appear, and at the request of Plaintiff's counsel, an order was entered defaulting Flagstar for its failure to appear and defend. The order also set the matter over for a hearing on damages on September 29, 2006. (R.E.9, R.1344). This order was filed and entered by the clerk on September 25, 2006, and served on Flagstar Bank by certified mail. (R.E.5, R.5). On the day of the hearing on damages, the case was called again and neither defendant appeared. The Plaintiffs presented their evidence on damages, and a judgment was entered against Flagstar and Michael Burks for $500,000.00. (R.E.10, R.1345). This final judgment also was mailed to Flagstar by the clerk upon filing and entry. (R.E.5, R.5).

Despite the timely notice to Flagstar of the judgment, it did not file a motion for *jnov* or for a new trial. It did enter an appearance in this action on October 11, 2006, but ignored the October 29 deadline for an appeal. (*Id.*; R.1349). Flagstar did nothing to challenge the judgment until it filed its Rule 60(b) motion to set the judgment aside on November 15, 2006. (*Id.*; R.E.14, R.1353). With that motion, Flagstar raised for the first time sufficiency of service of process, not as an independent ground but because it constituted "good cause" to set the judgment aside. (R.E.18, 19, R. 1357-58). This issue had not been raised in Flagstar's letter to Plaintiff's counsel and Flagstar already had entered a general appearance in this action. (R.E.17, R.1356; R.1353).

Flagstar also claimed that good cause existed to set aside the default because the Plaintiffs had "fatally ignored" the provisions of Rule 55(a) MRCiv.P. (R.E.18-19, R. 1357-58). In its motion, Flagstar also maintained that it had a colorable defense to the complaint and that the Plaintiffs had suffered no prejudice by its failure to answer and appear. (R.E.19-20, R. 1358-59). No evidence was submitted in support of either contention, other than references to the pleadings. (R.E. 19-24, R.1358-63).

Plaintiffs responded to the Rule 60(b) motion and challenged the affidavit attached to the motion as Exhibit A with a motion to strike. (R.E.47-60; R.1393-06; R.1408-16) Exhibits were attached in support of the response to rebut those submitted by the Defendant Flagstar in its motion. Plaintiffs' response was delayed because they attempted to schedule the depositions of Albert Gladner, the agent for service of process and Mr. Pena, the alleged mail clerk. Plaintiffs were advised by Flagstar that its position was that discovery was improper since a judgment had already been entered. (R.E.60, R.1406) Believing that it was incumbent upon the Defendant to call these witnesses at the hearing, Plaintiffs responded without the requested depositions, but at the hearing, no witnesses appeared for Flagstar and it declined the Court's invitation to receive evidence and testimony at a hearing on its motion.

The circuit judge denied Flagstar's motion on March 12, 2007, finding no grounds to set the default aside. (R.E. 11, R.1426) He noted Flagstar's failure to attend the docket calls which violated the Court's local rules. He found that since Flagstar had failed to appear and defend the action, it was not entitled to notice of the application for default. He found that the default was proper under M. R. Civ. P. Rule 55(b), since it was applied for and entered on the day the case was set for trial. He found that Flagstar's arguments regarding service of process and prejudice to be without merit.

In his opinion, the "important judicial policy of finality of judgment" would not be fostered by setting this judgment aside. (R.C.11-13, R.1426-28) The Defendant Flagstar appealed this denial.

C. STATEMENT OF THE FACTS

Because Flagstar has appealed the denial of a motion to set aside the default judgment, there are few facts for the court to consider. On March 22, 2004, the Plaintiffs filed suit against Flagstar and other individuals alleging various improprieties in connection with their purchase and financing of a mobile home on a tract of land. (R.13) In their complaint, the Plaintiffs allege that various misrepresentations were made about the mobile home, its condition, the value of the property, the value of the structure, its condition, and similar matters. In the complaint, the Plaintiffs allege repeatedly that Chris Shirley was responsible for gathering a large amount of the information including the erroneous information in transmitting it to Flagstar. In Count Six of the Complaint, which incorporated all of the factual allegations by reference, the Plaintiffs claimed that Chris Shirley was acting as an agent for Flagstar, FSB, that material misrepresentations were made regarding the value of the property and its financing, the end result of which was that the Plaintiffs incurred indebtedness to Flagstar in an amount far exceeding the value of the property they purchased and became obligated on a mortgage with a high rate of interest which they could not afford. (R.1-18, 22). The complaint also stated claims against Allstate for its underwriting practices and its failure to pay for certain damage to the mobile home alleged to have occurred while Allstate's policy was in effect.

