IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

APPEAL NO. 2007-CA-00418

FLAGSTAR BANK, FSB — **DEFENDANT/APPELLANT**

V.

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

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

REPLY BRIEF OF APPELLANT FLAGSTAR BANK, FSB

ORAL ARGUMENT NOT REQUESTED

Camille Henick Evans (Miss. Bar No. [redacted])
BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
17th Floor, AmSouth Plaza
Post Office Box 22567
Jackson, Mississippi 39225-2567
(601) 948-5711
(601) 985-4500 (fax)

ATTORNEY FOR APPELLANT
FLAGSTAR BANK, FSB

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Other Authorities

STATEMENT REGARDING ORAL ARGUMENT NOT REQUESTED

Appellees requested oral argument on the cover of their Brief but did not state why as required by Miss. R. App. P. 34(b). Appellant Flagstar believes the Record and the briefing sufficiently apprises this Court how the trial court erred and abused its discretion in failing to set aside the default judgment and judgment of $500,000.00, and oral argument is not necessary for this Court to right that manifest wrong. Should the Court deem oral argument to be beneficial for it to pose questions that are otherwise unanswered, then Appellant is confident the Court will so direct the parties that the case be argued pursuant to Miss. R. App. P. 34(b).

INTRODUCTION

Flagstar's principal brief demonstrated that the trial court incorrectly based its decision on an erroneous assumption about Flagstar's failure to appear and did not engage in balancing the true factors for denial of a motion to set aside a default. The prejudice to Flagstar is egregious -- $500,000.00 was awarded with no consideration of the merits or allocation of damages as to the claims against Flagstar rather than co-defendant Michael Burks. Appellees failed to respond to the merits of Flagstar's arguments and authority, instead contending that, since they did not prevail on their substantive claims against the other defendants after two years of litigation, they should be entitled to hang on to this windfall. The substance of Appellees' argument is

This Court is well within the law in reversing the trial court's order and remanding for a hearing on the merits of the claims asserted against Flagstar in the Complaint.

ARGUMENT IN REPLY

A. <u>The Trial Court Incorrectly Based Its Opinion on Non-Appearance at Trial Setting</u>

1. Trial Court's Assumption of Notice by Clerk Was Wrong

In denying Flagstar's Motion to Set Aside Default Judgments the trial court stated:

> The basis for the Judgment was that the defendant failed to appear for a trial on the merits, and that on three different docket calls, the defendant had failed to appear, or make any announcement. After entry of the judgment, and consistent with M.R.C.P. 55, this Court held a hearing on damages, where the defendant also failed to appear.

(R. 1426; R.E.11). The trial court concluded that the Rule 55 requirements for notice of the application for a default judgment were not needed "in light of" the failure to appear at trial and the docket calls. (R. 1428; R.E. 13). In doing so, it reiterated its initial holding: "This Cause having come before the Court for trial on the merits, *and the clerk having called the docket*, and on three different occasions called the Defendants, Flagstar Bank FSB, and said Defendant failed to answer or appear . . . ." (R. 1344; R.E. 9) (emphasis added). *See also* Transcript of September 29, 2006 hearing on damages (Sept. 29, 2006 TR. at 2; R.E. 97) ("Let the record show that this case was set for trial and *the Clerk duly notified all the parties of the trial date.* . . . but neither defendant appeared on the date the case was set for trial"); Judgment entered on September 29, 2006 (R. 1345; R.E. 10) ("the case having been called for trial on the merits and neither Defendant appeared for trial on the merits"). The trial court clearly premised its opinion on the erroneous assumption that Flagstar had received notice of the trial settings from the Clerk that it was to be present at the trial or docket calls noted in the trial settings.

The specific basis for the court's ruling of default and subsequent denial of the motion to set aside default is contradicted by the Record itself. Each time the Clerk sent a notice of trial setting, the Clerk did not send any trial notice or docket call to Flagstar. (R. 2-4, 225, 264, 850, 873, 912; R.E. 2-4, 70-74). In its principal brief, Flagstar pointed out visually the Clerk's docketing information which revealed the Circuit Clerk did not send the notice of trial calendar or docket calls to Flagstar. *See* Brief of Appellant Flagstar at 18-19, and R. 2-5, R.E. 2-4. The record does not support the sole "basis" on which the trial judge relied in entering default judgment and in thereafter denying the motion to set aside the default. (R. 2-4, R.E. 2-4).

The Appellees characterize the trial court's decision thus: "He found the default was proper under M. R. Civ. P. 55(b), since it was applied for and entered on the day the case was set for trial." (Appellees' Brief at 4.) But default which "may be entered by the court on the day the case is set for trial" *presupposes* that the notice of trial setting was sent to the party. Miss. R. Civ. P. 55; Miss. R. Civ. P. 40. The trial court committed clear and plain error in concluding that Flagstar failed to appear after notice of the trial setting by relying on Rule 55(b), and in denying relief from the default judgment *on that basis* when the record establishes no notice of such docket calls or trial settings had ever been sent by the Circuit Clerk to Flagstar. The trial court thereafter abused its discretion in failing to set aside the default judgment that had been entered on an erroneous ground.

For the trial court's evidentiary or fact findings, the appellate court has inherent power to notice plain error to prevent manifest miscarriage of justice, as cited in Miss. R. Evid. 103(d). *See Miss. Transp. Comm. v. Highland Development, LLC,* 836 So. 2d 731, 737-38 (Miss. 2002) (if plain error in court's finding, appellate court can address); *see also Univ. of Miss. Medical Center v. Peacock*, 972 So. 2d 619, 625-26 (Miss. Ct. App. 2006)(appellate court may review plain error if trial court deviated from legal rule and error prejudiced outcome). The trial court erred when it entered a default judgment against Flagstar solely for not appearing at the trial setting because Flagstar was never sent any notice of trial setting by the Circuit Clerk, and it erred in denying Flagstar's Motion to Set Aside Default Judgments on the same basis.

2. Trial Court's Local Circuit Rule 5 Must Be Read in Context of Local Circuit Rules 3 and 4

Appellees rely on Local Circuit Rule 5 of the Fifteenth Circuit Court, but take it out of context of the other Fifteenth Circuit Court Local Rules on the topic of trial settings -- Local

Circuit Rules 3 and 4. *See* Local Rules 3, 4, and 5 (as found at the Mississippi Supreme Court website, http://www.mssc.state.ms.us/rules/localcircuitrules.html[1]), attached as Appendix A.

Fifteenth Circuit Court Local Rule 3 provides that the Circuit Clerk shall maintain a trial calendar pursuant to Miss. R. Civ. P. 40(a) whereby the trial calendar is called on the first day of the term of court and "*the Circuit Clerk shall notify the attorneys of record or the parties, if not represented by counsel, of the calling of said trial calendar at least five days in advance thereof.*" See Appendix A (emphasis added). Local Rule 3 thereafter provides that if the trial calendar is to be called "in any county other than on the first day of a regular term therein . . . *the Circuit Clerk shall notify all attorneys of record and parties*, if unrepresented, of the calling of such trial calendar in and for said county." Local Rule 3 thus imposes the duty on the Circuit Clerk to *notify the attorneys of record or the parties, if not represented by counsel* of the trial calendar or trial settings.

Fifteenth Circuit Court Local Rule 4 requires the Circuit Clerk to maintain a trial docket of the cases set for trial at the calling of the trial calendar and provides "in addition to this method of setting a case for trial" that "attorneys may set cases by agreement in vacation for a day certain during the next regular term of Court." *See* Local Rule 4 (Appendix A). This Rule allows the attorneys representing the parties to mutually agree to a day certain to try the case rather than wait for the conclusion of each trial set before it on the trial calendar during the term of court. This is done with full knowledge of and notice to the parties and their counsel.

After Local Rules 3 and 4, the Fifteenth Circuit has Local 5 for "all other cases then pending in each county which are not listed on either the trial calendar or trial docket." Local Rule 5 simply says that when the general docket is called,

[1] Flagstar specifically refers the Court to http://www.mssc.state.ms.us/rules/localcircuitrules/15thCirRecodification.pdf, included in Appendix A.

> . . . 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.

Fifteenth Circuit Local 5 (Appendix A). What Local Rule 5 provides for is an attorney announcement, not anything more. If an attorney announces that "a default judgment may be taken," then the attorney and the Court must thereafter follow the rule for default judgments -- Miss. R. Civ. P. 55.

The trial court here presumed that Local Rules 3 and 4 had been followed for notification of the calling of the trial calendar. (Sept. 29, 2006 TR. at 2; R.E. 97) ("Let the record show that this case was set for trial and **the Clerk duly notified all the parties** of the trial date. . . . but neither defendant appeared on the date the case was set for trial"). The trial court made no mention of Local Rule 5 concerning general dockets "which are not listed on either the trial calendar or trial docket." Appellees' recitation of Local Rule 5 in their Response Brief is taken out of context and is not applicable. Further, Appellees' reference to Local Rule 5 is disingenuous, especially in light of Appellees' failure to invoke this rule at any general docket call *before* the trial setting to suggest to the Court that a default might be taken against Flagstar.

3. Trial Court's Local Circuit Rule 5 Does Not Override Miss. R. Civ. P. 55

Appellees appear to urge that the trial court defaulted Flagstar because it did not attend general docket calls under Local Rule 5. (Appellees' Brief at 13-14). Fifteenth Circuit Court Local Rule 5 providing for attorney announcements on general docket day may be an efficiency tool; however, it does not override Miss. R. Civ. P. 55. "The purpose of Rule 55 is to provide a uniform procedure for acting upon and setting aside actions upon parties' defaults." Comment to Miss. R. Civ. P. 55. Furthermore, "[p]rior to obtaining a default judgment, Rule 55(b), there

must be an entry of default as provided by Rule 55(a). . . . These elements of default must be shown by an affidavit or other competent proof." *Id.* One of the purposes of an entry of default is to provide the defaulting party with notice of a hearing before the court ascertains the measure of recovery and enters a default judgment.

> Rule 55(c) differentiates between relief from the entry of default and relief from a default judgment. This distinction reflects the different consequences of the two events and the different procedures that bring them about. . . [A] default judgment is not possible against a party in default until the measure of recovery has been ascertained, which typically requires a hearing, in which the defaulting party may participate.

Comment to Miss. R. Civ. P. 55.

The Appellees cite to *Stinson v. Stinson*, 738 So. 2d 1259, 1261 (Miss. Ct. App. 1999), for the argument that notice was not necessary, but in that case there was no issue that the husband was properly served with process. 738 So. 2d at 1261 ("Process was issued and a return indicated that it was personally served on September 25, 1997. . . . He later testified that he talked several times with his wife by telephone, attempting to negotiate a resolution."). Pertinent here, *Stinson* held that the default rules were not directly applicable to the divorce case. 738 So. 2d at 1262-63. Therefore, *Stinson* is distinguishable from the facts of this case and is not controlling authority.

Appellees' arguments amount to trying to "have it both ways." Appellees argued to the trial court that Flagstar did not enter an appearance because it did not file an answer and was not entitled to any notice of default. (R. 1397; R.E. 51). Then Appellees urge that Flagstar "appeared" by sending a letter to Appellees' counsel (Appellees' Brief at 3, 8, 15), and stating "Flagstar already had entered a general appearance in this action" (Appellees' Brief at 3). Apellees contend that "[b]ecause of the letter from Flagstar, the affidavit required by Rule 55(a) was inappropriate and inapplicable." (Appellees' Brief at 8, 15.) However, Appellees do not

support any supposed "general appearance" in the trial court. Appellees' state -- with no citation to the Record -- that "the trial court was aware that Flagstar's counsel[2] had sent this letter" (Appellees' Brief at 15), but the letter was not filed and the trial court's opinions and orders do not indicate that the trial court in any way accepted the letter as a "general appearance" by Flagstar in the action.

However, Appellees' Janus-faced arguments are of no avail because good cause for default is shown even if the defendant appeared in the action but was not properly served with notice before a hearing on the application for default judgment. *See Johnson v. Weston Lumber & Bldg. Supply Co.*, 566 So. 2d 466, 468 (Miss. 1990). In *Johnson* the court examined the three-prong balancing test under Miss. R. Civ. P. 60(b) for defaults, and concluded as follows:

> The Court in both *H & W Transfer [and Cartage Service, Inc. v. Griffin*, 511 So. 2d 895 (Miss. 1987)] and in *King v. King* [, 556 So. 2d 716 (Miss. 1990)] refer to the standard as a balancing test. Applying the first part of the test, "whether the defendant has good cause for default," the record is devoid of any notice to Johnson as to the date of the trial. We need test no further. There can be no balance to a test where there is no notice. This Court has said in *Edwards v. James*, 453 So. 2d 684 (Miss. 1984), "Even though the result might be the same ... every ... defendant or respondent has the right to notice in a court proceeding involving him, and to be present, and to introduce evidence at the hearing." Where that valuable right is denied there must follow a reversal.

566 So. 2d at 468. In contrast, *Hood v. Mordecai*, 900 So. 2d 370 (Miss. Ct. App. 2004), cited by Appellees, involved a default judgment granted "as an extreme sanction for discovery abuse," pursuant to Miss. R. Civ. P. 37(b)(2)(C), not under Miss. R. Civ. P. 55(b). 900 So. 2d at 375. The defendant Hood had answered, but had engaged in contumacious conduct in failing to respond to discovery or to the court's orders on motions to compel. *Id.* at 372-73. The *Hood* court held that "M.R.C.P. 37(b)(2)(C) is a totally distinct avenue for obtaining a default

[2] The letter was sent by a clerical worker (Fleming) at Flagstar, not Flagstar's counsel, thus emphasizing the problem when the summons and complaint was signed for by a mail clerk instead of the corporate officer to whom it was addressed. *See infra* Section C. 1.

judgment than the provisions of M.R.C.P.55." *Id* at 375. Accordingly, *Hood* is not dispositive here.

In the present case the trial court was diverted by the notion that Flagstar had failed to appear at the call of trial, such that the trial court did not properly consider the good cause for default that was shown. Good cause for default is the applicable consideration here.

B. Flagstar Followed the Proper Procedure of a Rule 60(b) Motion to Set Aside a Default

Plaintiffs/Appellees contend Flagstar was not timely in bringing its motion to set aside the default judgment, and should instead have filed a motion for "JNOV or for a new trial" or direct appeal from the default judgment. (Appellees' Brief at 1, 3, 8-9, and Appellees' Statement of Issues). Flagstar's Rule 60(b) motion to set aside the default judgments was the proper procedure and timely filed to preserve its objections to the default judgment and judgment.

1. Flagstar Did Not Have to File a Motion for "JNOV" or Direct Appeal from the Default Judgment Before Filing a Rule 60(b) Motion

Miss. R. Civ. Rule 60(b) is the established procedure for trying to set aside a default judgment. Miss. R. Civ. Rule 55(c) specifically provides:

> **Setting Aside Default.** For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Miss. R. Civ. Rule 55(c). Miss. R. Civ. Rule 55(c) refers to Rule 60(b), not to Rule 59. Miss. R. Civ. Rule 60(b) provides for motions for relief from judgments or orders, not motions for new trials.

Appellees contend Flagstar "allowed the time to take a direct appeal to run" (Appellees' Brief at 8), and argued it allowed "one deadline after another to run" by not filing a "motion for *jnov*, or new trial." (*Id.* at 9.) Further, Appellees contend that somehow the Rule 60(b) denial is not a "viable issue" and that "[a]n 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." (*Id.* at 11-12.) Appellees wholly fail to grasp there was no "failure to file a motion for JNOV" or "failure to take a direct appeal" by Flagstar[3] because neither a Rule 59 motion nor a direct appeal from a default judgment is the procedure established by the Mississippi Rules of Civil Procedure. Flagstar followed the proper procedure of a Rule 60(b) motion to set aside a default. Thus, Flagstar is not limited in how this Court may consider the denial of its Rule 60(b) motion.

2. Flagstar Was Timely in Filing its Motion to Set Aside

Plaintiffs/Appellees contend Flagstar was not timely in bringing its motion to set aside, because they erroneously look at the time for appeals under Miss. R. App. P. 4 rather than the time for motions to set aside under Miss. Rule Civ. P. 60(b). Rule 60(b) provides that a motion under that rule "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six months after the judgment, order, or proceeding was entered or taken." Miss. Rule Civ. P. 60(b). Appellees' response brief ignores clear authority. As the Mississippi Court of Appeals found in *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545 (Miss. Ct. App. 2000):

> In the present case, *the motion to set aside the default judgment was filed* on February 9, 1996, *a little over one month after the circuit judge granted the default judgment.* The judge did not rule on the motion until December 29 that same year. *The fairly prompt bringing of the motion to set aside* indicates that American Cable did not cause much delay in providing an opportunity for relief from the judgment. We find that to the extent memories may be growing dim, that was not the result of American Cable's delay but was the required procedural delay for the trial and appellate courts to reach a final resolution of the motion.

[3] The only party who failed to take an appeal was the Appellees who chose not to appeal the trial court's dismissal of all other defendants, including the summary judgments to Allstate and AmeriGo.

754 So. 2d at 555 ¶40 (emphasis added). Flagstar brought its motion to set aside a little over a month after the default judgment and judgment were entered. Accordingly, under *American Cable* Flagstar was "fairly prompt" in bringing the motion and was not untimely.

Further, the trial court did not consider the motion to set aside to be untimely as it made no mention of this point in its March 12, 2007 Memorandum Opinion and Order. (R. 1426-1428; R.E. 11-13).

