IN THE SUPREME COURT OF 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;
The 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

BRIEF OF APPELLANT FLAGSTAR BANK, FSB

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CERTIFICATE OF INTERESTED PERSONS

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

1. Calvin and Jamie Danos, Picayune, Mississippi, and Lafitte, Louisiana, Plaintiffs/Appellees

2. Laura Matherne, Gavin Danos, and Marissa Danos, minor children, Plaintiffs/Appellees

3. Flagstar Bank FSB, Troy, Michigan, Defendant/Appellant

4. Michael Burks, Pass Christian, Mississippi, Defendant

5. Catherine Jacobs, Ocean Springs, Mississippi, counsel for Plaintiffs/Appellees

6. Matthew Mestayer, Biloxi, Mississippi, counsel for Plaintiffs/Appellees

7. Camille Henick Evans, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, Jackson, Mississippi, counsel for Defendant/Appellant Flagstar Bank FSB

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Counsel for Appellant Flagstar Bank, FSB

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STATEMENT OF THE ISSUES

I. Did the trial court err when it entered a default judgment against Flagstar Bank, FSB for not appearing at docket call or trial when no notice of trial setting was sent by the Circuit Clerk to Flagstar, and even though the plaintiffs had not sought entry of default?

II. Did the trial court abuse its discretion when it refused to set aside the default judgment and judgment against Flagstar Bank, FSB, and did it abuse its discretion in not considering the three factors for setting aside a default judgment?

III. Did the trial court abuse its discretion in not setting aside the $500,00.00 damages award against Flagstar Bank, FSB or not apportioning damages as to Flagstar?

STATEMENT OF THE CASE

A. Nature of the Case

Flagstar Bank FSB appeals the trial court's denial of its Motion to Set Aside Default Judgments. Among other defendants, Plaintiffs sued Flagstar Bank FSB ("Flagstar), a lending institution that for a short while held the mortgage on property and a mobile home Plaintiffs later claimed was defective. The answering defendants were all dismissed or granted summary judgment. A default judgment was entered against Flagstar on the basis "the clerk having called the dockets, and on three different occasions called the defendants [sic], Flagstar Bank FSB, and said Defendant failed to answer or appear." (R. 1344-1345; R.E. 9-10[1]). The trial court entered a judgment on the basis of default and awarded $500,000.00 jointly and severally against Flagstar and the property seller, Michael Burks.

B. Course of Proceedings and Disposition Below

On March 22, 2004, Plaintiffs/Appellees Calvin and Jamie Danos filed suit in the Circuit Court of Lamar County, Mississippi against various defendants -- Allstate Property & Casualty Insurance, Coldwell Bankers Country Properties, Country Living Insurance Inc., AmeriGo Mortgage, Flagstar Bank FSB, Chris Shirley, Angela Miller, Michael Burks, and John Doe 1, 2, & 3, Shirley Roe 1, 2, & 3 and ABC Corp. 1, 2, & 3 (R. 13) -- alleging the Plaintiffs, who residents of Pearl River County, had been sold a damaged mobile home in Picayune, Mississippi, by individual defendant Michael Burks in May of 2001. The Plaintiffs served Allstate Property & Casualty Insurance ("Allstate") by service on the Mississippi Insurance Commissioner (R. 77); Coldwell Bankers Country Properties ("Coldwell Bankers") and Angela Miller, a real estate broker employed by Coldwell Bankers, in Picayune, Mississippi (R.107-110); Country Living Insurance Inc. ("Country Living"), an insurance

[1] Record Excerpts are noted as "R.E."

agency located in Poplarville, Mississippi (R. 105-106); and AmeriGo Mortgage ("AmeriGo"), a mortgage brokering agency based in Hattiesburg, Mississippi (R. 99-100), and Chris Shirley, an employee of AmeriGo based in Pass Christian, Mississippi (R. 101-102). Each of these four defendant groups[2] filed answers and engaged in discovery with the Plaintiffs. Plaintiffs apparently served the property seller, the individual defendant Michael Burks (R. 103-104), in a place other than his original known address, but he did not answer the pleadings.

Plaintiffs attempted to serve the non-resident corporation Flagstar Bank, FSB, a Michigan corporation with no registered agent in Mississippi, by mailing a certified letter, restricted delivery requested, to Albert Gladner, the registered agent of Flagstar *in Michigan* (R. 111-112; R.E. 68-69). However, the mail to Flagstar was not signed for by Gladner (R. 112; R.E. 69) but only by a mail clerk who did not have authority to accept service of process for Flagstar. (R. 1355-56, 1365; R.E. 16-17, 26). Flagstar did not file an answer to the pleadings.