During the course of the litigation, which lasted two years, the Plaintiffs were forced to live in a shed on the property because of the condition of the mobile home. They were unable to meet their financial obligations and ultimately, the Flagstar mortgage, which it had sold to Chase upon

learning that there might be problems, was foreclosed. (Tr. 3-13) At the time that the complaint was filed, the Plaintiffs believed that they could have presented a case for predatory lending on the part of Flagstar had it bothered to answer the complaint and allow discovery. However, it did not, and now seeks to use depositions that were taken by other parties to prove that it had a colorable defense. Plaintiffs believe that this is improper under the law, that Flagstar had a duty to present any evidence that it wanted to have considered in connection with its Rule 60 motion to the trial judge, and that its failure to do so precludes this court from utilizing any such materials in its review.

II. SUMMARY OF THE ARGUMENT

When deciding whether the trial court was correct in refusing to set aside a default judgment pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure, this court review the ruling to determine whether or not the trial court abused its discretion in failing to set the judgment aside. The Appellate Court, when making this determination, confines itself to the evidence presented to the trial court in connection with the Rule 60(b) motion. *Capital One Services, Inc. v. Rawls*, 904 So.2d 1010 (Miss. 2004). In *Rawls*, as here, the defaulting defendant was offered the opportunity by Judge Prichard to present witnesses and other evidence to give the court a factual basis in support of its Rule 60(b) motion to set a default judgment aside. As here, the defaulting defendant did not avail itself of this opportunity and relied instead upon affidavits which were conclusary in nature and which provided no factual basis to overturn the judgment. In this matter, the defaulting defendant, Flagstar, has raised issues that were not presented to the trial court in connection with its motion and it asked the court to consider evidence that was not presented to the trial court in connection with its motion. Plaintiffs respectfully submit that the court should not consider positions of other sworn testimony attached to various motions submitted by answering defendants and which appear as part

of the record in the underlying case because they were not presented to the trial judge in connection with this motion, as required by *Capital One Services*.

The defendant's argument that the default judgment against Flagstar was improperly taken is specious. Flagstar's first attack on the process relates to its contention that it should have received notice of the trial setting or judgment could not be entered against it on the day of the hearing. This is not true. Under Rule 40 of the Mississippi Rules of Civil Procedure, notice of trial dockets and trial settings do not have to be served upon parties who have failed to make an appearance in the action. *Stinson v. Stinson*, 738 So.2d 1259 (Miss. Ct. App. 1999). Moreover, pursuant to the Local Rules of Lamar County, each party to a lawsuit is required to attend calls of the general docket to make announcements with respect to their cases. Rule 5 of the Local Rules of the Fifteenth Circuit Court District (Appendix A). Failure to abide by these Rules can, and has, resulted in sanctions including dismissal and default, as the Rule itself provides. No notices of the call of the general docket are sent to attorneys. Rather they know, pursuant to Rule 5, that the general docket is called the first Monday of each term of court in each County, and they are expected to be there. Notice to Flagstar simply is not an issue.

The next defect alleged by Flagstar in the process of default is the Plaintiff's failure to obtain a clerk's entry of default pursuant to Rule 55(a). However, this default was not taken pursuant to Rule 55(a). As the record will show, Flagstar, upon receiving the Summons and Complaint, sent a letter to Plaintiffs' counsel indicating that it had received the Summons and Complaint and advising that the loan in question had been sold to Chase Manhatten. Although the letter came from Flagstar's legal department, the attorneys never sent the letter to the court nor did they file an answer. The letter to Plaintiffs' counsel, prevented the use of Rule 55(a) to obtain the Clerk's Entry of

Default. As part of Rule 55(a), an attorney is required to submit an affidavit swearing that the defendant in default has not served a copy of any answer or other defense which he might have upon the undersigned attorney of record for the Plaintiff. Form 36, M. R. Civ. P. Because of the letter from Flagstar, the affidavit required by Rule 55(a) was inappropriate and inapplicable.

However, as the comments to Rule 55 show, Rule 55(a) is not the only path to a default judgment. In this instance, conduct such as the failure to appear at general calls of the docket and failure to appear at trial can serve as the basis for a default judgment without a clerk's entry pursuant to Rule 55(a). *Sartain v. White*, 588 So.2d 204 (Miss. 1991); *Hood v. Mordecai*, 900 So.2d 370 (Miss. Ct. App. 2004) *cert. denied* 898 So.2d 679 (Miss. 2005). That day, the Plaintiffs applied for, and received, a default judgment and pursuant to Rule 55(b), they were not required to provide Flagstar with three days notice.