C. Flagstar Raised the "Issues" in the Trial Court and the Trial Court Erred in Denying the Motion to Set Aside the Default Judgments

Appellees contend that one of the "issues" of this appeal is whether "this Court [should] look beyond the issues and evidence presented to the Circuit judge in support of the Rule 60(b) Motion to Set Aside the Judgment[ ] [sic] when considering whether to set the judgment aside." (Appellees' Statement of Issues). Thereafter Appellees attempt to argue that this Court's scope is somehow limited because it must confine itself to consider matters that appear in the record.[4] (Appellees' Brief at 13). Flagstar raised the issues which are the subject of this appeal in the court below and is not relying on information for the first time on appeal. The Record that existed in the trial court establishes the trial court abused its discretion in denying the Motion to Set Aside the "Default Judgment" of September 25, 2006[5] and the "Judgment" of September 29, 2006 by failing to apply the three-prong balancing test for determining whether to set aside a default judgment.

1. Good Cause Existed for Flagstar's Default

Appellees disregard that *Brown v. Bristol-Myers Squibb Co.*, 2002 WL 34213425 (S.D. Miss. 2002), attached in Appendix B, quite simply is directly on point to the circumstances here

[4] Appellees urge the Court to confine itself to the Record, while setting forth supposed factual assertions which do not appear in the Record. (*See* Appellees' Brief at 12, 15).

[5] The trial judge signed the Default Judgment on September 21, 2006, but it was not filed and docketed by the Circuit Clerk until four days later on September 25, 2006. (R. 1344; R.E. 9).

and establishes that good cause existed for Flagstar's default. *Brown* involved the same issue here: a default judgment when a summons/complaint sent via certified mail was signed for by a mail clerk instead of the corporate officer to whom it was addressed. (R. 111-112, 1355-1356, 1365-1366; R.E. 16-17, 26-27, 68-69.) The *Brown* court relied on Mississippi law to hold that "where process, though properly directed by the plaintiff in accordance with the rules governing service of process, is not delivered in accordance with the plaintiff's directions and in accordance with the rules, it cannot be said that proper service has been effected. Simply stated, process was not 'served' on a person authorized to receive service of process." 2002 WL 34213425 at *3 (citing *Kolikas v. Kolikas*, 821 So. 2d 874, 878 (Miss. 2002)). Further the *Brown* court relied on *McCain v. Dauzat*, 791 So. 2d 839, 842 (Miss. 2001) to hold that the default judgment was void since service of process was defective. 2002 WL 34213425 at *5.

The *Brown* court followed established law that "[b]efore a default can be entered, the court must have jurisdiction over the party against whom the judgment is sought, which also means that he must have been effectively served with process." Comment to Miss. R. Civ. P. 55, citing *Arnold v. Miller*, 26 Miss 152 (1853). As Flagstar pointed out in its Motion to Set Aside Default Judgments, proper service of process, which is necessary to obtain jurisdiction over a party, was lacking here because Flagstar was not properly served. (R. 111-112, 1355-1356, 1365-1366; R.E. 16-17, 26-27, 68-69). Appellees stake their argument that "a presumption of valid service exists in Mississippi jurisprudence" and faults the federal district court for not including that in its *Brown* opinion. Yet *Brown* cited the very case on which Appellees rely: *McCain v. Dauzat*. A presumption may exist, but not when it is rebutted. Flagstar overcame any

presumption by affidavit by one who had knowledge[6], and the reasoning and analysis of *Brown v. Bristol-Myers Squibb Co.* should be adopted by this Court.

"Good cause" existed for the "default" by Flagstar due to a faulty service of process by mail. But it is evident the trial court's preoccupation with whether there should have been an entry of default and the notion that Flagstar had failed to appear at the call of trial allowed it to misconstrue those issues as a "good cause for default" issue; thus, the trial court abused its discretion in wholly failing to address the good cause reason for default in the first place that was shown: Flagstar was not served properly.

2. Flagstar Has a Colorable Defense to the Merits of Plaintiffs' Claims

As Flagstar noted, the trial court made no mention of Flagstar's asserted defenses and did not appropriately address the most important factor in deciding whether to set aside the default judgment: whether Flagstar had a colorable defense to the merits of the claim. *See Allstate Ins. Co. v. Green*, 794 So. 2d 170, 174 (Miss. 2001)) (most important factor in deciding whether to set aside default judgment is whether defendant has colorable defense to merits of claim).

a. Flagstar specifically referenced and relied on the Record before the Trial Court

Appellees contend in their Response Brief that Flagstar did not "give the trial judge the opportunity to consider matters in the record" and "the trial judge had no colorable defense to consider" and that the allegations of the colorable defense were not "supported by affidavit or any sworn testimony." (Appellees' Brief at 13, 21.) **Flagstar specifically referenced and relied on the Record made in this case and previously presented to the Trial Court** (R. 1358-60,

[6] The trial court never ruled on the credibility of the Roslin affidavit (R. 1356, 1365-66; R.E. 17, 26-27) as Appellees appear to suggest (see Appellees' Brief at 18, 21), because the trial court wholly failed to address the service of process issue at all. The affidavit testified to a positive fact -- that the signature on the return receipt (i.e., green card) was that of Romeo Pena, a person not authorized to accept service of process -- and there was no need to "testify" to a negative fact, *i.e.*, that it was *not* Gladner's signature. The affidavit is thus factual and not conclusory.

1374-82; R.E. 19-21, 38-46), a record fully argued before that same court less than two months **before** the Motion to Set Aside was filed. (*See* R. 592-841, 916-1170, 1337; R.E. 75-83, 88.) Appellees' argument simply boils down to they wanted duplication of paper in the court file, even though the trial court had considered it just a few months before. Flagstar specifically pointed the trial court to the *existing* record on the colorable defense to the merits of Plaintiffs/Appellees' claims:

- "There are no other allegations against Flagstar other than the one contained in Paragraph 45 of the Complaint. This allegation is one that is founded on vicarious liability only, in that Flagstar's culpability rests on the actions of Defendant Chris Shirley. There is no direct allegation against Flagstar in the Complaint. Defendant Chris Shirley was granted summary judgment on September 12, 2006, and was finally dismissed as a party defendant. No appeal was taken from the Order." (R. 1359; R.E. 20.)

- Flagstar attached copies of the Order Granting Motion for Summary Judgment as to Chris Shirley (R. 1359, 1374-75; R.E. 20, 38-39); Order dismissing Angela Miller and Coldwell Banker (R. 1359, 1376; R.E. 20, 40); Judgment of Dismissal as to Defendant Country Living Insurance, Inc. (R. 1359, 1377; R.E. 20, 41); and Memorandum Opinion and Order of Final Judgment as to Allstate (R. 1359, 1378-1382; R.E. 20, 42-46).

- Flagstar argued, "The doctrine of *res judicata* demands that the default judgment be set aside. Liability of Flagstar was premised only on the actions of Chris Shirley acting as agent for Flagstar, according to the Complaint." (R. 1359; R.E. 20.)

- "Here, judgment was actively sought against Chris Shirley and summary judgment was granted in his favor. The essence of summary judgment is that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. M.R.C.P. 56(c). Chris Shirley's dismissal on summary judgment is a final judicial finding that no genuine issue of material fact exists as to his liability to the Plaintiffs and that he is entitled to be dismissed as a defendant. Since Flagstar's alleged liability was premised on Chris Shirley's liability, Flagstar cannot be held liable as a matter of law. In order to prevail on the vicarious liability claims, the Plaintiffs must first establish that Chris Shirley committed some act that would render him liable to the Plaintiffs. Fulcher [sic] v. Lynch Oil Company, 522 So. 2d 195 (Miss. 1988). By its grant of summary judgment in favor of Chris Shirley, the Court found that Chris Shirley committed no act that would render him liable to the Plaintiffs. In view of Chris Shirley's dismissal by summary judgment, the doctrine of res judicata bars the subsequent pursuit of a claim against Flagstar since it would be nothing more than relitigation of the same claims and issues already addressed by the Court on summary judgment." (R. 1360; R.E. 21.)

Thus, Flagstar called the trial court's attention to the materials and court file regarding the prior summary judgment motions. Also, the trial court referenced the Record in its March 12, 2007 Memorandum Opinion and Order -- "Given the exhaustive factual background detailed in this Court's Memorandum Opinion and Order, on Allstate's Motion for Summary Judgment, in the present case, a lengthy factual recitation is not warranted." (R. 1426; R.E. 11) -- although it did not address the colorable defense substantively. (R. 1427; R.E. 12.)

The Rule 60 motion was not offered in a vacuum from which the trial court had no other evidence of the merits and defenses; rather, the Rule 60 motion specifically called the trial court's attention to the Record that already existed in this case and *res judicata* of the claims already decided on summary judgment. The Record in existence before the default was entered does show more than just a "colorable" defense for Flagstar. The trial court simply refused to address it. Appellees' statement that this Court cannot consider anything "outside the Motion" is simply a red herring.

b. Flagstar has a colorable defense not considered by the Trial Court

As reflected above, the record established that Flagstar has a colorable defense to Appellees' claims. (*See* R. 592-841, 916-1170, 1337, 1358-60, 1374-82; R.E. 19-21, 38-46, 75-83, 88.) Yet the trial court wholly ignored this most important factor in deciding whether to set aside a default. *Allstate Inc. Co. v. Green*, 794 So. 2d at 174; *see also Pointer v. Huffman*, 509 So. 2d 870, 876 (Miss. 1987) ("The existence of a colorable defense on the merits 'is a factor which should often be sufficient to justify vacation of a judgment entered by default.'"); *American Cable Corp.*, 754 So. 2d at 555.

The Danos family sought only to impose vicarious liability upon Flagstar for any alleged acts of broker AmeriGo or Shirley. *See* Complaint at ¶45 (R. 22), attached as Appendix C.

Under the reasoning of *Richardson v. New Century Mortgage Corp.*, 2005 WL 1554026, *9-10 (N.D. Miss. 2005), *aff'd* 202 Fed. Appx. 773 (5th Cir. 2006), attached as Appendix D, the Danoses' claims against Flagstar fail, and thus Flagstar has more than a colorable defense. In *Richardson* the court found that a mortgage lender is not liable for a broker's actions:

> In any event, it would be unusual to perceive a mortgage broker as an agent of a lender, especially one lender among many that he routinely solicits loans from on behalf of the broker's client.
>
> The court concludes that the plaintiff has produced no evidence to establish that Hunt [broker] was an agent of New Century [mortgage lender]. Therefore, New Century cannot be held vicariously liable for any of Hunt's actions or inactions.

2005 WL 1554026 at *9-10. Since Flagstar's alleged liability was premised vicariously on mortgage broker Chris Shirley's liability, Flagstar could not be held liable for the broker to whom summary judgment had already been granted. *See also Lewis v. Lynn*, 236 F.3d 766, 768 (5th Cir. 2001) (where defending party establishes that plaintiff has no cause of action, this defense generally inures to benefit of defaulting defendant.) Plaintiffs did not oppose the extensive summary judgment motion of defendants AmeriGo and Chris Shirley, and the trial court's order stated "plaintiffs have no grounds to oppose the motion." (R. 1337; R.E. 88).

On this appeal Appellees state simply, and without proof, that Chris Shirley was an "agent" of a disclosed principal[7] and that they didn't have to prove anything against him in order to establish vicarious liability of Flagstar. (Appellees' Brief at 23-24). Appellees erroneously

---

[7] Flagstar has proof, not simply hearsay or innuendo, that Chris Shirley was not an "agent" of Flagstar under applicable law. As to evidence of lack of agency and proof of independent contractor status, *see* R. 996, 1002, 1008-1009 cited in Flagstar's principal brief at 7, 31. Appellees offer only a self-serving hearsay and conclusory assertion by their counsel; this is not evidence. Under *Richardson* the Appellees have no evidence of an agency relationship.

Further, Flagstar will offer more proof of lack of agency upon remand for a hearing on the merits. Flagstar only had to show a "colorable defense" for a Rule 60(b) motion, and not at that time prove it beyond all reasonable doubt. A "'colorable' or 'meritorious' defense under this Rule is whether it is 'good at law so as to give the fact-finder some determination to make.'" *American Cable*, 754 So. 2d at 554 (*citing Bieganek v. Taylor*, 801 F.2d 879, 882 (7th Cir.1986)).

cite cases concerning liability of the agent irrespective of vicarious liability, and ignore basic law of vicarious liability of an alleged principal. "An action against an employer based on the doctrine of *respondeat superior* is a derivative claim arising solely out of the negligent conduct of its employee within the scope of his or her employment.' *J&J Timber Co. v. Broome*, 932 So. 2d 1, 6(¶19) (Miss. 2006). With respect to vicarious liability, once the employee/agent is discharged from liability, the purely derivative vicarious liability claim becomes barred. *Id.* Further, there can be no vicarious liability for an independent contractor under Mississippi law. *Fruchter v. Lynch Oil Company*, 522 So. 2d 195, 200-201 (Miss. 1988) (defendant not liable for acts of independent contractor); *see also Ramsey v. Georgia-Pacific Corp.*, 597 F.2d 890 (5th Cir. 1979).

Yet the trial court did not consider or address the existence of such a colorable defense. "The existence of a colorable defense on the merits 'is a factor which should often be sufficient to justify vacation of a judgment entered by default.'" *Pointer*, 509 So. 2d at 876 (quoting *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987)). The trial court abused its discretion by this failure.

c. Appellees did not assert a claim of predatory lending against Flagstar in the Complaint

At this late date the Danoses' counsel asserts for the first time that Appellees have a "predatory lending" claim against Flagstar, trying to assert a claim not based on vicarious liability but for "its own acts." (Appellees' Brief at 23.) The Complaint in no way asserted predatory lending or mortgage fraud against Flagstar. In the Complaint (R. 13-33), attached as Appendix C, the only mention of Flagstar is in Count VI of the Complaint, Paragraph 45:

> At all material times hereto, the defendant Angela Miller was acting as agent and employee of Coldwell Banker as well as the seller, Michael Burks. Defendant Chris Shirley, at all material times, was acting as agent

> and employee of Amerigo Mortgage and Flagstar Bank FSB. While acting as agents for Coldwell Banker, Amerigo Mortgage, and Flagstar Bank, defendant Miller and Shirley submitted false and erroneous information to their principals, as well as Allstate Property and Casualty.

(R. 22, Appendix C). No conduct by Flagstar was alleged in any manner; Plaintiffs simply alleged that information by others was submitted to Flagstar. (*See Id.*). According to the language of the Danoses' own Complaint, the only claim against Flagstar was founded on vicarious liability only, in that Flagstar's alleged culpability was premised on Defendant Shirley submitting information to it. The Danoses did not allege Flagstar committed "its own acts."

Appellees had never pled any misrepresentations by Flagstar[8], and Flagstar was not a party to the Seller's Disclosure Statement (R. 24-25 in Appendix C, and EX 1 to Sept. 29, 2006 hearing), nor was it a party to the Contract for Sale and Purchase of Real Estate (R. 26-29 in Appendix C, and EX 2 to Sept. 29, 2006 hearing).[9] Furthermore, when Appellee Calvin Danos was asked in his deposition specifically about paragraph 45 of the Complaint (the only paragraph mentioning Flagstar) and whether there was any "false and erroneous information" submitted, Calvin Danos replied only "serial numbers, size" as to the mobile home which was submitted to AmeriGo and Shirley in the independent appraisal. (R. 1060-61). Calvin Danos could not identify any information submitted by Flagstar. (*See Id.*) Chris Shirley of AmeriGo testified that information was simply given to Flagstar for funding the mortgage, and that no information was submitted by Flagstar to the Danoses. (R. 1008-1009).

If the claim against Flagstar was one of "predatory lending," then why were medical records submitted in the September 29 damages hearing? (TR. 4-6, 11; EX 12-E; R.E. 99-101,

---

[8] Even in the hearing on September 29, 2006, the Appellees did not offer any evidence of misrepresentations by Flagstar nor of any damages attributable to Flagstar (TR. 1-14; R.E. 95-109), and no negative remark on the credit report of EX 11 for either Calvin Danos or Jamie Danos is attributed to Flagstar. (R.E. 112-117).

[9] These documents as well as the insurance policy by Allstate were the only attachments to the Complaint. (R. 13-33, Appendix C.) No financing documents were included with the Complaint.

106). Appellees' testified primarily to water damage and mold from either Tropical Storm Allison or pre-existing conditions in the mobile home, and in their Response Brief they characterize their harm as "because of the condition of the mobile home." (Appellees' Brief at 24). Those are damages against Allstate or the seller Burk; they are not damages against Flagstar for funding a mortgage sold to it or for "predatory lending."

Appellees' late attempt on appeal to use inflammatory language of "predatory lending" and to refer to vague assertions not in the record cannot alter the fact that Flagstar had a colorable defense to the vicarious liability claim (the only claim asserted in the Complaint) which the trial court did not consider. The trial court abused its discretion by wholly ignoring the important factor of Flagstar's colorable defense to the claims, and the motion to set aside default judgments should have been granted.

3. There Is No Undue Prejudice to Plaintiffs Compared to the Severe Prejudice to Flagstar of Denial of the Motion to Set Aside

It is no doubt that "the default judgment was the welcome end" for the Danoses (Appellees' Brief at 24) because all their claims had previously been found to be without merit and dismissed with prejudice. They had indeed litigated against Allstate Property & Casualty Insurance, Coldwell Bankers Country Properties, Country Living Insurance Inc., AmeriGo Mortgage, Chris Shirley, and Angela Miller concerning the condition of the mobile home and the water damage for over two years, and all the Danoses' claims were dismissed.

Any prejudice from "delay" was due solely to Appellees the Danoses waiting over two years before seeking any default or attempting further contact with Flagstar. Under the holdings of *City of Jackson v. Presley*, 942 So. 2d 777, ¶29 (Miss. 2006), and *American Cable Corp.*, 754 So. 2d at 555, Appellees would not be unduly prejudiced by setting aside the default and allowing a hearing or trial on the merits as to Flagstar to proceed.