The four answering defendant groups engaged in discovery with the Plaintiffs. On several occasions the trial court clerk issued a trial calendar or notices of pre-setting of trial, but each time these were addressed only to counsel for the Plaintiffs and counsel for Allstate, Country Living, Coldwell Bankers and Miller, and AmeriGo and Shirley. (R. 02-04, 225, 264, 850, 873, 912; R.E. 2-4, 70-74).

Depositions and motions for summary judgment occupied the parties for two years. Defendants Coldwell Bankers and Miller were the first to file a summary judgment motion on July 28, 2004 (R. 118-137, 234-263, 454-523), to which the Plaintiffs responded on August 10, 2004. (R. 142-162). Country Living then filed a motion for summary judgment on March 29,

[2] The four answering defendant groups were: (1) insurance company Allstate, (2) insurance agency Country Living, (3) real estate broker Coldwell Bankers and its employee Angela Miller, and (4) mortgage broker/lending originator AmeriGo and its employee Chris Shirley.

2005 (R. 265-453), but the record does not reflect any response by Plaintiffs at any time. The hearing on Coldwell Bankers' and Country Living's summary judgment motions was rescheduled several times. (R. 524-526, 528-529, 532-533, 535-537, 538-541, 570-572, 588-590). Thereafter Allstate filed a motion for summary judgment on June 3, 2005 (R. 545-556), and the June 13, 2005 hearing continued and re-noticed several times (R. (R. 557-558, 585-586). In the meantime, on June 6, 2005, Coldwell Bankers and Miller were dismissed as defendants. (R. 569). Country Living was dismissed on December 6, 2005 (R. 851) with Plaintiffs never having responded to its summary judgment motion.

On August 4, 2005, AmeriGo and Shirley filed a motion for summary judgment with extensive exhibits (R. 592-841) and noticed the motion for hearing (R. 842-843), but Hurricane Katrina caused some delays in scheduling and further depositions. Several times Allstate's and AmeriGo's summary judgment motions were re-noticed for hearing (R. 853-855, 871-872, 909-911, 913-915) and trial continuances were granted (R. 864-870, 887-891, 893-898), but it was not until September 5, 2006, that Plaintiffs responded to Allstate's motion for summary judgment (R. 1174-1318). Plaintiffs never responded to AmeriGo and Shirley's summary judgment motion that had been filed over a year earlier.

On September 11, 2006, Allstate's and AmeriGo's motions were to be argued. (R. 909, 913). September 11, 2006 was also the date of the docket call before the court's trial calendar.[3] (R. 912). On that date the trial court signed an Order Granting Motion for Summary Judgment as to AmeriGo and Shirley, finding that "the Plaintiffs have no grounds to oppose the motion." (R. 1337-1338; R.E. 88-89). The next day the trial court signed a Memorandum Opinion and Final Judgment grating Allstate's motion for summary judgment. (R. 1339-1343; R.E. 90-94). The Plaintiffs did not appeal from these adverse rulings.

[3] The trial was set for September 19, 2006, following the September 11, 2006 docket call. (R. 912).

At the same time the summary judgments were granted, Plaintiffs applied for entry of default against the individual Burks, and, on the same date of September 11, 2006, the trial court clerk filed an Entry of Default against Michael Burks "only." (R. 1333-1336, 1366A-1367; R.E. 28-31). Plaintiffs did not similarly apply for entry of default against Flagstar. On September 21, 2006, the trial court signed a "Default Judgment" against Flagstar, stating:

> 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, it is therefore
>
> ORDERED AND ADJUDGED that Default Judgment be and is hereby entered against the Defendant, Flagstar Bank FSB and in favor of the Plaintiffs pursuant to Rule 55(b) of the Mississippi Rules of Civil Procedure.

(R. 1344; R.E. 9). In that same order the trial court set a hearing on damages to be held on September 29, 2006. (*Id.*). This default judgment signed on September 21, 2006 was not filed with the Clerk until several days later, September 25, 2006. The trial court held a hearing on September 29, 2006, attended only by the Plaintiffs, and allowed Plaintiffs to make a presentation of exhibits and brief testimony. (TR.[4] at 1-16; R.E. 95-111). The trial court then entered a Judgment awarding Plaintiffs the amount of $500,000.00 against Defendants Burks and Flagstar "jointly and severally." (R. 1345; R.E. 10).