Flagstar was, however, provided with a notice of the court's default judgment entered on September 21st when it was mailed to Flagstar by the clerk on September 25, 2006. That Order contained a provision setting the case over to be heard on the issue of damages on September 29, 2006. Flagstar failed to appear at this hearing and after the hearing the evidence on damages, judgment was entered in favor of the Plaintiffs for $500,000.00. Notice of this judgment was sent to Flagstar, which eventually made an appearance in the action on October 11, 2006 and yet, it waited over a month to file its Rule 60(b) motion and in the meantime, allowed the time to take a direct appeal to run.

Flagstar's final argument is that the Court improperly balanced the factors and must consider in determining whether to set the default judgment aside. Before the trial court, Flagstar argued that good cause, one of the factors, existed because the judgment was void for insufficiency of service

or process and default was improperly taken. These issues have already been addressed. In fact, good cause is defined as (1) the nature and legitimacy of the defendant's reason for default. *McCain v. Dauzat*, 791 So.2d 839, 843. The issue of sufficiency of process had nothing to do with the defendant's reason for default. There is no question that Flagstar's legal department received notice of the Summons and Complaint, since it acknowledged receipt in a letter to Plaintiffs' counsel. It negligently filed to fail an answer with the Clerk of Court thereby subjecting itself to default. This act of negligence on the part of Flagstar was compounded over and over by its subsequent conduct. It received a copy of the default judgment entered against it no later than October 4, 2006. At this time, the ten day period for filing a motion for *jnov*, or new trial, had not yet expired. Flagstar, however, waited until October 11, 2006, to enter an appearance in this case. It then waited until November 15, 2006, to file its motion under Rule 60(b) to set aside the verdict. In the meantime, time to take a direct appeal of the adverse judgment had expired on October 29, 2006.

In support of its Rule 60(b) motion, Flagstar declined to engage in any discovery to obtain evidence to support its Rule 60(b) motion and then declined the opportunity presented by the court to present witnesses and other evidence in support of its motion. In *Stringfellow v. Stringfellow*, 451 So.2d 219, 221 (Miss. 1984), the Mississippi Supreme Court ruled that in order to obtain relief under Rule 60(b), a litigant must present an adequate showing of exceptional circumstances, and neither ignorance nor carelessness on the part of an attorney will provide grounds for relief. In order to prevail, the defaulted party must show that he was justified in failing to avoid mistake or inadvertence. There is no proof at all that Flagstar can justify any of its behavior in allowing one deadline after another to run and failing to present the courts with a factual basis to overturn the default. Therefore, good cause has not been shown.

The next prong of the balancing tests used by trial courts in determining whether to set aside the default judgment is whether the defendant has a colorable defense to the merits of the claim. *McCain v. Dauzat*, 791 So.2d @ 843. The decision to set aside a default judgment because of a meritorious defense is left to the sound discretion of the trial court and subject to the abuse of discretion standard. *Williams v. Kilgore*, 618 So.2d 51, 55 (Miss. 1992). Since no evidence was presented to the trial court to support Flagstar's claim that it had a colorable defense, the court was within reason when it found that the equities still required the judgment to be upheld.

Finally, there is the question of prejudice to the Plaintiffs. The defendant argues that the Plaintiffs suffered no prejudice because there is no liability. This is not the case. If the default judgment were set aside and remanded, the Plaintiffs would be given the opportunity to conduct discovery. Since thousands of dollars have already been spent, and since nearly two years were consumed in the litigation of this matter already, to say that the Plaintiffs would not be prejudiced by setting the judgment aside is meaningless. While the defendants could use any of the depositions in the case against the Plaintiffs, the Plaintiffs could not ;use any of the depositions in the case against the defendant. After enduring already two years of litigation, the Plaintiffs would be forced to endure many more months. That does not include the time and effort already spent defending this appeal and the time it will take for a ruling to become final. The defendant bears the burden of proving lack of prejudice on the part of the Plaintiffs and this it has failed to do.

Having set forth no reason to reverse the decision of the trial judge that this default should not be set aside, the Plaintiffs respectfully submit that the court's ruling on the Rule 60(b) motion to set this judgment aside be affirmed.

III. ARGUMENT

A. STANDARD OF REVIEW

Motions for relief, under Rule 60(b), are addressed to the sound discretion of the trial court and appellate review is limited to whether that discretion has been abused. *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). When ruling on these motions, "a balance must be struck between granting a litigant a hearing on the merits with the need and desire to achieve finality in litigation." *Id.* In order to obtain relief under Rule 60(b), a litigant must present an adequate showing of exceptional circumstances, and neither ignorance nor carelessness on the part of an attorney will provide grounds for relief. The party must show that he was justified in failing to avoid mistake or inadvertence and gross negligence, ignorance of the rules, or ignorance of the law is not enough. *Id.* See, also, Fed. Pract. & Procedure, Section 2858, p. 170. Eleven Wright & Miller . In *Stringfellow*, the Mississippi Supreme Court quoted *Clark v. Burkle*, 70 F. 2d 824, 831 (5th Circuit 1978), for the proposition that a judgment resulting from incompetence or ignorance on the part of an attorney employed by the parties seeking relief is never enough. The denial of a motion to set aside a default judgment will be disturbed only where the trial court has abused its discretion. *McCain v. Dauzat*, 791 So. 2d 839, 842 (Miss. 2001); *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So.2d 377, 388 (Miss. 1987).