Appellees noted that "a balance must be struck between granting a litigant a hearing on the merits with the need and desire to achieve finality in litigation," and cited to *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1994), for their quote. (Appellees' Brief at 11). Appellant Flagstar would have this Court note that *Stringfellow* involved a Rule 60(b) motion following a full trial on a divorce. It did not involve a default judgment where no merits adjudication was made. The severe prejudice to Flagstar by the default judgment and the awarding of $500,000.00 in damages when there was no proof of harm by Flagstar outweighs any "desire to achieve finality." Allowing an erroneous ruling to stand in the name of "achieving finality" would not advance the purposes of justice or the purpose of an appellate court system.

The balance in this case must weigh in favor of granting Flagstar a hearing on the merits.

4. Flagstar Raised the Issue of the Damage Award by Challenging the Sept. 29, 2006 Judgment in the Trial Court

Appellees contend that Flagstar did not challenge the damage award in the trial court and raised it for the first time on appeal. (Appellees' Brief at 1). Yet, the record clearly shows that Flagstar filed its Motion to Set Aside Default Judgments and for Additional Relief (R. 1353-1382: R.E. 14-46) challenging "the September 25, 2006 Default Judgment ***and the September 29, 2006 Judgment***" and requesting both be set aside "and for such other relief" as Flagstar may be entitled (R. 1363; R.E. 24)(emphasis added), and urging that "Flagstar's defenses to the merits of the Plaintiffs' allegations demonstrate that the Default Judgment ***and Judgment*** should be set aside immediately." (R. 1362; R.E. 23)(emphasis added).

The only difference between the September 25, 2006 Default Judgment and the September 29, 2006 Judgment was the inclusion of the $500,000.00 monetary damage award "jointly and severally" against Flagstar and the other defendant, the seller Burks. Flagstar's challenge to the September 29, 2006 Judgment was thus necessarily a challenge to the

$500,000.00 award of September 29, 2006. The half million dollar award came from the September 29, 2006 hearing transcript. (R.E. 95-111.) The issue was raised in the trial court and preserved on appeal. Plaintiffs did nothing to causally link any of the damages to Flagstar's act of buying and selling a mortgage. "Recoverable damages must be reasonably certain in respect to the efficient cause from which they proceed." *Dennis v. Prisock*, 181 So. 2d 125, 128 (Miss. 1965).

The judgment, if not set aside in its entirety, must be set aside for the trial court to properly allocate any damages as to Flagstar's actions.

CONCLUSION

Flagstar recognizes that abuse of discretion is a heavy burden to establish on appeal, yet in this case Flagstar has met this burden by showing (a) the trial court clearly erred when it entered a default judgment against Flagstar Bank, FSB solely on the basis for not appearing at trial, when the record shows no notice of trial setting was sent by the Circuit Clerk to Flagstar, and (b) the trial court abused its discretion when it wholly failed to apply the appropriate factors in determining whether to set aside a default judgment. The trial court abused its discretion in denying Flagstar's Motion to Set Aside Default Judgments by disregarding the showing Flagstar had made that good cause existed for the default, Flagstar had a colorable defense to the merits of the Plaintiffs' claims, and no undue prejudice would be suffered by the Plaintiffs if the default judgment was set aside. This Court must correct that error by reversing the trial court, setting aside the default and default judgment, and allowing Flagstar its day in court to prove its meritorious defenses to the claims asserted against it. In the alternative, Flagstar respectfully requests that this Court reverse the trial court's judgment as to the amount of damages against Flagstar, which has no relationship whatsoever to the claims against Flagstar, and remand for a new trial or hearing on damages.

Respectfully submitted,

FLAGSTAR BANK, FSB

By _____
Camille Henick Evans, Miss. Bar No. [redacted]

ATTORNEY FOR FLAGSTAR BANK, FSB

OF COUNSEL:
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
17th Floor, Regions Plaza
210 E. Capitol Street (39201)
Post Office Box 22567
Jackson, Mississippi 39225-2567
(601) 948-5711
(601) 985-4500 (fax)

CERTIFICATE OF SERVICE

I, Camille Henick Evans, do hereby certify that a true and correct copy of the above and foregoing Brief of Appellant Flagstar Bank, FSB by depositing such copies with the United States Postal Service, first-class postage prepaid, addressed as follows:

Catherine Jacobs
425 Porter Avenue
Ocean Springs, MS 39564

Matthew G. Mestayer
Byrd & Wiser
Post Office Box 1939
Biloxi, MS 39533

COUNSEL FOR PLAINTIFFS/APPELLEES

The Honorable R. I. Prichard III
District Fifteen Circuit Court Judge
Post Office Box 1075
Picayune, MS 39466

THIS, the 14th day of April, 2008.

_____
Camille Henick Evans

Appendix A

LOCAL RULES
FOR
FIFTEENTH CIRCUIT COURT DISTRICT OF MISSISSIPPI

[Renumbered and codified by order of the Supreme Court effective May 18, 2006.]

RULE 1.

The Circuit Court shall meet in each county according to the terms established by Order entered each year pursuant to Section 9-7-3(2) of the Mississippi Code of 1972 as amended, and Court will convene at 9:00 a.m. unless attorneys are otherwise notified by the Circuit Clerk. Court terms shall be divided between Place 1 and Place 2, pursuant to Exhibit "A" attached hereto and made a part hereof as though copied at length herein.

RULE 2.

The 15th Judicial Circuit Court District shall utilize a "Place System" for assigning civil cases. The Place System shall be filled by seniority first, and should future judges have equal seniority, then the system shall be filled alphabetically. As of the adoption of this rule, Judge R.I. Prichard, III fills Place One Judge Michael R. Eubanks fills Place Two.

The Circuit Clerk of each County of the District shall keep a separate Judges' civil docket for each Place and cases shall be assigned to each Place by the first letter of the last name of the Judge. Upon receipt of the complaint the clerk shall file the complaint and assign a case number but not a judge. The party presenting a complaint to the clerk shall provide a 3" x 5" index card stating the name of the first plaintiff vs. the name of the first defendant which the clerk shall place in a box. At the end of the work day the clerk shall randomly determine which Judge will receive the first case drawn by rolling a six-sided die with 1-3 representing Place One and 4-6 representing Place Two. Should a third judge be added to the District, 1-2 shall represent Place One, 3-4 shall represent Place Two and 5-6 shall represent Place Three. After determining which Judge will receive the first case drawn, the clerk shall then draw out the index cards and assign Judges accordingly. Should a third judge be added to the District, after determining which Judge will receive the first case drawn, the clerk shall assign cases in ascending order.

Once a case is assigned to a Judge by the letter system, that Judge shall handle that case until final disposition. For good cause, a Judge may transfer a case to another Judge of the

District for that Judge's handling and, upon transfer, the clerk is to add a hyphen and the letter of that Judge's Place to show the case has been transferred. This rule is for the assignment of civil cases only and shall not be used in the assignment of criminal cases.

RULE 3.

The Circuit Clerk of each county of the District shall maintain a trial calendar as provided pursuant to Rule (40)(a) of the Mississippi Rules of Civil Procedure. Said calendar shall contain all cases pending in said county in which issue has been joined and that, unless otherwise notified, the trial calendar shall be called on the first day of each term of Court at 9:00 a.m. and the Circuit Clerk shall notify the attorneys of record or the parties, if not represented by counsel, of the calling of said trial calendar at least five days in advance thereof. If either judge decides to call his trial calendar in any county other than on the first day of a regular term therein, he shall notify said Circuit Clerk in writing of the date, time and place of the calling of such trial calendar and, at least five days prior to said date, the Circuit Clerk shall notify all attorneys of record and parties, if unrepresented, of the calling of such trial calendar in and for said county. That, at the calling of the said trial calendar, each case placed thereon shall be set for trial within the time frame set out in Rule 40 unless prior to the calling of said trial calendar the plaintiff or defendant, pursuant to Rule 26(c), requests a discovery conference with the Court and state therein that said matter is still in need of discovery and is not, at that time, ready for trial. That upon such notice by either the plaintiff or defendant, the Court, at the calling of said trial calendar, shall schedule said case for a Rule 26(c) conference rather than for trial.

RULE 4.

The Circuit Clerk will maintain a trial docket pursuant to Rule 40 of the Mississippi Rules of Civil Procedure whereon shall be kept the cases set for trial at the calling of the trial calendar and, in addition to this method of setting a case for trial, attorneys may set cases by agreement in vacation for a day certain during the next regular term of Court. That upon the attorneys agreeing to a trial date, the Clerk shall be notified in writing by the parties to set the case for trial on the date as agreed to between the parties and said case shall then be placed on the trial docket in addition to the cases set during the calling of the trial calendar. Once a case is set on the trial docket, either by setting at the calling of the trial calendar or by agreement of the parties, no continuance will be allowed without a pre-trial conference with the Court at least one week prior to trial date and then only on good cause shown. No case can be set peremptorily except for the next regular term of Court even by agreement of the parties.

RULE 5.

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.

RULE 6.

Whenever an announcement of final disposition is made to the Court, a final order must be submitted to the Court on or before the last day of the term, or said call will be dismissed.

RULE 7.

When a case is settled in vacation the Clerk will immediately be notified and the case removed from the Circuit Court docket.

RULE 8.

In an effort to keep each civil docket in a current status, the trial Judge for each place shall have the inherent authority to set for pre-trial any case appearing as one of the oldest 20% of the cases on the docket. Said setting shall be done pursuant to Rule 2.03 Uniform Circuit Court Rules, and upon the setting by said Court, the Circuit Clerk shall notify the parties involved in said action at least five days prior to the pre-trial conference of said setting. The purpose of said pre-trial conference is for the Court to ascertain the status of said case and to alleviate any problems involved in said case with the purpose being to prepare said case for trial as expeditiously as possible. That if either party fails to appear at said pre-trial conference upon proper notification by the Clerk, and fails to notify the Court in advance of their inability to attend as required, appropriate sanctions can be taken by the trial Court.

RULE 9.

Parties to civil actions are encouraged by the Court to attempt settlement of each case on the docket. If the Court, in its discretion, finds that a case has been set for trial and one of the parties has failed to make a diligent effort to settle the case until the date of trial and then attempts serious settlement negotiations, which had they been taken earlier would have resulted in the settlement of the case prior to the trial day, the Court may, in its discretion, assess the actual cost to the county of the jury in attendance on that date to any party that the Court finds did not engage in prior diligent efforts to settle the case.

RULE 10.

All cases dismissed pursuant to Rule 41(a)(1) shall be dismissed by order pursuant to said Rule signed by the judge to which the case was assigned and said order shall be place of record in the minutes of the Court as any other order.

RULE 11.

At 1:00 o'clock p.m. on the first Monday of all court terms, Motion day shall be held pursuant to Rule 78 of the Mississippi Rules of Civil Procedure, wherein motions may be presented on cases assigned to that Judge on any of the dockets of that Judge in any of the counties of the district. However, motions under Rule 56 or 57, or any other motion requiring testimony, shall be set at an appropriate time by prior arrangement with the Court. The attorney bringing the motion shall be responsible for having the court file and notifying the Court and the opposing attorney of the motion and when it is to be heard. The Circuit Clerk where the court is sitting shall keep a calendar of all motions scheduled for facilitating the disposition of motions. Attorneys having motions pursuant to Rule 56 or 57, or motions requiring testimony, should apply to the proper Judge wherein said case is pending for a time, place and setting of the motion and, upon the setting by the proper Judge, the moving attorneys shall notify opposing counsel pursuant to the Mississippi Rules of Civil Procedure.

[Adopted by order entered July 25, 1986 and approved by Supreme Court by order dated April 14, 1993; amended by order entered June 27, 2003 and approved as amended by Supreme Court by order entered September 4, 2003.]

Appendix B

CBrown v. Bristol-Myers Squibb Co.
S.D.Miss.,2002.
Only the Westlaw citation is currently available.
United States District Court,S.D. Mississippi, Eastern Division.
Nicole M. BROWN, Sandra Neely, Miriam M. Long, Karen Roderick and Misty Stalcup, Plaintiffs
v.
BRISTOL-MYERS SQUIBB COMPANY; Apothecon, Inc.; Cephalon, Inc.; and Terry French, M.D., and Fictitious Persons A, B, C and D, Defendants.
No. CIV A 402CV301LN.

Nov. 2, 2002.

Wilbur O. Colom, The Colom Law Firm, Columbus, MS, R. Keith Foreman, McKay, Simpson, Lawler Franklin & Foreman, PLLC, Ridgeland, MS, James Montgomery Mars, II, Mars, Mars & Mars, Philadelphia, MS, for Plaintiffs.
Lynn Plimpton Ladner, Walter T. Johnson, Patrick N. Harkins, III, Watkins & Eager, Jackson, MS, for Defendants.

MEMORANDUM OPINION AND ORDER

LEE, J.
***1** There are currently pending in this case the following motions:
1. The motion of plaintiffs Nicole M. Brown, Sandra Neely, Miriam M. Long, Karen Roderick and Misty Stalcup to remand and abstain;
2. The motion of defendant Cephalon to vacate or set aside entry of default and putative default judgment;
3. The motion of defendant Apothecon to set aside entry of default; and
4. Bristol-Myers' motion to strike plaintiffs' rebuttal affidavits.

Each of these motions has been fully briefed by the parties, and are addressed herein.

Plaintiffs, four of whom are Mississippi residents and one of whom is a citizen of Utah, filed this case on June 9, 2002 in the Circuit Court of Kemper County, alleging personal injury from their use of the prescription drug Stadol®. All the plaintiffs asserted claims against the non-resident defendants, Bristol-Myers, Apothecon and Cephalon, and one, Sandra Neely, one of the Mississippi plaintiffs, asserted claims against her prescribing physician, Terry French.

On August 5, 2002, defendants Bristol-Myers, Apothecon and Cephalon removed the case to this court pursuant to 28 U.S.C. § 1441 and § 1452, asserting both diversity jurisdiction under 28 U.S.C. § 1332 and bankruptcy jurisdiction under 28 U.S.C. § 1334. Defendants contend that complete diversity exists in this case because plaintiffs "have improperly and fraudulently joined together and have improperly and fraudulently joined Dr. Terry French, the one resident defendant."Finally, defendants contend that the court has removal jurisdiction on the basis that the claims of two of the plaintiffs, Karen Roderick and Sandra Neely, are the property of their bankruptcy estates.

In their motion, plaintiffs argue this case is due to be remanded on the basis that defendants' removal was untimely. They further assert that Terry French is a proper defendant, that fraudulent misjoinder is no basis for remand and that although the claims of Karen Roderick do relate to her pending Chapter 13 bankruptcy proceeding, abstention and remand are mandated, or at least warranted. The court addresses each of these arguments in turn.

Timeliness of Removal:

Defendants Bristol-Meyers, Apothecon and Cephalon filed their notice of removal on August 5, 2002. Plaintiffs maintain that the notice of removal was not filed within thirty days of June 28, 2002, the date on which the first defendant was properly served with process, and that consequently, the notice of removal was untimely. They contend alternatively that even if the court were to conclude that their attempted service on Apothecon was ineffective, removal was still untimely since the case was not removed within thirty days of their July 3, 2002 service on Cephalon. In the court's opinion, neither defendant was properly served, and therefore, the notice of removal was timely.

The general removal statute, 28 U.S.C. § 1446(b), provides as follows:
The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

*2 In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999), the Supreme Court, applying the "bedrock principle" that "[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process," concluded that "a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service."*Id.* at 347-48, 526 U.S. 344, 119 S.Ct. 1322, 143 L.Ed.2d 448. Following *Murphy Brothers*, numerous courts have recognized that the relevant date for gauging timeliness of removal is the date on which *proper* service was effected or, if there has been no proper service, the date on which objections to the sufficiency of process or service of process are waived.[FN1]

FN1.*See, e.g., Liberty Mut. Ins. Co. v. Bayer Corp.*, No. 02-343-GMS, 2002 WL 1467331, *2 (D.Del.2002) (stating that "only after a plaintiff has rendered proper service is a defending party obligated to take action"); *Mauldin v. Blackhawk Area Credit Union*, No. 01 C 50221, 2002 WL 23830, *1 (N.D.Ill. January 2002) (holding that "the thirty-day removal technically never really began" since the defendant was not properly served with process, "meaning [the defendant's] notice of removal was timely"); *Heredia v. Transp. S.A.S., Inc.*, 101 F.Supp.2d 158, 160 (S.D.N.Y.2000) ("[O]nce a defendant receives a copy of the initial pleading-in this case, the summons and complaint-the thirty-day period for filing notice of removal is triggered, provided that service of the initial pleading is proper."); *Tabbert, Hahn, Earnest, Webble, P.C. v. Lanza*, 94 F.Supp.2d 1010, 1012 (S.D.Ind.2000) (determinative issue was whether plaintiff's attempt at service was proper, for if it was, "then the thirty-day removal clock began to run at that time and the [defendants'] Notice of Removal [more than thirty days later] would be untimely ... [but] if [the] attempts at service [were] ineffective, then the removal clock would still not have begun (because there ha[d] been no other attempts at service) and the Notice of Removal would be timely"); *Big B Automotive Warehouse Distributors, Inc. v. Cooperative Computing, Inc.*, No. SC 00-2602, 2000 WL 1677948, *1-2 (N.D.Cal. Nov.2000) (stating that under *Murphy Bros.*,"it is not enough for Plaintiffs to show that Defendant ... actually received a copy of the complaint by a particular date; Plaintiffs must demonstrate compliance with the requirements of service."); *Ward v. Aetna Life Ins. Co.*, No. 98 Civ. 542E, 1999 U.S. Dist. LEXIS 5133, *2 (W . D.N.Y.1999) (stating that "the Court's reasoning [in *Murphy Bros* .] supports the conclusion that the time for removal commences when service is completed and jurisdiction over the defendant has been obtained."); *seealsoinfra* p. 9.