Flagstar was mailed the default judgment and judgment in late September, 2006 (R. 05; R.E. 5). Flagstar thereafter obtained counsel and filed a Motion to Set Aside Default Judgments and for Additional Relief on November 15, 2006, challenging the default judgment of September 26, 2006, and the Judgment of September 29, 2006. (R. 1353-1382; R.E. 14-46). Plaintiff responded to the motion on March 2, 2007 (R. 1393-1406; R.E. 47-60), and Flagstar

[4] The transcript consisting of seventeen (17) pages is contained in Volume 12 of the Record.

submitted a rebuttal on March 8, 2007 (R. 1419-1425; R.E. 61-67). Although counsel appeared for a hearing on March 12, 2007 (R. 1387, 1390), the trial judge had prepared a proposed Memorandum Opinion and Order and no hearing on the record was conducted. The trial judge entered the Memorandum Opinion and Order on March 12, 2007, denying Flagstar's Motion to Set Aside Default Judgments. (R. 1426-1428; R.E. 11-13).

Flagstar timely filed its Notice of Appeal on March 15, 2007, appealing from the March 12, 2007 denial of its Motion to Set Aside Default Judgments and for Other Relief (R. 1429-1430; R.E. 7-8), and obtained a stay from the Supreme Court after Plaintiffs demanded payment of the full judgment plus interest. (R. 1442).

C. Statement of the Facts

The Plaintiffs Calvin and Jamie Danos and family ("Danos") decided to purchase a mobile home and 8.12 acres of property in Picayune, Mississippi, in March 2001. As the trial court found in ruling on Allstate's motion for summary judgment, which was incorporated into the Order which is the subject of this appeal (R. 1426; R.E. 11):

> This case arises out of an alleged sale of a defective manufactured home and the subsequent denial of insurance coverage. On or about March 23, 2001 the Plaintiffs, Calvin and Jamie Danos, offered to purchase a manufactured home and the surrounding acreage from Michael Burks, through their realtor Angela Miller, subject to obtaining financing.
>
> In an effort to obtain financing, the plaintiffs contacted Chris Shirley with AmeriGo Mortgage and began the process of obtaining the necessary financing, which included procuring an appraisal and insurance. At the request of the plaintiffs, Shirley contacted an appraiser who agreed to conduct the appraisal. After the appraisal was conducted the plaintiffs contacted Country Living Insurance, Inc., who after receiving the appraisal subsequently issued a policy though Allstate Insurance.

(R. 1339-1340; R.E. 90-91).

The Danoses closed on the mobile home and acreage on May 9, 2001. (R. 1340). Flagstar Bank FSB ("Flagstar") was one of 20 or 30 lenders to whom AmeriGo sold loans it originated, and Flagstar "ended up" with buying the loan to the Danoses in 2001. (R. 996, 1002, 1008-1009).

Several months after the sale of the property, after Tropical Storm Allison had dumped heavy rains in the area in June 2001, the Danos family noticed water coming into the mobile home and even later they discovered mold in the mobile home. The Danoses sought help from their real estate agent Miller, the seller Burks, and their insurance company Allstate for the water leaks and mold. They alleged several misrepresentations in March 2001 by the seller Burks as to the condition of the mobile home, and that they had relied on the seller's representations as to age of the mobile home, age of the roof on the mobile home, any infestations in the mobile home, and any leaks or other problems with the roof. (R. 15). This lawsuit was filed in 2004 against Allstate as the insurance company on the policy the Danoses obtained, Country Living the insurance agency through whom they obtained the Allstate policy, Coldwell Bankers and Miller as the real estate brokers, AmeriGo Mortgage and Chris Shirley as the mortgage brokers who helped in arranging financing of the purchase, Michael Burks as the seller of the allegedly damaged mobile home, and Flagstar Bank which had funded the mortgage to the Plaintiffs. (R. 13-23).

In the Complaint (R. 13-23), Flagstar is mentioned only twice. The first mention is in Paragraph 9, in which the registered agent for service of process in Michigan (not Mississippi), Albert Gladner, is named. (R. 14). The only other mention of Flagstar in the Complaint is in Count VI, Paragraph 45, for which the cause of action is not identified:

> 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). No conduct by Flagstar was alleged in any manner; Plaintiffs simply alleged that information by others was submitted to Flagstar. (*See Id.*). The next paragraph 46 states only that "[b]ut 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." (R. 22).