B. WHAT EVIDENCE AND ISSUES ARE VIABLE ON THIS APPEAL

On this appeal, the Defendant has raised issues that were never presented a the trial court. First, it claims that it was entitled to notice of trial settings, a point never raised below. Second, it argues that the judgment is void because of insufficiency of service of process, which was raised below only in the context of constituting good cause, and finally, it challenges the amount

of damages and the form of the verdict, which were issues never raised below. When the standard of review to set aside a default judgment is whether the trial court abused its discretion, it seems only fair that the trial court be presented with the opportunity to rule on such matters before this Court will consider them. Indeed, the general rule is that issues may not be raised for the first time on appeal. *Bechtel Power Corp. v. MMC Materials, Inc.*, 830 So.2d 672, 676 (Miss. Ct. App. 2002); *Read v. Southern Pine Elec. Power Ass'n*, 515 So.2d 916, 921 (Miss. 1987).

An issue this Court must decide is whether by failing to take a direct appeal, the defendant limited the evidence this Court can consider in an appeal of a Rule 60(b) motion.

In *McCain v. Dauzat*, the Supreme Court made it clear that a challenge to a judgment under Rule 60(b) clearly contemplates a hearing to enable the defendant to present whatever evidence he desires to support his position that a judgment should be overturned. In this case, Flagstar attached exhibits to its motion to set the default judgment aside. (R.E.26-46; R.1365-85) A hearing on the motion was set by the Court for March 12, 2007, nearly three months after the motion was filed. During this three month period, the Plaintiffs attempted to engage in discovery believing that Flagstar would do the same. Instead, when Plaintiffs asked for depositions, Flagstar replied that it would engage in discovery only if required to do so by order of the Court since a final judgment had already been entered. (R.E.59-60; R.1405-06)

At the hearing, Judge Prichard asked Flagstar whether it had any witnesses to call or exhibits that it wished to introduce into evidence. Flagstar indicated that it had no witnesses and no additional evidence to consider other than the documents attached to its motion. Having squandered its right to answer and defend on the merits, its right to file a motion for JNOV or new trial, its right to take a direct appeal, Flagstar then squandered its opportunity to present the court with competent

evidence to support its position that the judgment entered against it should be set aside. This court shall consider the evidence presented in support of the Rule 60(b) motion and no more. Capital One Services v. Rawls, 904 So.2d 1010 (Miss. 2004).

In Brown v. State, 965 So.2d 1023, 1027 (Miss. 2007), the Mississippi Supreme Court held that it "*will not consider matters that do not appear in the record, and it must confine its review to what appears in the record.*" *quoting* Pulphus v. State, 782 So.2d 1220, 1224 (Miss. 2001). In this case, the record on the Rule 60(b) motion does not include many of the materials that Flagstar now relies upon to challenge the judgment. It is respectfully submitted that since Flagstar failed to give the trial judge the opportunity to consider matters in the record developed by other parties at the Rule 60(b) hearing, this Defendant should not now be allowed to rely on this information for the first time on appeal.

C. THE COURT'S PROPERLY DEFAULTED FLAGSTAR

From the Defendant's arguments in support of it claim that default was improperly entered, it is clear that Flagstar is not familiar with the local rules governing practice in Lamar county. Flagstar believes it cannot be faulted for failing to attend docket calls because it received no notice. However, anyone who practices regularly there knows that Rule 5 of the Local Rules of the Fifteenth Circuit Court District requires attendance at Docket calls for which the only notice is the Court's term calendar. It provides:

> All other cases then pending in each county which are not listed on either the trial calendar or trial docket shall be maintained on the general docket in and for said county. That on the first Monday of each court term, in and for each county, the general docket shall be called by the Court. At the call of the general docket, each attorney shall be required to make an appropriate announcement, which announcement shall be limited to the following; (1) the case may be set for trial or for preliminary matters, (2) the case may be dismissed, (3) a default judgment may be taken, (4) the case may be set for call

on the last Friday of the term, and (5) the case may be continued for good cause shown. (Appendix A)

If a party or his attorney fail to appear at the call of the docket, the case may be dismissed (if it is the Plaintiff) or if a Defendant, he can be defaulted. Similarly Rules 3 and 4 of the Local Rules address the court's trial docket and repeat, more or less, the provisions of Rule 40 M.R.Civ.P. While Rule 40 requires notice of trial dockets and settings, as the Judge noted in his opinion, these do not have to be served on parties who have not entered an appearance. *Stinson v.Stinson*, 738 So.2d 1259 (Miss. Ct. App. 1999).