Mississippi Rule of Civil Procedure Rule 4(d)(4) requires that service upon a "domestic or foreign corporation or upon a partnership or other unincorporated association" be made by "delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive process."Rule 4(c)(5), which governs service on non-resident defendants, provides for service by certified mail:
In addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked by "restricted delivery." Service by this method shall be

deemed complete as of the date of delivery as evidenced by the receipt or by the returned envelope marked "Refused." 4(d)(4) requires that service upon a "domestic or foreign corporation" be made by "delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive process."

Here, the record reflects that plaintiffs sent the summons and complaint to Apothecon via certified mail, return receipt requested, but did not address it to any particular person. Rather, though they purported to send it "restricted delivery," plaintiffs failed to designate any person to whom delivery was to be restricted and mailed it instead to "Apothecon, Inc., Route 2, Province Line Road, Princeton, New Jersey."The papers were signed for by an employee of Bristol-Myers named John Kozak; but evidence submitted by Apothecon establishes that Kozak was not an officer, managing or general agent or any other agent authorized by appointment or by law to receive process for Apothecon. In fact, the evidence establishes that on July 2, the summons and complaint were returned to the sender, via United States Postal Service, on July 2, 2002 and received by the sender on July 17, 2002, "because it could not be delivered as addressed."

*3 In *Rogers v. Hartford Life and Accident Insurance Company*, 167 F.3d 933, 940 (5th Cir.1999), the court considered the interrelationship between Rule 4(c)(5) and 4(d) with respect to service on nonresident unincorporated associations, and interpreted these rules as follows:

We begin by examining the plain language of Rule 4(c)(5). The first sentence of the Rule states that "a summons may be served on a *person* outside this state by sending a copy of the summons and of the complaint to the *person* to be served by certified mail, return receipt requested."Miss. R. Civ. P. 4(c)(5) (emphasis added). The Rule then states that "[w]here the defendant is a natural person, the envelope containing the summons and complaint shall be marked 'restricted delivery." ' Miss R. Civ. P. 4(c)(5) (emphasis added). The Rule, therefore, distinguishes between the "person" that physically receives service, and the actual "defendant." The two terms are not synonymous.

Interpreting Rule 4(c)(5) in this way is appropriate, because this interpretation makes Rule 4(c)(5) consistent with Rule 4(d).Rule 4(d), which is entitled "Summons and Complaint: Person to Be Served," specifically identifies the "person" the plaintiff must serve with process based on the type of defendant involved in the case. If the defendant is an "unincorporated association which is subject to suit under a common name," like the Plan, then the plaintiff must deliver "a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process."Miss. R. Civ. P. 4(d)(4). Thus, when the defendant is an unincorporated association the "person" referred to in Rule 4(c)(5) is not the defendant itself, but the agent authorized to receive service on the defendant's behalf.

Rogers, 167 F.3d at 941.[FN2]Plaintiffs did not properly serve Apothecon.

> FN2.*Seealso* 1 *Mississippi Civil Procedure* § 2.12 (2001) (stating that "[i]f the plaintiff is in possession of the name and address of the officer or managing agent of a foreign corporation, service may be made by mail pursuant to Rule 4(c)(5)).

Turning, then, to Cephalon, it appears from the record that plaintiffs did correctly address and request restricted delivery of their certified mail with the summons and complaint to John Osborn, Cephalon's general counsel and corporate secretary, all in accordance with Rule 4(c)(5). However, the Postal Service erroneously allowed the certified mail to be signed for by and delivered to John Kolb. Kolb, who is described as a mail clerk and maintenance man for Cephalon, is not an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive process on behalf of Cephalon, and he was not authorized to sign for restricted delivery letters on behalf of Osborn.

It does appear in the case of Cephalon, as contrasted with the situation with Apothecon, the certified mail did make its way to John Osborn, the person to whom it was addressed, and hence the summons and complaint were actually received by a proper person to receive process on this defendant's behalf. In the court's opinion, however, where process, though properly directed by the plaintiff in accordance with the rules governing service of process, is not

delivered in accordance with the plaintiff's directions and in accordance with the rules, it cannot be said that proper service has been effected. Simply stated, process was not "served" on a person authorized to receive service of process. *SeeKolikas v. Kolikas*, 821 So.2d 874, 878 (Miss.2002) ("The rules on service of process are to be strictly construed. If they have not been complied with, the court is without jurisdiction unless the defendant appears on his own volition."). Accordingly, the court concludes Cephalon was not effectively served with process on July 3, 2002, as claimed by plaintiffs, and the thirty-day removal clock thus did not commence to run at that time.

***4** There remains the question of when the time period for removal started to run. In this regard, the court recognizes that Cephalon filed an answer in this court on August 9, 2002, following removal, and in its answer, did not raise any objection to the sufficiency of service of process; Cephalon thereby waived any objections to the sufficiency of service. However, in the court's opinion, the thirty-day period for removal could not have begun to run on the basis of service of process on Cephalon until Cephalon actually waived its objections to the sufficiency of service. *SeeThomas v. Klinkhamer*, No. 00 C 2654, 2000 WL 967984, *1-2 (N.D.Ill.2000) (holding that 30-day period for removal began when defendants waived objections to sufficiency of service of process by appearing before the court without contesting service of process); *Prescott v. Memorial Med. Center-Livingston*, No. 9:00CV-00025, 2000 WL 532035, 3 (E.D.Tex.2000) (observing that the Supreme Court in *Murphy Brothers* indicated that time limits run from the date of service of citation or from the time of waiver of that service). By the time that occurred in this case, Bristol-Myers had been served with process and, within thirty days of being served on July 9, Bristol-Myers, with the consent of Apothecon and Cephalon, had removed the case. The removal was thus timely.

Fraudulent Joinder/Misjoinder

The five plaintiffs in this case have all sued Bristol-Myers, Apothecon and Cephalon (the manufacturing defendants), alleging vaguely that as a result of their having taken the prescription drug Stadol for unspecified conditions, each became addicted and suffered injury as a result of their prolonged use os Stadol. In addition to suing the manufacturers, one of the Mississippi plaintiffs, Sandra Neely, has also sued Terry French, the Mississippi doctor who prescribed Stadol for her.

In their notice of removal, defendants asserted that Dr. French had been fraudulently joined and claimed alternatively that Neely's co-plaintiffs had "fraudulently misjoined" their claims with those of Neely in order to defeat diversity jurisdiction over their claims against the diverse manufacturer defendants. Having reviewed plaintiffs' complaint, the court concludes that Dr. French has been fraudulently joined, for reasons that follow.

The first amended complaint filed by plaintiffs in the Circuit Court of Kemper County contains sixteen paragraphs of "factual allegations," followed by twelve counts, the first eleven of which are primarily products liability claims directed against the manufacturer defendants, Bristol-Myers, Apothecon and Cephalon. The final count encompasses Neely's putative negligence claim against Dr. French.

The "facts" set forth by plaintiff in their complaint are these: In 1992, Bristol-Myers obtained FDA approval for its nasal spray form of Stadol as an uncontrolled substance by falsely representing to the FDA and to the DEA that Stadol had few addictive qualities, and by further representing that it would be used in the same manner as prior forms of Stadol, namely, for temporary, postoperative pain relief, and not for prolonged and repetitive use. Plaintiffs allege that because the manufacturer defendants misled the FDA and DEA about the addictive nature of Stadol, it was not initially classified as a controlled substance, as a result of which it was more readily prescribed and more abundantly purchased. Plaintiffs charge that after the manufacturer defendants misled the FDA and DEA into not classifying Stadol as a controlled substance, they then began aggressively marketing Stadol, not for temporary, non-recurring pain, the use which had been identified to the FDA and DEA, but instead for chronic pain, with an emphasis on migraine headaches. They allege that "[u]pon government approval and at the urging of the corporate Defendants' marketing campaign, physicians in the State of Mississippi and elsewhere within the United States started prescribing Stadol for their patients."Plaintiffs allege that they justifiably relied on "the corporate Defendants' marketing and assurances of the safety and non-addictiveness of its

FN5. Having concluded that Neely has failed to allege a cognizable claim against Dr. French, the court need not address whether her claims have been fraudulently misjoined with the claims of her co-plaintiffs, though it could well be that this case does present an instance of fraudulent misjoinder sufficient to warrant relief. In this vein, the court recognizes that the Fifth Circuit recently approved the concept of fraudulent misjoinder of plaintiffs in *In re Benjamin Moore & Co.*, 309 F.3d 296 (5th Cir.2002). There, although the court denied the multiple defendants' petition for writ of mandamus in the wake of the district court's order granting remand, the court suggested that the case might be one of fraudulent misjoinder and observed that the district court should have considered the defendants' arguments on that point. *Seeid.* (stating, "[T]he point cannot be ignored, since it goes to the court's jurisdiction and to the defendants' rights to establish federal jurisdiction following removal," and describing this as "a feature critical to jurisdictional analysis"). Though the complaint in the case at bar is entirely lacking in factual allegations as to the individual plaintiffs' circumstances, it does not appear from the complaint that the plaintiffs have anything in common other than having taken Stadol. The court questions whether this is a sufficient tie to bind the claims of these plaintiffs. *Cf.In re Rezulin Prods. Liability Litigation*, 168 F. Sup.2d 136 (S.D.N.Y.2001) (severing claims of five plaintiffs with claims against their nondiverse physicians from those other six plaintiffs who asserted no such claims in order to preserve the defendants' right to removal in the remaining actions," and observing that the costs and efficiency benefits to joined plaintiffs "simply do not carry the same weight when balanced against the defendant's right to removal."). But this court need not decide the issue.

Bankruptcy Jurisdiction

In view of the court's conclusion that it has diversity jurisdiction, the court finds it unnecessary to determine whether it might also properly have and exercise jurisdiction based on the bankruptcy filing of two of the plaintiffs. FN6

FN6. Bristol-Meyers has moved to strike exhibits submitted by plaintiffs with their rebuttal on the motion to remand and abstain. Those affidavits are devoted to the issue of bankruptcy jurisdiction, and since the court has concluded that this issue need not be addressed, the motion to strike is now moot and will be denied as such.

Apothecon's Motion to Set Aside Default and Cephalon's Motion to Set Aside Entry of Default and Putative Default Judgment:

Prior to removal, plaintiffs obtained a clerk's entry of default as to Apothecon and an entry of default and default judgment as to Cephalon. These defendants have moved for relief from entry of default and default judgment on the basis that they were not properly served with process. This court, which has now determined that it has subject matter jurisdiction, has concluded that service of process was not effective as to either of these defendants. It thus follows that the entries of default and of the default judgment are void, having been entered without jurisdiction over those parties.FN7 *See McCain v. Dauzat*, 791 So.2d 839, 842 (Miss.2001) (stating, "A court must have jurisdiction, [sic] proper service of process, in order to enter a default judgment against a party. Otherwise, the default judgment is void. If a default judgment is void, the trial court has no discretion and must set the judgment aside."). Defendants' motions will be granted.

FN7."The proper procedure respecting the opening vel non of a removed default judgment is to file a motion to set aside ... in federal court...."*Pennsylvania Nat'l Bank & Trust v. American Home Assurance Co.*, 87 F.R.D. 152, 154 (E.D.Pa.1980).

Conclusion

***6** Based on the foregoing, it is ordered that plaintiffs' motion to remand is denied and defendant Terry French is dismissed as fraudulently joined; Apothecon's motion to set aside entry of default is

granted; Cephalon's motion to set aside entry of default and putative default judgment is granted; and Bristol-Meyer's motion to strike is denied as moot.

SO ORDERED this *30th* day of November, 2002.

S.D.Miss.,2002.
Brown v. Bristol-Myers Squibb Co.
Slip Copy, 2002 WL 34213425 (S.D.Miss.)

END OF DOCUMENT

Appendix C

IN THE CIRCUIT COURT OF LAMAR COUNTY, MISSISSIPPI

CALVIN and JAMIE DANOS, INDIVIDUALLY AND AS GUARDIANS AND NEXT FRIENDS OF LAURA MATHERNE, A MINOR, GAVIN DANOS, A MINOR, and MARISSA DANOS, A MINOR

PLAINTIFFS

VERSUS **CAUSE NUMBER:** 2004-108P

FILED

Lamar County MAR 22 2004 Circuit Clerk

Becki Wilson

ALLSTATE PROPERTY & CASUALTY INSURANCE, COLDWELL BANKERS COUNTRY PROPERTIES, COUNTRY LIVING INSURANCE INC., AMERIGO MORTGAGE, FLAGSTAR BANK FSB, CHRIS SHIRLEY, ANGELA MILLER, MICHAEL M. BURKS, and JOHN DOE 1, 2 & 3, SHIRLEY ROE 1, 2 & 3 and ABC CORP. 1, 2 & 3

DEFENDANTS

COMPLAINT

Come now the Plaintiffs, Calvin Danos and Jamie Danos, by and through the undersigned counsel, and file this their complaint against the Defendants herein and in support thereof would show as follows:

1. The Plaintiffs, Calvin and Jamie Danos, are adult resident citizens of Pearl River County, Mississippi, and guardians and next friends of Laura Matherne, Gavin Danos and Marissa Danos.

2. The Defendant, Allstate Property & Casualty Insurance may be served with process by serving the Commissioner of Insurance George Dale, Woolfolk State Office Building, 501 North West Street, Suite 101, Jackson, Mississippi 39205.

3. The Defendant, Amerigo Mortgage, Inc., is a Mississippi Corporation whose principal place of business is in Lamar County, Mississippi. It may be served with process upon its agent, Edward J. Langton, 14 Plaza Drive, Post Office Box 16988, Hattiesburg, Mississippi

39404-6988.

4. The Defendant, Chris Shirley, is an adult resident citizen of Pearl River County, Mississippi, and may be served with process at 22426 Heritage Drive, Pass Christian, Mississippi 39571. At all times material herein he was the agent and employee of Amerigo Mortgage, Inc.

5. The Defendant, Coldwell Banker Country Properties, Inc., is a Mississippi Corporation whose principal place of business is 919 Highway 43 North, Picayune, Mississippi 39466-2143. It may be served with process upon its registered agent, Robert Bruce Kammer, 919 Highway 43 North, Picayune, Mississippi 39466-2143.

6. The Defendant, Angela Miller, was at all material times hereto an agent for Coldwell Banker as well as Michael H. Burks, the property owner. She may be served with process at 919 Highway 43 North, Picayune, Mississippi 39466-214,

7. The Defendant, Michael H. Burks, is an adult resident citizen of Pearl River County, Mississippi, who may be served with process at 174 Harvey Burks Road, Picayune, Mississippi 39466, and/or 6138 Kiowa Street, Kiln, Mississippi. He sold the property that is the subject of this litigation to the Plaintiffs, and repaired or replaced the roof of the mobile home situated on the property.

8. The Defendant, Country Living Insurance, Inc., is a Mississippi corporation with its principal place of business in Poplarville, Mississippi. It may be served with process upon its registered agent, Kenneth H. Cochran, Route 4 Box 497, Poplarville, Mississippi 39470.

9. The Defendant, Flagstar Bank FSB, may be served with process by registered mail, return receipt requested, upon its agent Albert J. Gladner, 5151 Corporate Drive, Troy, Michigan 48098-2639.

10. On or about March 23, 2001, the plaintiffs, Calvin and Jamie Danos, made an

offer to purchase property located at 828 Pinegrove Road, Picayune, Mississippi, together with a mobile home and outbuildings that were situated thereon. Angela Miller, of Country Properties, Inc., was the agent contacted by the plaintiffs for purposes of looking at the property in question. In making the offer to purchase the property for $65,000.00, the plaintiffs relied upon representations that were made by defendant, Michael Burks. Specifically, they relied upon the fact that the roof on the double wide mobile home was approximately four or five years old. Upon further inquiry, the plaintiffs were told that the owner, Michael Burks, was a contractor who had replaced the roof himself. The mobile home on the property was represented to be a different year, make and model than it was by the seller in his disclosure.

11. In addition, the seller represented the mobile home to be permanently affixed and he reported that all wheels, axles, and hitches were removed prior to installation. This representation could not be verified by the appraiser, even upon a second request, because skirting had been permanently affixed which could not be removed without damaging the skirting. The make and model of the trailer could not be verified because all serial numbers had been removed or completely obscured.

12. In the seller's disclosure, the seller also reported that he was aware of no latent defects in the home.

13. In making said offer, the Danos relied upon the accuracy of the information provided in the seller's disclosure, a copy of which is attached as Exhibit "A". Specifically, the Danos relied upon seller's representations as to the age of the mobile home, the age of the roof, the seller's statement that he was unaware of any history of infestation, and representations that there had never been any leaks, gutter backup, or other problems with the roof.

14. The Danos' offer to purchase, attached as Exhibit "B", was contingent upon the

Danos' ability to obtain financing for the purchase of the property. In this regard, they contacted Chris Shirley, an agent and employee of Amerigo Mortgage, Inc., a mortgage broker. The defendant Shirley along with defendant Angela Miller, became involved in meeting all of the lender's requirements in order to obtain financing, such as finding insurance for the property and obtaining the necessary certifications and other information so that all of the lenders requirements could be satisfied.

15. Indeed, Ms. Miller sent the Danos to the defendant County Living Insurance, an Allstate Agency, to see whether insurance on the property could be obtained. She worked together with the Defendant Shirley, to obtain all of the information required by Country Living and in the process, material misrepresentations about the property were made. For example, the wrong information was given to the insurer regarding the year, make and model of the mobile home and pictures were provided of a mobile home all together different from the one that appears on the property. It was represented to the lender that there were no axles, wheels, hitches or other equipment that would allow the home to be moved, which was an important requirement before financing could be obtained.

16. Rather than taking its own pictures or conducting its own examination of the property, the defendant, Country Living Insurance Inc. and the defendant Allstate relied upon erroneous information submitted by the defendant, Chris Shirley, Angela Miller and/or Michael Burks. This misinformation included the age of the roof, the absence of wheels and axles, the absence of roof problems or leaks, and the absence of any infestations, including rot and mildew.

17. At the time the plaintiffs offered to purchase the property and in doing all that was necessary to close the transaction, the plaintiffs believed the representations made by the seller, the real estate agent, and the mortgage broker, Chris Shirley. Indeed, the plaintiffs had no reason

to believe that any of the information provided to them, their insurer or their lender was false. Acting in reliance upon the misrepresentations made by the various defendants, the Danos obtained insurance on the mobile home and met all of the lender's requirements for a mortgage on the property. As a result, the real estate transaction closed on or about May 9, 2001.

18. Shortly thereafter, the Danos moved into the mobile home on the subject property. They began clearing away trees located close to the mobile home since they wanted to make room for an addition. However, in early June, 2001, heavy thunderstorms hit portions of the Gulf Coast dumping several inches of rain followed by storms associated with Allison. After it had rained for several days, the Danos found water on the carpet in the living room for several days in a row. Upon checking the roof, the Danos realized that there was no ridge cap on the center of the roof and that water was pouring in and following the visqueen which had been stapled to the underside of the roof which served to direct the water into the walls of the mobile home.

19. The defendant Miller was notified of the problem and she in turn advised Burks who claimed that there was nothing wrong with the house when he sold it and refused to make any repairs. The plaintiffs attempted to repair some of the damage in the kitchen and discovered that several of the walls in the mobile home had rotted and molded and were simply covered up with newer paneling whose supports had rotted away. The plaintiffs were therefore left without any means to install kitchen cabinets to replace those they had removed, including the sink cabinet, making it impossible to use their kitchen. In addition, odors from the exposed and rotting wood were becoming more noticeable.

20. By September, 2001, all of the plaintiffs began having respiratory problems ranging from nose bleeds to congestion to asthma. As these conditions persisted, the plaintiffs

finally engaged the services of an inspector who determined that the mobile home had become infested with molds and mildew. In an effort to alleviate their health problems, the plaintiffs moved to one of the out buildings on the property, which was nothing more than a small shed.

21. Meanwhile, the plaintiffs had filed a claim with their insurer, Allstate Property and Casualty. Allstate sent an engineer to look at the property and as a result of the report, determined that all conditions the plaintiffs complained of were excluded under the "wear and tear; deterioration; molds" exclusion of the policy which appears on page 6.

22. Said denial was wrongful and without justification and constituted a breach of the contract of insurance. Since Allstate and its agent had relied upon representations of the seller and others to determine the insurability of the risk, and since it failed to adequately underwrite the risk, it should be estopped from denying the claim based upon pre-existing conditions that a proper inspection would have revealed, and as an insurer, it is liable for the misrepresentations made by all persons who participated in obtaining the information relied upon by Allstate when it decided to insure this risk.

23. Allstate's engineers, Quick and Associates, together with an environmental specialist, each have indicated that the subject mobile home is uninhabitable thereby depriving the Danos of the use of their property and making it impossible for them to afford to pay the mortgage on the property. To compound matters Allstate recinded the policy on January, 2002, because the property was vacant.

24. As a result thereof, the plaintiffs have been severely injured as is more fully set forth hereinafter.

COUNT I

25. Paragraph 1 through 24 are incorporated herein by reference.

26. The defendant, Michael Burks, is guilty of negligent and/or intentional misrepresentations made to the plaintiffs, Calvin and Jamie Danos. Specifically, he represented that the roof on the mobile home was four or five years old and he failed to disclose the inadequacy of the roof that he himself had installed or repaired, including, but not limited to, the absence of a ridge cap over the central portion of the mobile home. He denied that he was aware of any leaks, or infestation, when he knew that leaks and infestations existed and that other threatening conditions would likely develop.

27. When Burks made these misrepresentations, he made them knowing they were false and that any potential buyer and in particular the Danos would rely on his misrepresentations and the plaintiffs herein did so rely on his misrepresentations.

28. As a result thereof, the plaintiffs have suffered severe injuries as are more fully set forth hereinafter.

COUNT II

29. Paragraphs 1 through 28 are incorporated herein by reference.

30. In their efforts to close the real estate transaction transferring the subject property to the Danos from Michael Burks, defendants Coldwell Bankers Country Properties, Angela Miller, Amerigo Mortgage, and Chris Shirley acted as agents for the defendant, Allstate Property and Casualty and in that they submitted erroneous information to the insurer and its agent, Country Living Insurance. When Allstate and Country Living Insurance elected to rely upon the erroneous information submitted by the aforementioned defendants instead of following proper underwriting procedures, it forfeited its right to rely upon pre-existing conditions as a legitimate reasons to deny the claim. Indeed, Allstate should be held to the knowledge that Shirley, Miller, and its agent Country Living had with respect to the risks and it should be estopped from denying

the claim for conditions that would have been revealed as an uninsurable risk if proper underwriting procedures been utilized.

COUNT III

31. Paragraphs 1 through 30 are incorporated herein by reference.

32. The defendant Burks by and through his construction company, ABC Corp 1 and/or Burks individually, negligently repaired the roof to the mobile home while he was still an owner. Said repairs were defective in that Burks failed to install a roof cap, thereby allowing water to enter the walls. In addition, Burks failed to remove and replace paneling, studs, and other materials within the mobile home that had been damaged as a result of the leaking roof and in fact, the defendant Burks merely covered over the damaged portions of the mobile home thereby preventing the plaintiffs from discovering the true condition of the mobile home prior to purchase.

33. The defendant Burks kept the mobile home under his control from the time the repairs were allegedly made through the date said mobile home was sold to the plaintiffs.

34. As a result thereof, the plaintiffs, and each of them, have been severely damaged as is more fully set forth hereinafter.

COUNTY IV

EQUITABLE ESTOPPEL

35. Paragraphs 1 through 34 are incorporated herein by reference.

36. Defendants Country Living Insurance Inc., and Allstate Property and Casualty had a duty to adequately underwrite the risk presented by the property which is the subject of this lawsuit prior to issuing a policy thereon.

37. Rather than performing its own investigation, Allstate and Country Living

Insurance Inc. relied upon the representations of others who were not parties to the contract. Specifically, they used information that the mobile home in question was a 1988 Fleetwood, which was not the make and model of the mobile home in question from which the axles and wheels had been removed.

38. In addition, they relied upon information obtained from the seller and/or other sources to determine that the risk was insurable, when in fact, it was not.

39. Under the circumstances, Allstate Property & Casualty, and the other defendants named herein should be estopped to deny the plaintiffs insurance claim based upon pre-existing conditions such as mold, rot, and wear and tear, because if proper underwriting had been used, the risk would have never been insured and the real estate transaction that has so injured the plaintiffs would have never occurred.

40. As a result thereof, the Plaintiffs have been severely injured as is more fully set forth hereinafter.

COUNT V

BREACH OF CONTRACT

41. Paragraphs 1 through 40 are incorporated herein by reference.

42. The Defendant, Allstate Property and Casualty, has improperly denied the plaintiffs claim for damages as a result of the water leaks and subsequent development of toxic molds, in breach of the policy of insurer attached as Exhibit "C".

43. Said denial was malicious and intentional or with such reckless disregard for the rights of the plaintiffs as to be reckless and intentional, and constitutes bad faith on the part of the insurer. As a result thereof, the plaintiffs have been severely injured as is more fully set forth hereinafter.

COUNT VI

44. Paragraphs 1 through 43 are incorporated herein by reference.

45. At all material times hereto, the defendant Angela Miller was acting as agent and employee of defendant Coldwell Banker as well as the seller, Michael Burks. Defendant Chris Shirley, at all material times hereto, was acting as agent and employee of Amerigo Mortgage and Flagstar Bank FSB. While acting as agents for Coldwell Banker, Amerigo Mortgage, and Flagstar Bank FSB, defendants Miller and Shirley submitted false and erroneous information to their principals, as well as Allstate Property and Casualty.

46. But for the submission of said false and material information, this real estate transaction would not have closed due to the inability of the property to qualify either for a loan or for insurance.

47. As a result of said misrepresentations, whether intentional or erroneous, the plaintiffs have been caused to suffer property damage as well as personal harm, as is more fully set forth hereinafter.

COUNT VII

48. Paragraphs 1 through 47 are incorporated herein by reference.

49. As a result thereof, the plaintiffs have been injured as is more fully set forth hereinafter.

50. The defendants, and each of them, have caused the plaintiff to suffer from the intentional infliction of emotional distress by virtue of the false and erroneous misrepresentations that were made in connection with the real estate transaction that is the subject of this litigation.

51. As a result of the aforementioned acts, the plaintiffs, Calvin and Jamie Danos have been caused to suffer substantial economic losses in that the property they purchased for

their residence either was or became uninhabitable, therefore depriving them of the use for which the property was intended. In addition, the Danos have suffered other economic losses resulting from the need to find living quarters other than their residence, which they could not afford. As a result thereof, the Danos have been unable to meet their mortgage payments on said property, resulting in substantial indebtedness that far exceeds the value of the property. In addition, the plaintiffs, together with their minor children, have all suffered personal injury as a result of the exposure to toxic molds that grew in the walls of the mobile home due to the heavy rains of Tropical Storm Allison and the inadequate repairs performed by Burks as well as medical bills. In addition thereto, all of the plaintiffs have suffered from severe humiliation and emotional distress, pain and suffering, and other injuries, for all of which they are entitled to be compensated.

WHEREFORE, PREMISES CONSIDERED, it is respectfully requested that the Court enter judgment for the plaintiffs and against the defendants for actual and punitive damages in an amount to be determined by a jury at the trial of this cause and for any and such other and further relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED,

CALVIN DANOS and JAMIE DANOS, individually and as guardians and next friends of their minor children, Laura Matherne, Gavin Danos and Marissa Danos

BY: _____
CATHERINE H. JACOBS

CATHERINE H. JACOBS
ATTORNEY AT LAW
425 PORTER AVENUE
OCEAN SPRINGS, MS 39564
MS BAR NO. 2979

SELLER'S DISCLOSURE STATEMENT

The following Seller's Disclosure Statement, required by Sections 89-1-507 through 89-1-525 of the Mississippi Real Estate Broker's Act of 1954, as Amended, and made by the seller, concerning the condition of the residential property located at: 828 Pine Grove Rd

Seller(s): Michael W. Burks Approximate Age of the Property 15

This Disclosure is not a warranty of any kind by the Seller or any Agent of the Seller in this transaction and is not a substitute for any inspections or warranties the Purchaser may wish to obtain. This statement may be made available to other parties and is to be attached to the Listing Agreement (signed by owner).

TO THE SELLER: Please Complete the following form, including any past history of problems, if known. If the condition or question does not apply to your property, mark with "N/A".

DO NOT LEAVE ANY BLANK SPACES. ATTACH ADDITIONAL PAGES IF NECESSARY.
THIS FORM MAY BE DUPLICATED IN SIZE AND CONTENT BUT NOT ALTERED

STRUCTURAL ITEMS:

A. **BUILDING CODE:**
Was the residence built in conformity with an approved building code? Yes ____ No ____ Unknown X
If yes, was it inspected by a code enforcement inspector? Yes ____ No ____ Unknown ____
Was it inspected by someone other than a code enforcement inspector? Yes ____ No ____ Unknown ____

B. **STRUCTURAL ITEMS:**
Are you aware of any foundation repairs made in the past? Yes ____ No X Explain ____
Are any foundation repairs currently needed? Yes ____ No ____ Explain ____

C. **HISTORY OF INFESTATION, IF ANY: TERMITES, CARPENTER ANTS, ETC.**
Any evidence of rot, mildew, vermin, rodents, termites, carpenter ants, or other infestation? Yes ____ No X
Any infestation treatments? Yes X No ____ Any Repaired Damage? Yes ____ No X
If your answer is "YES", please describe ANNUAL Treatment by owner
Is the structure under a termite contract? Yes ____ No X Who is contractor? ____

D. **ROOF:**
How old is the Roof? 4-5 Years. Any Repairs? ____
Have there been any leaks, gutter back up, or other problems with the roof? Yes ____ No X
Has the roof been replaced or repaired during your ownership? Yes X No ____

E. **LAND AND SITE DATA:**
Is there a survey available? Yes ____ No X Date the survey was completed ____
Are you aware of the existence of any of the following, to wit:

Encroachments:	Yes ___ No X Unknown ___	Standing Water:	Yes ___ No X Unknown ___
Easements:	Yes ___ No X Unknown ___	Bluff/Erosion:	Yes ___ No X Unknown ___
Soil Problems:	Yes ___ No X Unknown ___	Subsoil Problem:	Yes ___ No X Unknown ___
Flood Zone:	Yes ___ No X Unknown ___	Land Fill:	Yes ___ No X Unknown ___

Are there any specific zoning regulations which make the subject a non-conforming use (proper lot size, set backs, zoning, etc) Yes ____ No X If any of your answers in this section are "YES", please explain each in detail: ____
Has the property ever flooded? Yes ___ No X Is flood insurance required? Yes ___ No X Unknown ____
Are there any rights-of-way, easements, or similar matters that may affect your ownership interest in the property? Yes ___ No X Unknown ____ If "YES", please explain: ____

F. **ADDITIONS/REMODELS:**
Have there been any additions, remodeling, structural changes, or other alterations to property? Yes X No ____
If "YES", was all work done with necessary permits and approvals in compliance with the local building codes? Yes ___ No ___ N/A X If "YES", who did the work? ____
If "NO", explain ____

G. **WALLS/ WINDOWS:**
Have there ever been any problems with interior or exterior walls or siding? Yes X No ___ Unknown ____
Any problems with the windows? Yes ___ No X If "YES", please explain: Some Damaged siding Replaced

H. **OTHER:**
Has there been major damage to the property or any of the structure from fire, windstorm, or any other disaster? Yes ___ No X Please describe ____
Are you aware of any problems which may exist with the property by virtue of prior usages such as, but not limited to, hazardous or toxic waste, asbestos components, lead based paint, urea-formaldehyde insulation, radon gas, underground tanks, naturally occurring radiation, or any past industrial uses of the premises? Yes ___ No X
If the answer to any of these questions is "YES", please explain ____

MECHANICAL ITEMS:

A. **ELECTRICAL SYSTEM/PLUMBING SYSTEM:**
Are you aware of any problems or conditions that affect the value, desirability, or functionality of the Heating, Cooling, Electrical, Plumbing, or Mechanical Systems? Yes ____ No X If "YES", please explain all known problems in detail ____

SELLER(S) INITIALS MWB PURCHASER(S) INITIALS

FILED
Lamar County MAR 22 2004
Leslie Wilson

WATER, SEWER, & SEPTIC ITEMS:

A. **WATER:**
The water supply is: Public ____ Private ____ On-site Well X Neighbor's Well ____ Other ____
If your drinking water is from a well, when was your water last checked for safety, what were the results of the test, and who conducted the test? ____
Do you have a water softener? Yes ____ No X Unknown ____
The Sewage System is: Public ____ Private ____ Septic X Cesspool ____ Treatment Plant ____ Other ____
Is there a sewage pump installed? Yes ____ No X. Any problems with Treatment Plant? Yes ____ No X
Date of the last Septic Inspection or Clean-out ____
Are you aware of any leaks, back-ups, or other problems relating to any of the plumbing, water, sewage, or related items during your ownership? Yes ____ No X. If "YES", please explain ____

OTHER MATTERS/ITEMS:

A. **MISCELLANEOUS:**
Is the subject situated on Leasehold of Sixteenth Section land? Yes ____ No X Explain ____
Is there any existing or threatening legal action affecting the property? Yes ____ No X
Are you aware of any violations of local/state/federal laws/regulations relating to the property? Yes ____ No X
Are you aware of any defects or needed repairs about which the purchaser should be informed? Yes ____ No X
If "YES", please explain in detail ____
What is the approximate square footage of the Heated and Cooled Living Area of the residence 1000
How was the approximation of square footage determined? MEASURED
Are there any finished wood floors beneath the floor coverings? Yes ____ No X
Are there any Homeowner's Association Fees associated with ownership? Yes ____ No X
If the property is a Condominium, the Maintenance Fees are $ ____ per ____
What is the Total Real Estate Tax Bill? $ 225.00 Homestead Exemption has been filed for ____
What is the average YEARLY Electric Bill? $1,200. What is the average YEARLY Gas Bill? $ ____
If the residence is serviced by Propane (LP) Gas, what is the average YEARLY Propane Bill? $ 35.00
The Propane Tank is: Owned X Leased ____ If Leased, how much is the lease payment? $ ____
Is Cable Television Service available at the site? Yes X No ____
Are any items remaining with the residence that are financed separately from the mortgages? Yes ____ No X
If "YES", please provide information ____

MAJOR APPLIANCES/SYSTEMS REMAINING WITH RESIDENCE:

ITEM	YES	NO	GAS/ELECTRIC	AGE	REPAIRS IN LAST TWO (2) YEARS
Cook-top					
Dishwasher					
Garbage Disposal					
Ice-maker					
Microwave					
Oven(s)					
Refrigerator	✓		EL	5	
Stove	✓		9 ms	4	
Trash Compactor					
Vent-Fan	✓		EL	1	
Washer/Dryer					
Central Air	✓		EL		
Central Heat	✓		"		
Chimney					
Fireplace	✓				
Garage Door Opener					
Pool and Equipment					
Security System					
Water Heater	✓				
Wood Burning Stove					
Other Items					

To the extent of the Seller's knowledge as a property owner, the Seller(s) acknowledges that the information contained above is true and accurate for those areas of the property listed. The owner(s) agree to save and hold the Broker harmless from all claims, disputes, litigation and/or judgments arising from any incorrect information supplied by the owner(s) or from any material fact known by the owner(s) which owner(s) fail to disclose except the Broker is not held harmless to the owner(s) in claims, disputes, litigation, or judgments arising from conditions of which the Broker had actual knowledge.