Nearly all of the local rules of the Fifteenth Circuit Court District are designed to insure the orderly progression of cases and to give the judges a good handle on their dockets. It is because of these rules that Judge Prichard, in his opinion on the Rule 60 motion, referenced Flagstar's failure to attend the docket calls. With or without a notice from the clerk, attorneys and parties know to be there and learn quickly that there can be dire consequences if they are not. The judge committed no "plain error" here as Flagstar maintains. To the contrary, it is standard operating procedure in Lamar County to require attorneys and parties to attend docket calls with and without notice from the clerk, and it is one of the most efficient trial courts in Mississippi.

In further support of its position that the lower court erred when it granted a default judgment, Flagstar maintains that the Plaintiffs' failure to file an entry of default before applying for default is fatal. However, as is recognized in the comments to M.R.Civ.P.Rule 55, Rule 55(a) is not the "only source of authority in these rules for the

entry of a default that may lead to judgment. " It applies only when there has been a failure "to plead or otherwise defend." *Id.* The affidavit that must accompany the entry require an attorney to state "that the defendant has failed to answer or otherwise defend as to the plaintiffs complaint or serve a copy of any answer or other defense, which he might have upon the undersigned attorney of record for the plaintiff." Comments Rule 55 MRCiv. P. This procedure simply was not applicable since a letter had been sent to Plaintiff's counsel by Flagstar's legal counsel indicating that the note in question had been sold. (R.E.56, R.1402) The trial court was aware that Flagstar's counsel had sent this letter which also acknowledged receipt of the summons and complaint before the Plaintiffs applied for and received a default judgment on the day of trial. With his close supervision of the case, he knew that this Defendant had failed to appear in the case, had failed to appear at calls of the general docket, as required, and had placed itself in the worst position possible by having its lawyer respond to Plaintiff's counsel without protecting itself by entering an appearance in the case. Abuses such as these can lead to default through portals other than Rule 55(a). In *Hood v. Mordecai*, 900 So.2d 370 (Miss Ct. App. 2004) *cert. denied* 898 So.2d 679 (Miss.2005), default judgment was granted without a clerk's entry for discovery abuses. Rule 55(b) contemplates default against Defendants who fail to appear for trial, and allow them to be defaulted without prior application, which is precisely what happened here. In *Sartain v. White*, 588 So.2d 204 (Miss.1991) the plain meaning of the Rule was confirmed when the court allowed default to be taken at trial on a counterclaim when the Plaintiff/Counter-Defendant failed to appear at trial. As happened here, default was allowed in *Sartain*

without prior application because it was entered on the day of trial.

The Defendant, Flagstar, argued that the trial court incorrectly balanced the factors to be used to determine whether to set aside the default judgment. When it made this argument before the trial court, it indicated that there were only three factors to consider, good cause, whether there was a colorable defense, and the prejudice, if any, suffered by the Plaintiffs. (R.E. 16-24, 1355-63). In essence, Flagstar argued before the trial court that there was good cause to set the judgment aside because it was void due to insufficiency of service of process and it argued that the judgment be set aside because default procedures were not properly followed. (R.E. 16-24, R. 1355-63). The Defendant's arguments regarding the process for setting the judgment aside have already been addressed and it has been shown that the process followed by the trial court was proper under the law.

D. SERVICE OF PROCESS WAS PROPER

The next issue is whether the trial court was correct in rejecting Flagstar's argument that service of process was improper and therefore the judgment is void. Under Rule 4(c)(5), a non-resident defendant may be served by certified mail, return receipt requested. If the defendant is a natural person, it must be served restricted delivery. While Flagstar is not a natural person, its agent for service of process, Albert Gladner, is, and so the Plaintiffs' restricted delivery to Mr. Gladner. (R.111-12). Under Rule 4(f), service made under Paragraph 4(c)(5), is complete when the sender files with the court the return receipt or the returned envelope marked "refused". Thus, under Mississippi law, a defendant can be properly served even

without knowing that a refused letter might be a Summons and Complaint against him.

The green card which constitutes the return in this case, contains an illegible signature. (R.111-12). In Mississippi, it is presumed that process was correctly served, and it is up to the defendant to present competent evidence to overcome this presumption.