SELLER (UPON LISTING) DATE 12/4/00 — SELLER (UPON LISTING) DATE

SELLER (AT CLOSING) DATE — SELLER (AT CLOSING) DATE

PROSPECTIVE PURCHASER'S SIGNATURE — PURCHASER(S) ACKNOWLEDGE RECEIPT OF REPORT DATE

AREC FORM #010C

Coldwell Banker Country Properties
919 Hwy 43 North, Picayune, MS 39466

CONTRACT FOR THE SALE AND PURCHASE OF REAL ESTATE

IF NOT FULLY UNDERSTOOD, SEEK LEGAL ADVICE FROM YOUR ATTORNEY BEFORE SIGNING. THIS BECOMES A BINDING CONTRACT UPON ACCEPTANCE IN WRITING OF ALL PARTIES.

COLDWELL BANKER

This purchase agreement is made the ______ day of March, 2001
Purchaser(s) Calvin S. and Jamie A. Dross
agree(s) to buy and Seller(s) agree(s) to sell, the herein described property:
Legal Description: 828 Pine Grove Rd. Picayune Ms. 39466

(street address) (city/town)
in Pearl River county, MS together with the following items:
as per seller's disclosure

FILED
Lamar County MAR 22 2004 Circuit Clerk
Leslie Wilson

and all items permanently attached, unless specifically excluded herein. The property is further described as tax parcel # ______ in the records of the county courthouse within which the property is located, the exact legal description to be determined by survey (if warranted).

1. PURCHASE PRICE: The purchaser will pay a total sum of .... $ 65,000

EARNEST MONEY: A sum of $ ______ (per cash ☐ check ☐) deposited with Coldwell Banker Country Properties [Broker/Trustee], who shall hold it in trust, presuming clearance of check.

Cash Down Payment: Paid at closing and subject to adjustments and prorations........................ $ 500.00

BALANCE: Balance payable.. $ 64,500.00

Balance is payable as: (check one of the options below)

___ **(A)** Cash

___ **(B)** New Loan (check applicable boxes) ☐ FHA; ☐ VA; ☑ CONV.; ☐ Other: ______

☐ Adjustable; ☑ Fixed, Contingent upon purchaser(s) ability to qualify for a new loan secured by subject property in an amount not less than $ 65,000, with interest not to exceed 10.5 % payable over the next 30 years. Purchaser(s) shall make loan application within three (3) business days of final agreement on this Offer to Purchase.

___ **(C)** **Loan Assumption:** Contingent upon Purchaser(s) ability to assume the existing loan with an approximate balance of ______, and payable over a period not less than _____ years. Purchaser(s) agree(s) to make application for a loan assumption within _____ days from the date of acceptance of this offer.

___ **(D)** **Owner Financed with the following terms: (See attached addendum made a part of this offer to purchase.)**

2. EARNEST MONEY DEPOSIT: Upon acceptance of the Purchase Agreement, deposits and down payments received by above named Broker/Trustee shall be deposited in an escrow account and shall remain in that account until the transaction has been consummated or terminated. All such funds will be deposited by the above named Broker/Trustee in federally insured accounts. In the event the transaction is not consummated, the above name Broker/Trustee shall hold such funds in escrow until : (a) all parties to the transaction have agreed in writing as to their disposition; or (b) a court of competent jurisdiction orders such disbursement of the funds; or (c) the above name Broker/Trustee can pay the funds to the party who is entitled to receive them in accordance with the clear and explicit terms of this Purchase Agreement which established the deposit. In the latter event, prior to disbursement, the above name Broker/Trustee shall give written notice to each party not to be paid, by either : (a) hand delivery signed for by the addressee; or (b) by certified mail, both stating that this payment will be made unless a written protest from that party is received by the Broker/Trustee within 5 business days of the delivery of the mailing, as appropriate, of that notice.

3. LOAN AND CLOSING COSTS: (Please mark each space with appropriate letter(s))
Print the letter S if paid by the Seller; Print the letter P if paid by Purchaser, Print the letter J if split by parties , Print NA if not applicable

Appraisal	B	**Survey**	B	**Atty. Closing Fee**	B+P	**Title Ins. Lender**	B	**Flood Cert.**	N/A
Credit Report	B	**Disc. Points**	N/A	**Certificate of Title**	B	**Home Warranty**	N/A	**Pest Insp.**	S
Recording Fee	B	**PMI/FHA-MIP**	B	**Deed Preparation**	S	**Courier Ser.**	N/A		
Loan Transfer	N/A	**VA Funding Fee**	N/A	**Pre-paid items**	B	**Tax Service**	B		
Loan Origination	B	**Well/Septic Insp.**	S	**Underwriting**	B	**Doc. Prep.**	B		
Wetlands Insp.	N/A	**Environ. Insp.**	N/A	**Title Ins. Owner**	B	**Home Insp.**	N/A		

Other ______

C.D. J.D.

 Purchaser(s) Initials Seller(s) Initials 26

4. APPRAISAL OF PROPERTY: VA/FHA STATEMENT ☐ IS ☑ IS NOT APPLICABLE

VA/FHA: It is expressly agreed that not withstanding any provisions of this contract, the Purchaser shall not be obligated to complete the Purchase of the Property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the appraised value (☐ FHA or ☐ VA) of the property, excluding closing costs, of not less than $ _____. The Purchaser shall, however, have the privilege and option of proceeding with the consummation of the contract without regard to the amount of the appraised valuation made by the Federal Housing Commissioner or the Veterans Administration. The appraised valuation determines the maximum mortgage the Department of Housing and Urban Development or the Veterans Administration will insure. HUD or VA does not warrant the value or the condition of the property. The Purchaser should satisfy himself/herself that the price and the condition of the property are acceptable.

THE FOLLOWING CONVENTIONAL FINANCING STATEMENT ☑ IS ☐ IS NOT APPLICABLE.

CONVENTIONAL FINANCING: Property must appraise at or above sale price, or purchaser shall not be obligated to complete the purchase of real estate described herein and all earnest money shall be refunded to the purchaser.

5. OFFER: This offer expires at 5 o'clock ☐ AM/ ☑ PM, Central time March 26, 2001 19 ___ if not accepted. countered, or rejected by seller by that time.

FILED

Lamar County MAR 22 2004 Circuit Clerk

6. CLOSING: Closing to be on or before April 30, 2001

7. POSSESSION: Possession shall be delivered to Purchaser (check one box): ☑ (A) Upon completion of closing; ☐ (B) By separate Possession Agreement attached and made a part of this Purchase Agreement.

8. PRORATION: In regard to prorations, the following may apply.

A. All taxes, rents, and appropriate condominium or POA fees are to be prorated as of the settlement date, or:

B. Seller represents that all mortgage payments, escrow accounts and condominium or POA fees will be current at settlement date, and in lieu of prorations, escrow accounts (containing taxes, interest, existing hazard insurance premiums and mortgage insurance premiums), condominium or POA fees, and existing hazard insurance policies will pass gratis to Purchaser subject to any required approval of lenders and insurers. Mortgage payment(s) due on or following the settlement date shall be paid by the Purchaser. (ASSUMPTION SALE)

AFTER REVIEWING THE ABOVE, THE PARTIES AGREE THAT SUBPARAGRAPH A (INDICATE A OR B) APPLIES

9. COMMISSION: ☑ Seller ☐ Buyer of property sold under this contract or through any other negotiated agreement, agrees to pay Selling Broker(s) the sum of 6 (check box) ☑ % or ☐ $ commission on the total purchase price indicated in Item 1. If Broker collects this commission, or any part thereof through legal action, defaulting party agrees to pay court costs and reasonable attorney's fees. This agreement shall not limit the rights of the Broker set forth in any listing agreement which may be in effect between Seller or Purchaser, and Broker, except that said listing agreement(s) is extended through the closing date of this contract or any other agreement or negotiated contract between the parties or the assigns. Any commission or fee due hereunder shall be earned and payable upon presentation of a Purchaser ready, willing and able to purchase at any price and terms acceptable to Seller, although Broker agrees to accept said commission or fee at closing as an accommodation to party paying commission. Seller and Purchaser hereby acknowledge receipt of a duplicate original hereof and acknowledge further that they have not received or relied upon any statement or representations regarding the effect of this transaction upon Seller(s)' or Purchaser(s)' tax or legal liability.

☐ THE ABOVE PARAGRAPH DOES NOT APPLY. SEE SPECIAL PROVISIONS.

10. TITLE AND CONVEYANCE: A ☑ Warranty Deed, ☐ Special Warranty Deed, ☐ Lease Assignment, ☐ Quit Claim and a certificate of title prepared by an attorney, upon whose certificate title insurance may be obtained from a title insurance company qualified to do, and doing, business in the State of Mississippi will be provided by ☑ Seller; ☐ Purchaser; ☐ See special provisions. Seller shall, prior to closing, satisfy all outstanding mortgages, deeds of trust and special liens affecting the subject property which are not specifically assumed by Purchaser herein. Title shall be good and marketable, subject only to the following items recorded in the Chancery Clerk's office of said county: easements without encroachments, applicable zoning ordinances, protective covenants and prior mineral reservations; otherwise Purchaser, at his option, may either (a) if defects can not be cured by designated closing date, cancel this contract, in which case all earnest money deposited shall be returned; (b) accept title as is or; (c) if the defects are of such character that they can be remedied by legal action within a reasonable time, permit Seller such reasonable time to perform this curative work at Seller(s) expense. In the event the curative work is performed by the Seller, the time specified herein for closing of this sale shall be extended for a reasonable period necessary for such action. Seller represents that the property may be legally used as zoned and that no governmental agency has served any notice requiring repairs, alterations or corrections of any existing condition except as stated herein.

11. BREACH OF CONTRACT: Specific performance is the essence of this contract, except as otherwise specifically provided for in Paragraph 2. 5, 11, and 14 and as further delineated below, and time is of the essence of this contract. In the event of breach of this contract by Purchaser, Seller may at his option (a) accept the earnest money deposit as liquidated damages and this contract shall then be null and void, or (b); enter suit in any court of competent jurisdiction for damages for the said earnest money deposit, or (c) enter suit in any court of competent jurisdiction for specific performance. If Seller accepts the earnest money deposit as liquidated damages, or if Seller litigates for additional damages in any court of law. Broker (s) shall be paid one half (1/2) of the earnest money deposit amount, or damages awarded, not to exceed the full commission herein provided. If the Seller succeeds in a suit for specific performance, Broker shall be paid a full Commission by Seller. (d) In the event of breach of contract by Seller, Purchaser at his option may either accept the return of the earnest money deposit and cancel the contract or enter suit for damages in any court of competent jurisdiction, or enter suit for specific performance in any court of competent jurisdiction; (e) in the event of

Residential MLS: 145328 Sta Active Address: 828 Pine Grove **Price: $69,700**

City:	Picayune
Zip:	39466
County:	Pearl River
Area:	3
State:	MS
School:	SS-PM HS
Excl Agency:	No
Agent Owned:	No
Agency:	Buyer Agent
Parcel #:	
Lot Size:	8.16 acres
Prop Type:	Residential
Street Const:	Asphalt
Construction:	Mobile
Exterior:	Aluminum
Foundation:	Pier
Car Storage:	1 Car
Heat:	Central, Elect
Gas:	
Cooling:	Central-Elec
Roof:	Comp Shingle
Flooring:	Carpet, Vinyl
Fireplace:	No
Walls:	Panel
Fence:	Partial, Barbed Wire
Features:	
Appliances:	Range-Elec, Refrigerator
Water:	Well
Sewer:	Septic
Concessions:	
Mapping Info:	

Subdivision:	Other
Home Warranty:	No
County Rd:	Yes
Pool:	None
Other Buildings:	2 sheds
Waterfront:	No
Waterfront Type:	
Elec. Supplier:	
Occupancy:	Vacant
Laundry:	Utility

Rooms:	6	Acres:	8.16
Bedrooms:	3	SqFt-H&C Apx:	994
Baths:	2.00	SqFt-Underbeam	994
Levels #:	1.0	Tax Year:	2000
Year Built:	1980	Taxes-City $:	125
		Taxes-Cnty $:	100
		Tax Exemption:	
		Insurance $:	

Room	LV	Dimension
Family		
Dining		
Master Bedroom		

RE/MAX Premier Group
"Independently Owned and Operated"
Judy Melancon
REALTOR-ASSOCIATE®
Million Dollar Producer
417 Memorial Blvd
Picayune, Mississippi 39466
Office: (601) 798-3399
Office: (877) 736-2945
Fax: (601) 798-5080
Residence: (601) 798-6938

Judy

Directions: Go out Hwy 43 North about 6 miles to Cybur Curve, take left, first residence on left, see driveway

Legal: on file

Remarks: heavily wooded land, very private, nice location, plenty of storage, deck on rear with picnic table

ProMatch For Windows(c) Information herein believed to be accurate but not warranted. Pearl River, MS Board of Realtors

~~601-799-3200~~ Keith Robertson
601-798-8300 Terry Far

First Nat. Bank
Bank Plus
20% Down

FILED
MAR 22 2004
Lar... Circuit Clerk
Cou...

Lewis Wilson

Pine Grove RD.
1500.00 Trees

Roof 5 yrs old
No Flood or Insurance Required
Well - Septic tank
431.64 Across
8.16 acres 1,7071.1 30888. FT

COLDWELL BANKER

COUNTRY PROPERTIES, INC.

CONTRACT EXTENSION

DATE 4/30/01

We, the undersigned, do hereby agree to extend the contract between us originally dated April 30, 2001 for the Sale and Purchase of 828 Pine Grove Rd. Carriere Ms 39466 until May 31, 2001

All original terms and conditions apply to the extension.

Seller

Seller

Calvin J Danos Jr.
Buyer

Jamie A Danos
Buyer

1-601-798-1691

7.5%

FILED
Lamar County MAR 22 2004
Leslie W...

Allstate Insurance Company

Allstate. You're in good hands.

Deluxe Mobilehome Policy Declarations

Summary

NAMED INSURED(S)	YOUR ALLSTATE AGENT IS:	CONTACT YOUR AGENT AT:
Jamie Danos 828 Pinegrove Rd Carriere MS 39426	Country Living Ins. P.O. Box 532 Poplarville MS 39470	(601) 795-6711

POLICY NUMBER	POLICY PERIOD	PREMIUM PERIOD
1 10 322354 05/08	Begins on May 8, 2001 at 12:01 A.M. standard time, with no fixed date of expiration	May 8, 2001 to May 8, 2002 at 12:01 A.M. standard time

LOCATION OF PROPERTY INSURED
828 Pinegrove Rd, Carriere, MS 39426

MANUFACTURER - FLEETWOOD **SERIAL NO.** - ALBU28226054457 **YEAR** - 1988

MORTGAGEE

- FLAGSTAR BANK FSB ITS SUCCESSORS
  &/OR ASSIGNS
  P O Box 7026 Troy MI 48007-7026 *Loan # NONE*

Total Premium for the Premium Period *(Your bill will be mailed separately)*

Premium for Mobilehome Coverage	$925.00
TOTAL	**$925.00**

- ***Your Mobilehome Policy does not provide coverage for Earth Movement Losses.***

Policy countersigned by original agent Country Living Ins.

FILED

Lamar County MAR 22 2004 Clerk

Leslie Wilson

[redacted]

32

PROP *6100023010503570001216O3*

Information as of May 3, 2001

MS03YHCD

Allstate Insurance Company

Policy Number: 1 10 322354 05/08 Your Agent: Country Living Ins. (601) 795-6711
For Premium Period Beginning: May 8, 2001

POLICY COVERAGES AND LIMITS OF LIABILITY

COVERAGE AND APPLICABLE DEDUCTIBLES (See Policy for Applicable Terms, Conditions and Exclusions)	LIMITS OF LIABILITY	
Mobilehome Protection • $500 All Peril Deductible Applies	Actual cash value	
Improvements - Actual cash value but not to exceed • $500 All Peril Deductible Applies	$5,900	
Personal Property Protection - Actual cash value but not to exceed • $500 All Peril Deductible Applies	$29,500	
Family Liability Protection	$100,000	each occurrence
Guest Medical Protection	$1,000 $25,000	each person each accident

DISCOUNTS Your premium reflects the following discounts on applicable coverage(s):

Protective Device	5 %

FILED
Lamar County MAR 22 2004 Circuit Clerk
Leslie Wilson

Appendix D

HRichardson v. New Century Mortg. Corp.
N.D.Miss.,2005.
Only the Westlaw citation is currently available.
United States District Court,N.D. Mississippi, Delta Division.
Ronald Dale RICHARDSON, Plaintiff,
v.
NEW CENTURY MORTGAGE CORPORATION, Barry Hunt d/b/a United Mortgage Desoto, and Equity Title & Escrow Company of Memphis, LLC, Defendants.
No. Civ.A. 2:03CV372PA.

July 1, 2005.

Billie Sean Akins, Fortier & Akins, Ripley, MS, for Plaintiff.
George D. Hembree, III, John T. Rouse, McGlinchey Stafford, Jackson, MS, Brian L. Davis, Davis Law Firm, P.C., Southaven, MS, Linda Jew Mathis, Golden & Mathis, Memphis, TN, for Defendants.

MEMORANDUM OPINION

PEPPER, J.
*1 These matters come before the court upon New Century Mortgage Corporation's Motion for Summary Judgment [42-1], Equity Title & Escrow Company of Memphis, LLC's Motion for Summary Judgment [39-1], and Barry Hunt d/b/a United Mortgage DeSoto's Motion for Summary Judgment [44-1]. Upon due consideration of the motion, the plaintiff's combined response, and the reply filed by New Century Mortgage Corporation thereto, the court is prepared to rule.

I. FACTUAL BACKGROUND

A. Introduction

On October 13, 2003 the plaintiff filed the instant action against New Century Mortgage Corporation, Equity Title & Escrow Company of Memphis, LLC, and Barry Hunt d/b/a United Mortgage DeSoto in the Circuit Court of DeSoto County. On the basis of federal question and bankruptcy jurisdiction, the defendants removed to federal court. The plaintiff filed no motion to remand.

In 1999, the plaintiff pledge his homestead property in Blue Mountain, Mississippi as collateral to Citifinancial to secure a $46,999.72 loan at 10% for 120 months. In 2002, with seven years left on this first loan, the plaintiff sought to refinance the existing mortgage. He contacted Defendant Barry Hunt, a licensed Mississippi mortgage broker in Southaven, Mississippi to obtain a favorable mortgage.

Hunt contacted lender New Century Mortgage Corporation which offered a loan of $60,000.00 at a fixed interest rate of 10.5% for 30 years. According to the plaintiff, the understanding was that following the payoff of his existing mortgage at Citifinancial for $41, 467.56 and settlement charges of $7,135.79, the plaintiff was to receive $11,396 in cash at the closing.

The plaintiff accepted the terms and the loan was scheduled to close on November 25, 2002 at the office of Defendant Equity Title and Escrow Company of Memphis, LLC. On that date, the plaintiff was presented with numerous loan documents including a deed of trust, promissory note, and a HUD-1 settlement statement-all of which he executed. The HUD-1 statement provided that he should receive $11,396 in cash following his three-day right of rescission and that his mortgage at Citifinancial would be paid in full.

Richardson avers that the defendants told him he should return to the closing office of Equity Title on December 2, 2002 to pick up his check. When he did so, he was told he would have to wait before receiving it.

On January 2, 2003, Richardson received a notice of delinquency from Citifinancial, the holders of the first mortgage, informing him that his mortgage payments were past due for December 2002 and January 2003 and that therefore a foreclosure would soon commence. He received a second notice on February 6, 2003.

On January 31, 2003, Richardson's first mortgage at Citifinancial was paid in full and its deed of trust was released on February 17, 2003. Richardson then began receiving foreclosure notices from New Century Mortgage, his new mortgagee, given that he had not made his first payment due on January 2, 2003. Because Richardson never received the check for $11,396 he believed he was due from the defendants, he was unable to make his mortgage payments. He then filed a bankruptcy petition under Chapter 7 to prevent foreclosure of his home.

*2 The plaintiff filed the present case against the lender (New Century Mortgage), the broker (Hunt), and the escrow agent (Equity Title) arguing eight causes of action: (1) violations of the Truth in Lending Act; (2) fraud; (3) civil conspiracy; (4) breach of fiduciary duty; (5) violations of Mississippi Consumer Mortgage Protection Act; (6) violations of the Mississippi Consumer Loan Broker Act; (7) breach of the duty of good faith and fair dealing; and (8) violations of the Real Estate Settlement Procedures Act. In addition to seeking compensatory and punitive damages, the plaintiff seeks a rescission of the loan transaction, a termination of New Century Mortgage's security interest, a declaration that the transaction is void, and a return of any property given to anyone in connection with the transaction.

In the complaint, all eight causes of action are levied against all three defendants.

First, the plaintiff alleges that the defendants violated the Truth in Lending Act, 15U.S.C. § 1601*et seq.*, because he was never provided with a settlement statement accurately reflecting that the $11,396 was to go to the IRS in satisfaction of its tax lien on his property, because the defendants failed to provide proper disclosures, failed to make timely disclosure of the yield spread to the broker, failed to make the terms clear and conspicuous, failed to disclose certain finance charges, and failed to provide three business days to rescind the loan.

Second and third, the defendants are liable for fraud and conspiracy to commit fraud because even though they were aware of the federal tax lien and that it was required to be satisfied as part of the closing, the defendants misrepresented to him that he would receive the $11,396 in cash to "coerce" him to complete the loan. Consequently, Richardson writes, "[h]e traded a loan balance of [approximately] $41,000 for a loan balance of $60,000.00 without receiving any benefit."

Fourth, the defendants, because they had a fiduciary duty to the plaintiff to disburse the loan proceeds according to the HUD-1 statement, the defendants breached that duty by paying the IRS the $11, 396.65 rather than paying it to Richardson.

Fifth, the defendants violated the Mississippi Consumer Protection Act, Miss.Code Ann. § 81-18-1*et seq.* by misrepresenting or concealing material facts intended to persuade the plaintiff to agree to the loan, engaging in bad faith practices, engaging in fraudulent residential mortgage practices, and violating the limitations of the amount of finance charges that may be assessed.

Sixth, the defendants violated the Mississippi Consumer Loan Broker Act, Miss.Code Ann. § 81-19-1*et seq.* by charging fees in excess of allowable amount, using misleading statements regarding the services provided concerning the terms and conditions of the loan obtained, making false statements or concealing material information to induce use of the broker's services, and concealing material facts regarding the broker's services on the subject transaction.

*3 Seventh, the defendants breached their duty of good faith and fair dealing by engaging in fraudulent residential mortgage underwriting practices and by defrauding the plaintiff with the making of the mortgage loan.

Eight, the defendants violated the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601*et seq.* and Regulation "X" implementing RESPA, 24 C.F.R. § 3500*et seq.* by failing to provide the plaintiff a good faith estimate of the amount or range of settlement charges at closing, failing to provide a settlement statement that conspicuously and clearly itemized all charges imposed on the borrower, and charging excessive fees.

All three defendants filed the instant motions for summary judgment, arguing that there is no genuine issue of material fact warranting a trial on any of the plaintiff's claims because of the lack of evidence to support at least one required element for each cause

of action. Much of their arguments for summary judgment centers around the fact that there was a federal tax lien for approximately $19,000 placed against Richardson's real property in 1993-a fact that Richardson, Hunt, and Equity Title knew but it is undisputed that New Century did not. Rather than giving Richardson a check for the $11,396, which the HUD-1 indicated was due him, the money was given to the IRS to satisfy the $19,000 lien in order to give New Century its required title priority.

Essentially, Hunt and Equity Title argue that the reason the HUD-1 statement indicated that the $11,396 was to go to Richardson, while not mentioning the tax lien, was that Richardson informed them that the lien would be taken care of before the closing. Indeed, Richardson admits knowing that Equity Title did not disclose the tax lien to New Century because New Century would not have issued him the loan. Since the lien was not satisfied before closing or during the three-day rescission period, Equity Title as the escrow agent was duty bound to pay the lien. Hunt and Equity Title argue further that although Richardson did not receive the cash, he received the benefit of the $11,396 since he owed that money to the IRS.

The specifics of each defendant's summary judgment arguments follows.

B. New Century Mortgage

New Century argues first and foremost that contrary to Richardson's assertions, neither Equity Title the escrow agent nor Hunt the broker is an agent of New Century thereby conferring vicarious liability upon New Century for any actions or inactions by them. Rather, New Century avers that while Equity Title has closed loans for New Century in the past, there is no exclusive relationship between them. In this case, Equity Title was solicited by Hunt to close the plaintiff's loan. There was no ongoing or established relationship between New Century or Equity Title. With regard to Hunt, New Century asserts that Hunt was an independent broker and was hired by the plaintiff. It is undisputed that the broker agreement specifically provides that "[n]othing contained in this Agreement shall be deemed to create, nor shall this Agreement be construed so as to create a joint venture, partnership, agency or employment relationship between New Century and Broker."In any event, New Century argues that the plaintiff has produced no evidence to meet its burden in proving an agency relationship between New Century and Hunt or Equity Title.

***4** Apparently, the plaintiff does not dispute that Hunt is not an agent of New Century. Regarding Equity Title, Richardson argues that the evidence is clear that Equity Title was the agent of New Century because Pamela White, an employee of Equity Title, testified twice in her deposition that New Century was Equity Title's client, saying "That's our priority client. That's who we represent."New Century rebuts this by pointing out that White also referred to Richardson as Equity Title's client on at least fourteen occasions. Furthermore, outside of receiving the standard closing instructions and package, there was little, if any, communication between New Century and Equity Title. Although New Century completely denies any agency relationship with Equity Title, it argues that White's reference to Richardson as a client in addition to New Century establishes an issue of dual agency-*i.e.,* Equity Title as agent of both Richardson and New Century. According to Mississippi law, New Century posits, the general rule that knowledge obtained by an agent is imputed to the principal changes when the agent represents more than one principal. In *Lane v. Oustalet,* 873 So.2d 92, 95-97 (Miss.2004), the Mississippi Supreme Court ruled that it could not establish a bright line rule that knowledge of an agent is automatically imputed to a principal from an agent in a situation involving dual agency without proof of actual knowledge. New Century asserts that the plaintiff has provided no evidence that New Century had any knowledge of the tax lien.

Accordingly, since it is undisputed that Richardson never communicated directly with New Century, nor did New Century have any knowledge of the tax lien, New Century argues that Richardson cannot establish a claim against it for fraud, conspiracy, breach of fiduciary duty, and breach of the duty of good faith and fair dealing.

In any event, New Century stresses that it cannot be held liable for fraud because it never actually made any statement, fraudulent or otherwise, to the plaintiff. New Century adds that there was no fiduciary duty between it and the plaintiff to breach citing several Mississippi cases, including *Strong v.*

First Family Financial Services, Inc., 202 F.Supp.2d 536, 541 (S.D.Miss.2002) ("the Mississippi Supreme Court has repeatedly held that lenders and their borrowers typically are not in a fiduciary relationship and certainly are not so as a matter of law."). Rather, the transaction between the plaintiff and New Century was merely a typical residential loan transaction. With regard to the implied warranty of good faith and fair dealing claim, the plaintiff cannot establish such a claim because he explicitly granted New Century a security interest in the property and also assumed the contractual obligation to "promptly discharge any lien which has priority" over the deed of trust. What is more, the plaintiff proffers no evidence of any "conscious wrongdoing" by New Century.

*5 According to New Century, the plaintiff cannot establish claims under the Truth in Lending Act, the Mississippi Consumer Mortgage Protection Act, the Mississippi Consumer Loan Broker Act, and RESPA. In his response, the plaintiff concedes that New Century cannot be liable under the Mississippi Consumer Mortgage Protection Act and the Mississippi Consumer Loan Broker Act, thus leaving claims under the TILA and RESPA. New Century argues that it complied with each statute as it applied to New Century.

With regard to the alleged Truth in Lending Act violation, the plaintiff admits that a copy of the settlement statement was provided to him and that the only thing missing from it was the federal tax lien. The plaintiff also concedes that New Century had no knowledge of the tax lien. New Century argues that it is not liable for any mistaken charges that may have occurred. It concedes there was a clerical error on the HUD-1 under the section titled "Government Recording and Transfer Charges," which mentioned the charges applicable to property located in Shelby County, Tennessee when it should have been the rate charged to Tippah County, Mississippi. However, New Century responds that this was the error of Equity Title and that in any event, the error falls into the bona fide error exception in the Truth in Lending Act, 15U.S.C. § 1640(c). The plaintiff's response does not dispute this.

New Century points out that the two primary arguments regarding its alleged violations of the TILA were diverting of the $11,396 to the IRS and the payment of a $1700 fee to "Unicorp Marketing." The first argument fails, New Century argues, because it is undisputed that it had no knowledge of the tax lien and as far as it knew, the plaintiff received the money. The second argument fails because New Century had no knowledge that Hunt was the owner of Unicorp Marketing nor did it know anything about the $1700 fee until it received the revised closing statement.

Nevertheless, New Century argues that it cannot be liable under the TILA simply because the plaintiff suffered no damages given he was required to pay the tax lien and he received the benefit of the $11,396 when it was given to the IRS in satisfaction of that lien.

As to RESPA, which the plaintiff's response states is only applicable to New Century and Equity Title, New Century argues that the plaintiff only restates his Complaint with no specific violations asserted. The gist of Richardson's argument, New Century states, is that funds should not have been diverted from this closing to pay his IRS lien and that Hunt should not have charged him the $1700 fee for negotiating the subordination agreement with the IRS. New Century responds that the plaintiff was aware of the lien, he signed the HUD-1 statement which approved the $1700 to Unicorp Marketing (Hunt), and yet the plaintiff seeks to hold liable New Century which had no knowledge of either situation. The plaintiff's response only seeks liability on New Century's part under the RESPA based on his argument that Equity Title was an agent of New Century.

C. Equity Title

*6 The plaintiff concedes in his consolidated response to the defendants' motions for summary judgment that his claims under TILA, the Mississippi Consumer Mortgage Protection Act, and the Mississippi Consumer Loan Broker Act do not apply to Equity Title the escrow agent. See Response, 9 and 11-12. This leaves the claims of fraud, conspiracy, breach of fiduciary duty, breach of the implied warranty of good faith and fair dealing, and violations of RESPA.

Equity Title avers that after its title search revealed the outstanding federal tax lien, Hunt informed them

that Richardson would be providing proof of the release of the lien. Equity Title states further that Richardson represented to Hunt that he was in negotiations with the IRS and that the lien was either going to be released or subordinated so that the lender, New Century, would be placed in a first mortgage position ahead of the IRS. On the day of closing, the IRS release had not been provided to Equity Title. Nevertheless, Equity Title closed in escrow, pending proof that the IRS had released or subordinated its lien.

After the closing, Richardson began calling Equity Title wanting disbursement of the $11,396 but since he was unable to provide documentation that the IRS lien had been satisfied, Equity Title did not disburse the funds to Richardson. Plaintiff spoke with Pamela White at Equity Title during the three-day rescission period and told her he was working on getting the IRS release to them. Hunt also told White that Richardson was in the process of getting the release. When no proof was provided, Equity Title advised Richardson that no money could be disbursed to him until the lien was satisfied. Equity Title points out that although Richardson testified that he was never told by Equity Title the reason he could not pick up his check, he employed Hunt after the closing to help him negotiate a hardship with the IRS in order to get the release. Thus, Equity Title argues, Richardson was aware that the IRS lien was the impediment to receiving his money. Equity Title had several conversations with Richardson wherein it advised him to rescind the closing because the $11,396 would have to be paid to the IRS. It is undisputed that Richardson had the option to rescind but insisted on closing.

Equity Title argues it was under a legal duty to pay off the lien in order to provide clear title. Plaintiff received the benefit of the $11,396 because his IRS obligation was reduced by this amount.

According to Equity Title, the plaintiff's suit essentially alleges that the defendants fraudulently misrepresented facts to him and conspired together to coerce him to close, and then conspired to hold his money so the IRS could get it. He acknowledges, however, that Hunt and Equity Title treated him fairly, treated him with respect, and did a good job. Richardson has also not related with any specificity any communications he has engaged in with New Century other than the fact he began receive bills for his mortgage payment.

*7 With regard to Richardson's allegation that he did not receive various closure documents and that the HUD-1 was not accurate because he did not receive the $11,396, the plaintiff admits he signed the various truth-in-lending, loan application, and right of rescission documents. He further testified that he did not find any of the fees charged to be excessive. Richardson has not stated any misrepresentations made by any of the defendants other than they promised him a check and he did not receive a check.

Equity Title's position is that Richardson's own misrepresentations caused him to suffer any harm that may have occurred to him. Had he not lied about his ability to take care of the tax lien, Equity Title would not have performed the closing in the first place. Even after Richardson's misrepresentation came to light, he could have salvaged the situation by rescinding, as Equity argues it urged him to do. Because Richardson insisted on proceeding with the closing in light of the outstanding IRS lien, Equity was under a legal duty to pay off the lien to provide clear title to the lender.

The plaintiff response to Equity Title argues that it is liable for fraud because the HUD-1 statement's indication that the plaintiff was to receive the $11,396 in cash (while not mentioning the tax lien) was a false material representation that Equity Title and Hunt knew was false with the intent that Richardson should close the loan. As to conspiracy, the plaintiff argues that the defendants agreed with each other to perpetuate the fraud of paying the IRS with the money meant for Richardson.

The plaintiff argues that Equity Title as the settlement agent was in a fiduciary relationship with New Century and Richardson, while not discussing how Equity Title had effective control over Richardson or New Century.

As to Equity Title's alleged breach of the implied warranty of good faith and fair dealing, the plaintiff avers that the simple act of not including the tax lien on the HUD-1 statement constituted bad faith and unfair dealing.

With regard to the alleged violations of RESPA by

Equity Title, the plaintiff merely restates its Complaint that Equity Title failed to give a good faith estimate of the amount or range of settlement charges at closing by failing to provide a settlement statement which conspicuously and clearly itemized all charges imposed on the borrower in connection with the settlement.

D. Barry Hunt

The plaintiff concedes that Hunt is not liable under neither the TILA nor RESPA. This leaves claims of fraud, conspiracy, breach of fiduciary duty, breach of the implied warranty of good faith and fair dealing, and violations of the Mississippi Consumer Mortgage Protection Act and the Mississippi Consumer Loan Broker Act.