In *McCain v. Dauzat*, 791 So.2d 839 (Miss.2001), a defendant attempted to attack a judgment based upon insufficiency of process by testifying at trial that he was never served. The trial judge, having been presented with conflicting evidence, rejected this argument and found the testimony of the defendant to be incredible. In rejecting the defendant's argument on appeal, this Court ruled that "a return of process is presumed to be correct, and McCain did nothing to shake this presumption." *McCain v. Dauzat*, 791 So.2d 839, 842 (Miss. 2001). The Court relied upon its prior decision in *Pointer v. Huffman*, 509 So.2d 870, 872 (Miss. 1987) in rejecting the Defendant's argument that service was improper. In *Pointer*, the Court relied upon a presumption that a constable was authorized by the sheriff to serve a summons, even though there was no proof to that effect, to find that a summons was proper.

When the Court looks at the evidence presented by this Defendant to challenge sufficiency of process, it is easy to see why this "proof" was insufficient to overcome the presumption of validity of service. (R.E.26, R.1365). First, there is no proof that the "green card" Mr. Roslin was reviewing was the card at issue here. In its motion, Flagstar indicates that the green card and proof of service reviewed by Mr. Roslin is attached as "Exhibit A." (R.E. 17, R. 1356). No such green card or proof of service was attached to his affidavit. While the affidavit of Mr. Roslin states that the signature on the green card is not Mr.

Gladner's, he professes no familiarity with Mr. Gladner's signature. There is no indication that Mr. Roslin was even employed by the Flagstar at the time the summons and complaint in this matter were received, and neither Mr. Pena, the alleged mail clerk, or Mr. Gladner, the agent, have submitted any testimony that the summons and complaint were in fact received by Pena and not Gladner. As indicated in the Plaintiffs' response, their efforts to depose Pena and Gladner were refused by Flagstar. (R.E.59-60, R.1405-06). Clearly the trial court did not abuse its discretion when it relied upon the presumption that service in this case was valid. The Defendant's "proof" was insufficient to overcome this presumption and the court did not abuse its discretion in so ruling.

The Defendant has cited an unpublished federal district court opinion, *Brown v. Bristol Meyer Squib Co.*, 2002 WL 34213425 (S. D. Miss. 2000) for the proposition that the judgment in this case is void because it allegedly was not served upon Mr. Gladner. In that unpublished opinion, the court reasoned that Mississippi requires strict compliance with the rules governing service and that any defect will render a judgment void. The opinion does not mention the presumption of valid service that exists in Mississippi jurisprudence. From the opinion, it is unclear whether that was an oversight or an indication that there was sufficient proof to overcome the presumption. There is no question that a Defendant bears the burden of overcoming such a presumption, and in *Brown*, the judge must have been satisfied with the proof offered by Cephalon that service by the Postal Service was defective.

Here, the opposite is true. Unlike the trial judge in *Brown*, the judge here did not find that the presumption of valid service had been overcome. There is no proof that the affiant, worked at Flagstar when the summons was served, and if he did not, his statements are

hearsay. There is no proof whatsoever that the Postal Service did anything

no proof that the green card allegedly reviewed by Mr. Roslin was the

summons and complaint in this action.

's affidavit is full of conclusory allegations and hearsay for which there is no

As such, it cannot provide the basis for overcoming the presumption that service

Staten v. State, 2008 MSCA 2006-KA-01612-012908 (January 29, 2008)

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stifying as an expert on the policies and procedures in place at Flagstar, but he sets forth

factual basis for his opinions and conclusions, and they are of no value. *See Davis v. Christian Brotherhood Homes of Jackson Ms. Inc.*, 957 So.2d 390, 408 (Miss. Ct. App. 2007); (conclusory allegations are not competent evidence.) Plaintiffs moved to strike Roslin's affidavit on various grounds, and while the court never ruled upon the motion, it is clear that while his finding in that regard is reviewed by this Court for abuse of discretion.

nothing more than hearsay. There is no proof whatsoever that the Postal Service did anything wrong, and there is no proof that the green card allegedly reviewed by Mr. Roslin was the return on the summons and complaint in this action.

Roslin's affidavit is full of conclusory allegations and hearsay for which there is no foundation. As such, it cannot provide the basis for overcoming the presumption that service was valid. *Staten v. State*, 2008 MSCA 2006-KA-01612-012908 (January 29, 2008) (attorney's statement that client could not assist in his own defense was conclusory); Roslin is testifying as an expert on the policies and procedures in place at Flagstar, but he sets forth no factual basis for his opinions and conclusions, and they are of no value. *See Davis v. Christian Brotherhood Homes of Jackson Ms. Inc.*, 957 So.2d 390, 408 (Miss. Ct. App. 2007); (conclusory allegations are not competent evidence.) Plaintiffs moved to strike Roslin's affidavit on various grounds, and while the court never ruled upon the motion, it is clear that while his finding in that regard is reviewed by this Court for abuse of discretion.

correctly notes that the plaintiff did everything required of them to achieve process on the Defendant, Flagstar. There is no question that Flagstar received notice. The green card was returned with an illegible signature and shortly thereafter, this counsel received a letter from Flagstar's legal department, of which Mr. Gladner was chief counsel, indicating that they had received the Summons and Complaint.

With its Rule 60(b) motion, Flagstar attempted to attack the sufficiency of the process with an affidavit which was not signed by Mr. Gladner, nor the person who allegedly received the Complaint. Instead, it constituted a lay person's opinion as to whose signature appeared on the green card. The green card, that the affidavit allegedly addressed, was not attached to the affidavit and there was no way for the court to determine whether the witness was reviewing the green card return in this case or another case. As in *McCain*, the trial judge here flatly rejected the challenge to sufficiency of service of process. The defendant failed to overcome the presumption that process was valid as the evidence it used to challenge that presumption was neither credible nor the "best evidence" to support Flagstar's contention. There is no evidence whatsoever to support Flagstar's statement that the post office erred in allowing someone other than Mr. Gladner to sign for the Summons and Complaint.

Mississippi Courts have held repeatedly that "substantial compliance" with our process statutes is all that is required. As the Court has observed, the most important safeguard involving any person who stands to suffer from some official action is prior notice. *Brown v. Riley*, 580 So.2d 1234, 1237 (Miss. 1991).

There is another important distinction between the decision in in this instance. In *Brown*, clearly the trial judge found the proof of insufficiency of process admitted by the defendant to be credible. In this case, the trial judge did not find the proof to be credible. It is respectfully submitted that Judge Prichard's decision in this regard, does not amount to an abuse of discretion.

E. THE TRIAL JUDGE HAD NO COLORABLE DEFENSE TO CONSIDER

The second prong of the balancing test that a court must consider when deciding whether to set aside a Rule 60(b), is whether the Defendant has a colorable defense to the merits of the claim. *McCain v. Dauzat*, 791 So.2d 839, 843 (Miss. 2001). To support the claim that it has a meritorious defense, a defendant "must set forth in affidavit form the nature and substance of the defense." *H & W Transfer and Cartage Service v. Griffin*, 511 So.2d 895, 899 (Miss. 1987). As in *H & W Transfer*, all we have here are naked assertions of counsel, unsupported by any specifics. 511 So.2d @ 899. The arguments presented to the trial judge were as follows: (1) because Allstate was entitled to summary judgment on its breach of contract claim, the suit against Flagstar has no merit, and (2) because Chris Shirley was dismissed, there can be no claim against Flagstar. Neither of these allegations were supported by affidavit or any sworn testimony when presented to the Circuit Judge, and they do not seem constitute any defense that would be recognizable in Mississippi. First of all, the claim against Allstate Insurance Company was based upon a contract of insurance and allegedly negligent underwriting of an insurance policy. There is nothing about the ruling in favor of Allstate which would have any impact on the claims against Flagstar. For the allegations regarding Chris Shirley, Flagstar's argument was almost self-defeating. As it

noted, in their complaint, the Plaintiffs allege that Chris Shirley and Amerigo Mortgage were agents of Flagstar Bank. In order for an agent to be liable for the acts of a disclosed principle, he must have acted outside the scope of his agency and will incur no individual liability absent fraud or other equivalent conduct. *Rosson v. McFarland*, 962 So.2d 1279, 1288 (Miss. 2007). c. f. *Harrison v. Chandler-Sampson Ins. Co., Inc.*, 891 So.2d 224, 227-31 (Miss. 2005).

When Chris Shirley and Amerigo Mortgage filed their motion for summary judgment, the Plaintiffs had already determined that they would be unable to prove any fraud, malice, gross negligence or similar misconduct against these agents. Before the hearing on the motion, Plaintiffs' counsel contacted counsel for these defendants thus, the dismissal of Chris Shirley in Amerigo Mortgage did not assure an absolute defense to the Plaintiffs' claims against Flagstar.

On this appeal, Flagstar is asking this court to consider documents in the record that were submitted in connection with motions for summary judgment before Flagstar entered an appearance and which were not presented to the court for consideration when ruling on the Rule 60(b) motion to set the verdict aside. When the standard to be applied is abusive discretion, it is respectfully submitted that the Lower Court's decision should be reviewed on the basis of the record that it had before it. Flagstar had plenty of time to gather together any materials that it wanted the trial court to consider and present them to the Judge for consideration. Instead, it did nothing more than raise the points enumerated above.