With respect to conspiracy and fraud, the plaintiff admitted in his deposition that he had no knowledge of any conversations or communications between Equity Title and Hunt or between any of the defendants. Nor does he have any documentation evidencing an agreement between the defendants to defraud the plaintiff. Without an agreement, Hunt argues, there can be no conspiracy. Hunt argues further that there was no illegal act or legal act committed in an illegal manner because Richardson knew at all relevant times of the IRS lien. Though he denies the lien was mentioned at the closing table, he admits being aware there were problems arising from the lien during the critical three-day rescission period. Pamela White testified that she had discussions with Richardson during that period about the lien. Richardson's only allegation of misrepresentation centers around his essential argument that he wanted to receive cash out of his equity. It was unreasonable, argues Hunt, for Richardson to think he could do this without paying the IRS lien.

***8** Hunt argues that the claim that he breached a fiduciary duty to the plaintiff is without merit because the plaintiff has never established the existence of a fiduciary duty owed to him by Hunt. Hunt states that Richardson admitted in his deposition that he understood Hunt worked for himself and was not a representative of New Century.

II. DISCUSSION

A. Summary Judgment

Summary judgment should be entered only if "[t]here is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c). The party seeking summary judgment has the initial burden of demonstrating through the evidentiary materials that there is no actual dispute as to any material fact in the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). On motion for summary judgment, "[t]he inquiry performed is the threshold inquiry of determining whether there is a need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining whether this burden has been met, the court should view the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing the motion. *Id.* Furthermore, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."*Celotex Corp. v. Catrett, supra,* at 322.

The summary judgment procedure does not authorize trial by affidavit. Rather, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."*Anderson v. Liberty Lobby, Inc., supra,* at 255.Accordingly, a court may not decide any factual issues found in the record on motion for summary judgment, but if such material issues are present, the court must deny the motion and proceed to trial. *Impossible Elec. Tech. v. Wackenhut Protection Systems*, 669 F.2d 1026, 1031 (5 Cir.1982); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5 Cir.1981); *Lighting Fixture & Electric Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5 Cir.1969).

Under the provisions of Federal Rule of Civil Procedure 56(e), a party against whom a motion for

summary judgment is made may not merely rest upon his pleadings, but must, by affidavit, or other materials as provided in Rule 56, inform the court of specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett, supra,* at 324.

***9** Summary judgment is not proper if a dispute about a material fact is "genuine," or in other words the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson, supra* at 248.There is no such issue unless the evidence sufficiently supports the non-moving party's version of the facts for a jury to return a verdict in the non-moving party's favor. *Id.,* at 249.The relevant inquiry is whether or not there is sufficient disagreement on the facts to submit them to the jury or whether it is so one-sided that one party should prevail as a matter of law. *Id.,* at 251.The issue must be genuine, and not pretended, and the evidence relied on to create such an issue must be substantial. *Southern Distributing Co. v. Southdown, Inc.,* 574 F.2d 824, 826 (5th Cir.1978); *Schuchart & Associates v. Solo Serve Corp.,* 540 F.Supp. 928, 939 (W.D.Tex.1982).

B. New Century Mortgage

1. Agency and vicarious liability

The threshold issue with regard to New Century the lender is whether Hunt the broker or Equity Title the escrow agent were agents of New Century, thus subjecting the latter to vicarious liability for the alleged actions or inactions of the broker or escrow agent or both.

Agency is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."*Butler v. Bunge Corp.,* 329 F.Supp. 47, 49 (N.D.Miss.1971) (quoting Restatement (Second) of Agency § 14). Agency can either be express or de facto:
A de facto agency may be proven by the presence of three elements at the time of contracting: (1) "[m]anifestation by the alleged principal, either by words or conduct, that the alleged agent is employed as such by the principal," (2) "[t]he agent's acceptance of the agreement," and (3) "[t]he parties understood that the principal will control the undertaking."

Stripling v. Jordan Prod. Co., 234 F.3d 863, 870 (5th Cir.2000) (citations omitted).

As discussed above, it is undisputed that the agreement between Hunt the broker and New Century the lender specifically disclaimed any agency relationship between them. The plaintiff has submitted no evidence that there was an express agency relationship between Hunt and New Century. Similarly, the record does not support a de facto agency relationship. The plaintiff has produced no evidence to establish a manifestation by New Century that Hunt was an employee of New Century. Indeed, the agreement between them specifically disclaimed an employment relationship. Furthermore, there is no evidence that Hunt and New Century understood that New Century controlled the undertaking as far as Hunt was concerned. In any event, it would be unusual to perceive a mortgage broker as an agent of a lender, especially one lender among many that he routinely solicits loans from on behalf of the broker's client.

***10** The court concludes that the plaintiff has produced no evidence to establish that Hunt was an agent of New Century. Therefore, New Century cannot be held vicariously liable for any of Hunt's actions or inactions.

The next question is whether there was an agency relationship between New Century the lender and Equity Title the escrow agent. The plaintiff has produced no evidence that there was an express agency between the lender and escrow agent. It is undisputed that Equity Title services were solicited by Hunt the broker, that there was no exclusive relationship between Equity Title and the lender such that the lender could be said to employ or control the actions of Equity Title. Thus, while it is unlikely that Equity Title as the escrow agent would be the sole agent of the lender, which contradicts the nature of an escrow agent, it is not beyond reason to think of an escrow agent as a dual agent: an agent of the mortgagor (Richardson) and mortgagee (New Century). That does not mean, however, that the plaintiff has established dual agency. But assuming *arguendo* that he could, it would avail him little given the Mississippi Supreme Court's ruling in *Lane,* 873 So.2d at 95-87 (Miss.2004) which can fairly be read to mean that knowledge of a dual agent who is

serving two principals is not automatically imputed to both principals without proof of actual knowledge by both principals.

Since the plaintiff admits in his response that "New Century was never told of the existence of the tax lien," the plaintiff cannot impute the knowledge of Equity Title regarding the tax lien to New Century. Response, 3. This means that New Century cannot be held vicariously liable for any of the wrongful acts allegedly committed by Equity Title since all of those alleged wrongful acts depend upon and relate to the payment of the tax lien.

Accordingly, all of the plaintiff's claims against New Century must fail even after viewing the facts in a light most favorable to him since the record does not establish that New Century possessed any knowledge regarding the existence and payment of the tax lien-the lynchpin of the plaintiff's case. As to the plaintiff's secondary argument that New Century as the lender is liable under the TILA for the allegedly excessive $1700 fee Hunt the broker charged Richardson in the name of Unicorp Marketing (in payment for settling the $19,000 tax lien with the IRS for $11,396), there is likewise no evidence that New Century possessed any knowledge of this until they received the closing documents which were signed and agreed to by Richardson by that point.

C. Equity Title and Hunt

After concession in his response, the remaining claims against Equity Title the escrow agent are fraud, conspiracy to commit fraud, breach of fiduciary duty, breach of the implied warranty of good faith and fair dealing, and violations of RESPA. The remaining claims against Hunt are fraud, conspiracy, breach of fiduciary duty, breach of the implied warranty of good faith and fair dealing, and violations of the Mississippi Consumer Mortgage Protection Act and the Mississippi Consumer Loan Broker Act.

1. Fraud and conspiracy

***11** To establish fraud, the plaintiff must prove "by *clear and convincing evidence:* (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or its ignorance of its truth; (5) his intent that it should be relied upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury."*Levens v. Campbell,* 733 So.2d 753, 761-62 (Miss.1999) (emphasis added).

According to Richardson, the representation was that he would receive a check for $11,396 after the three-day rescission period following the closing of his loan. Richardson avers the representation was false since the $11,396 was used to settle the $19,000 IRS tax lien on his property. He argues that representation was material because had he not been able to receive the $11,396, he would not have gone through with the loan since his primary motivation in refinancing his mortgage was to get extra money to pay his mortgage payments while he was injured and not working. The argument continues that Equity Title the escrow agent and Hunt the broker knew the representation was false because they knew they would be paying the $11,396 to the IRS instead of giving the money to Richardson. Equity Title and Hunt intended that the representation be relied upon by Richardson. The plaintiff also avers that he did not know of the falsity of the representation-*i.e.,* he did not know the money would be used to pay the IRS-and that he relied upon the truth of the representation that he would receive the money.

Viewing the facts most favorable to Richard, the establishment of the first seven fraud elements is reasonably possible. The problem, however, comes in meeting the last two. Did Richardson have a right to rely on the representation that he would receive the $11,396 himself without using it to satisfy the tax lien? Further, did satisfaction of the $19,000 tax lien using the $11,396 create consequent and proximate injury to the plaintiff?

A sober review of the record in this case, even viewed in a light most favorable to the plaintiff, manifestly establishes that the answer to both questions is no. Richardson admits that he knew at all relevant time that he owed the IRS $19,000 on the property he was seeking to refinance. He knew that it would be necessary to deal with that tax lien before he could get the loan. Even if he believed Hunt would "handle" the lien, he had to know that handling it would require some fraction of the $19,000 owed. Given his apparent dearth of funds, the court fails to

see what money he planned to use to satisfy the tax lien. Essentially, the plaintiff did not have a right to believe that he could get the surplus of the new loan without paying the tax lien since such a belief is patently unreasonable. Furthermore, the record does not support the final element of fraud since Richardson received the benefit of the $11,396 by satisfaction of the IRS lien which was the prerequisite to receiving the loan. It is true that the entire point of refinancing was to get extra money, but given the known IRS tax lien, he should have either borrowed more money or exercised his right or rescission.

***12** The court concludes that the plaintiff has not presented sufficient, much less clear and convincing evidence, to establish fraud on the part of Equity Title and Hunt. Since fraud is the unlawful act Richardson argues these defendants conspired to commit, the conspiracy claim necessarily fails also.

2. Breach of fiduciary duty

Next is the plaintiff's claim against Equity Title and Hunt for breach of fiduciary duty. Basically, the plaintiff argues that because they had a fiduciary duty to the plaintiff to disburse the loan proceeds according to the HUD-1 statement, the defendants breached that duty by paying the IRS the $11,396 rather than paying it to Richardson. Equity Title and Hunt not only deny the breach, they also deny the existence of a fiduciary duty.

"The existence of a fiduciary duty must be established before a breach of that duty can arise."*Merchants & Planters Bank of Raymond v. Williamson*, 691 So.2d 398, 403 (Miss.1997). One may form a fiduciary relationship "in a legal context where there emerges 'on the one side an overmastering influence or, in the other, weakness, dependence, or trust, justifiably reposed."*Id.* To ascertain whether a fiduciary relationship exists in a loan transaction, the court considers the following factors: "(1) the parties have 'shared goals' in the other's commercial activity; (2) one party justifiably places trust or confidence in the integrity and fidelity of the other; and (3) the trusted party has effective control over the party."*Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 151 (Miss.1998). The plaintiff who asserts a fiduciary relationship "has the burden of proving the existence of such a relationship by clear and convincing evidence."*Id.* at 150.

Stated differently, the Mississippi Supreme court wrote:
Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character.... Although every contractual agreement does not give rise to a fiduciary relationship, such relationship may exist under the following circumstances: (1) the activities of the parties go beyond their operating on their own behalf, and the activities for the benefit of both; (2) where the parties have a common interest and profit from the activities of the other; (3) where the parties repose trust in one another; and (4) where one party has dominion or control over the other.

Hopewell Enterprises, Inc. v. Trustmark National Bank, 680 So.2d 812, 816 (Miss.1996). One important theme that is associated with a fiduciary relationship is dominion or control. While Richardson argues that Equity Title as escrow agent and Hunt as Richardson's mortgage broker were in a fiduciary relationship, he neither offers evidence nor discusses how either Hunt or Equity Title exercised control or dominion over him.

***13** The court concludes that there is no evidence to create a genuine issue of material fact as to whether there was a fiduciary relationship between the plaintiff and Equity Title and/or Hunt. Thus, the plaintiff's claim of the breach of fiduciary duty against both cannot withstand summary judgment.

3. Breach of the implied warranty of good faith and fair dealing

According to the plaintiff's pleadings and briefs, the plaintiff argues that the simple act of not including the tax lien on the HUD-1 statement constituted bad faith and unfair dealing on the part of Equity Title and Hunt since the $11,396 surplus was ultimately used to satisfy the lien rather than given to the plaintiff.

The implied warranty of good faith and fair dealing exists in all contracts."The breach of good faith is

bad faith characterized by some conduct which violates standards of decency, fairness, or reasonableness. Bad faith, in turn, requires a showing of more than bad judgment or negligence; rather 'bad faith' implies some conscious wrongdoing 'because of dishonest purpose or moral obliquity." ' *Harris v. Mississippi Valley State University*, 873 So.2d 970, 987 (Miss.2004).

The court concludes that the plaintiff has produced no evidence to warrant a finding that either Equity Title or Hunt acted in bad faith constituting conscious wrongdoing in seeing to it that the IRS lien was paid in order to consummate the loan. Furthermore, there was nothing unfair about the situation given that the plaintiff knew all along that the IRS had to be paid.

4. Real Estate Settlement Procedures Act

The plaintiff admits that his claim of RESPA violations only apply to Equity Title the escrow agent. Plaintiff argues that Equity Title violated the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601*et seq.* and Regulation "X" implementing RESPA, 24 C.F.R. § 3500*et seq.* by failing to provide the plaintiff a good faith estimate of the amount or range of settlement charges at closing, failing to provide a settlement statement that conspicuously and clearly itemized all charges imposed on the borrower, and charging excessive fees. This claim has never been developed with specificity.

As pointed out by New Century in their brief, the gist of the plaintiff's RESPA argument is that funds should not have been diverted from his closing to pay his IRS lien and that Hunt should not have charged him for negotiating the subordination agreement with the IRS. However, the plaintiff was aware of the IRS lien and he signed the HUD-1 statement which approved of the $1700 fee to Unicorp Marketing.

The court concludes that the plaintiff has provided no evidence creating a genuine issue of material fact that the HUD-1 statement was not a good faith estimate. This is especially true given that Richardson, Hunt, and Equity Title knew the IRS lien had to be paid. Furthermore, other than not specifically mentioning the tax lien on the HUD-1, the plaintiff has not shown any evidence that Equity Title failed to provide a settlement statement that conspicuously and clearly itemized all charges imposed on him. Finally, the plaintiff has produced no evidence that Equity Title charged him excessive fees.

5. Violations of the Mississippi Consumer Mortgage Protection Act and the Mississippi Consumer Loan Broker Act

***14** Regarding the alleged violation of the Mississippi Consumer Loan Broker Act by charging excessive fees, and violation of the Mississippi Mortgage Consumer Protection Act (which the plaintiff concedes are applicable only to the broker), Hunt argues that Mississippi Code Annotated § 81-19-7 provides that mortgage companies required to be licensed in Mississippi under the Mississippi Mortgage Consumer Protection Act are exempt from the Mississippi Consumer Loan Broker Act. Hunt, doing business as United Mortgage DeSoto, argues that he falls within the definition of "mortgage company" and therefore the Mississippi Consumer Loan Broker Act does not apply to him. Hunt also argues that the provision for a civil cause of action in the Mississippi Consumer Loan Broker Act underscores the absence of a civil liability provision in the Mississippi Mortgage Consumer Protection Act, thus leaving no private cause of action for an alleged violation of the Mississippi Mortgage Consumer Protection Act. The plaintiff does not address these arguments in his response.

Since the plaintiff appears to have abandoned these claims, and because Hunt's defense to them appear correct, the court concludes that summary judgment should be granted with respect to them.

III. CONCLUSION

For the reasons discussed above, the court concludes that the motions for summary judgment filed by each of the three defendants should be granted and that the plaintiff's claims should be dismissed with prejudice for failure to provide sufficient evidence to create a genuine issue of material fact necessitating a trial. Accordingly, and Order shall issue forthwith, THIS DAY of July 1, 2005.

N.D.Miss.,2005.
Richardson v. New Century Mortg. Corp.
Not Reported in F.Supp.2d, 2005 WL 1554026 (N.D.Miss.)
END OF DOCUMENT

HRichardson v. New Century Mortg. Corp.
C.A.5 (Miss.),2006.
This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Fifth Circuit Rule 47.5.4. (FIND CTA5 Rule 47.)

United States Court of Appeals,Fifth Circuit.
Ronald Dale RICHARDSON, Plaintiff-Appellant,
v.
NEW CENTURY MORTGAGE CORP.; Barry Hunt, Jr., doing business as United Mortgage Desoto and Equity Title & Escrow Company of Memphis LLC; Equity Title & Escrow Company of Memphis LLC, Defendants-Appellees.
No. 05-60826.

Oct. 19, 2006.

Billie Sean Akins, Fortier & Akins, Ripley, MS, for Plaintiff-Appellant.
George Dewey Hembree, III, McGlinchey Stafford, Jackson, MS, Brian L. Davis, Southaven, MS, Linda Jew Mathis, Golden & Mathis, Memphis, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi, Case No. 2:03-CV-372.

Before JONES, Chief Judge, and SMITH and STEWART, Circuit Judges.

PER CURIAM: [FN*]

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

***1** The court has considered appellant's position in light of the briefs and pertinent portions of the record. Appellant raises no significant arguments or factual or legal issues that he did not raise in the district court. Having done so, we find no reversible error of fact or law and affirm for essentially the reasons stated in the comprehensive opinion of the district court.

AFFIRMED.

C.A.5 (Miss.),2006.
Richardson v. New Century Mortg. Corp.
202 Fed.Appx. 773, 2006 WL 2990260 (C.A.5 (Miss.))

END OF DOCUMENT