On appeal, Flagstar maintains that as a question of law, a lender cannot be responsible for the acts of a broker. Because Flagstar has not been available to the Plaintiffs for

deposition and discovery, the nature and extent of the communications between Shirley and Flagstar are unknown. The Plaintiffs claim that they were injured when they purchased a piece of property worth nowhere near the amount of the mortgage. They had put no money down, were charged high interest rate, received no benefit and as anyone expect, finally endured foreclosure. As soon as it realized that the loan was troubled, Flagstar sold it to Chase Manhatten to avoid exposure that was not a holder in due course. Flagstar's efforts to use the deposition of the Plaintiffs to absolve this defendant is particularly disingenuous. Calvin Danos is a blue collar worker at a shipyard and his wife is a retail clerk. They agreed to purchase property they believed to be worth more than the amount that they paid, based upon an appraisal performed by a friend of Chris Shirley. At the time this complaint was filed, the Plaintiffs believed that Flagstar had engaged in predatory lending even to the extent that it violated its own rules and regulations regarding the credit worthiness of the Plaintiffs and the value of this older mobile home situated on several acres. Through his attorney, Chris Shirley indicated that he was acting only on behalf of Flagstar and in constant touch with their lending department in his efforts to get this loan approved. If in fact, that is the case, then Flagstar would be liable for its own acts, rather than the acts of the broker. To support its assertion, the relationship between Flagstar, Amerigo and Shirley, was one of lender and broker, Flagstar relies upon unsupported allegations contained in the motion filed by its attorney, Christopher Palmer which is unsworn and nothing more than a conclusory statement. (Appellant's Brief p. 30) ("Moreover, there was no agency or employment relationship between Amerigo Mortgage, Chris Shirley and Flagstar" (R.1361-62; R.E.22-23).) This is the only statement relied upon by Flagstar to prove the lack of agency as alleged

in the Plaintiffs' complaint.

As far as Flagstar's burden to prove a colorable defense, it submitted no sworn testimony to the trial court to support its assertion. It argued that the claim against it had no merit since summary judgment had been granted in favor of Allstate. However, the Plaintiffs' claim against Allstate was based upon the breach of an insurance contract and negligent underwriting rather than conduct of Flagstar. It indicates that it should be absolved because Chris Shirley, who was alleged to be the agent of Flagstar, was dismissed on the ground that the Plaintiffs admitted they could not oppose his motion. However, the reason the Plaintiffs did not oppose his dismissal, was because of their contention that he was the agent for a disclosed principle, *i.e.*, Flagstar, and he had not been proven to be guilty of any acts which would take him outside of that agency.

F. PREJUDICE

Flagstar maintains that the Plaintiffs would not be prejudiced if the Rule 60(b) motion to set aside the judgment was granted. It presented absolutely no proof to that end and argued merely that since the judgment needed to be set aside, no prejudice could possibly occur. The court, however, had witnessed the degree to which this litigation had already damaged the Plaintiffs. They could not keep their composure on this stand. They had no credit. They had lived in a shed because the condition of the mobile home was so poor that it was uninhabitable. They were saddled by debt that they could not afford. They could not obtain financing to get other housing. Their home had been foreclosed. They had endured two years of hell. (Tr. 3-13) The default judgment was the welcome end to the litigation. If it is set aside, the Plaintiffs will again have to endure all of the slings and arrows that come with litigation. This is not a matter

of filing a late answer. This is a case where two years of litigation occurred before Flagstar asked this court to set the judgment aside. Clearly, this is prejudice.

IV. CONCLUSION

No one but Flagstar is responsible for the default judgment that stands against it today. Every step was a misstep. From the failure to file an answer to the failure to file post trial motions, to the failure to take an appeal, to the delay in filing its Rule 60 motion, to the failure to present any evidence to the Judge to support its motion, to this appeal. There is not one case other than *Sartain*, where a party litigant has been so grossly negligent, and at least in the case of *Sartain*, there were mitigating circumstances. The Judge correctly ruled that the default judgment taken herein was correctly entered and should not be set aside. It is respectfully submitted that he exercised sound discretion in so ruling, and his decision should be affirmed.

RESPECTFULLY SUBMITTED on this the 22nd day of February, 2008.

CALVIN and JAMIE DANOS, et al, Plaintiffs

BY: _____
CATHERINE H. JACOBS,
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, CATHERINE H. JACOBS, do hereby certify that I have on this the 22nd day of February, 2008, served a true and correct copy of the Brief of Appellees, Calvin and Jamie

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