Flagstar is a banking and mortgage lending company in Troy, Michigan, that funds mortgages meeting its underwriting guidelines. (R. 1361; R.E. 22). Flagstar is not a resident corporation of Mississippi and does not have branches in Mississippi, nor does it have a registered agent for service of process in Mississippi. (R. 1356; R.E. 17). Plaintiffs attempted to serve the non-resident corporation Flagstar under Miss. R. Civ. P. 4(c) (5) by certified mail, restricted delivery, to Albert Gladner the registered agent of Flagstar *in Michigan* (R. 111-112; R.E. 68-69). However, the mail receipt to Flagstar was not signed by Gladner (R. 112; R.E. 69) but only by a mail clerk named Romeo Pena, who did not have authority to accept service of process for Flagstar and who was not an agent for Albert Gladner. (R. 1355-56, 1365-66; R.E. 16-17, 26-27).

The lawsuit proceeded against the four answering defendant groups as noted *supra* in the Course of Proceedings, with dismissals or summary judgments granted to each of the defendant groups following substantial discovery. AmeriGo and Shirley filed a comprehensive motion for summary judgment (R. 592-841, 916-1170), to which the Plaintiffs never responded, and the trial court signed an Order Granting Motion for Summary Judgment as to AmeriGo and Shirley, finding that "the Plaintiffs have no grounds to oppose the motion." (R.

1337-1338; R.E. 88-89). The trial court thereafter issued a Memorandum Opinion and Final Judgment granting Allstate's motion for summary judgment (R. 1339-1343; R.E. 90-94), specifically finding:

> Here, the Court finds that any alleged failure to properly inspect by Allstate, before issuing the policy, which resulted in damages, is outside the circle of foreseeability. While obtaining insurance was a prerequisite to obtaining financing, there is no evidence that the plaintiffs would not have consummated the purchase with another insurer, or sought alternative financing.

(R. 1342; R.E. 93).

On September 21, 2006, after entering summary judgments for the other defendants, the Circuit Court of Lamar County entered a default judgment against Defendant Flagstar, stating:

> 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, it is therefore
>
> ORDERED AND ADJUDGED that Default Judgment be and is hereby entered against the Defendant, Flagstar Bank FSB and in favor of the Plaintiffs pursuant to Rule 55(b) of the Mississippi Rules of Civil Procedure. It is further
>
> ORDERED AND ADJUDGED that the hearing on damages be and is hereby set over to September 29, 2006 at 11:00 A.M. at the Lamar County Courthouse in Purvis, Mississippi.

(R. 1344; R.E. 9).

The circuit court held a hearing on September 29, 2006, in which it took testimony and exhibits from the Plaintiffs Danos and their counsel. (TR. 1-16; R.E. 95-111) At the start of the

hearing, the trial court again stated its belief that Flagstar had been notified of the trial date: "Let the record show that this case was set for trial *and the Clerk duly notified all the parties of the trial date.* And not only have the defendants, Michael Burks and Flagstar Bank, not filed anything in this matter, but neither defendant appeared on the date the case was set for trial." (TR. at 2; R.E. 97)(emphasis added). Contrary to these assertions, Flagstar had not received any notification of the September 2006 trial nor of the hearing and, consequently, it was not present. The trial court entered a Judgment on September 29, 2006, stating that the matter came on for hearing on the motion of the Plaintiff for default judgment against Michael Burks and Flagstar, and again holding that "the case having been called for trial on the merits and neither Defendant having appeared or pled or otherwise defended . . . and neither Defendant having appeared for trial on the merits . . . ." (R. 1345; R.E. 10). The trial court set the damages at $500,000.00 -- half a million dollars -- against Burks and Flagstar *jointly and severally*. (R. 1345, TR. at 14; R.E. 10, 109).

The trial court denied Flagstar's Motion to Set Aside Default Judgments and for Additional Relief finding "[t]he 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." (R. 1426; R.E. 11).

SUMMARY OF THE ARGUMENT

A default judgment is a drastic, disfavored measure that is contrary to the strong policy of this State in favor of resolving cases on their merits. The Mississippi Supreme Court has declared "[t]o be sure, default judgments are not favored and trial courts should not be grudging

in the granting of orders vacating such judgment where showings within the rules have arguably been made." *McCain v. Dauzat*, 791 So. 2d 839, 842 (Miss. 2001); *see also King v. Sigrest,* 641 So. 2d 1158, 1161 (Miss. 1994) ("[d]efault judgments are not favored, and trial judges have traditionally been lenient when it comes to relieving a party of the burden of a default judgment."); *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 552 (Miss. Ct. App. 2000) (default judgments are not favored). Yet in this case the trial court was grudging and denied Flagstar's motion to set aside a default judgment and judgment of $500,000.00 even though a "showing within the rules" was made.

First, the trial court erred by entering a default judgment against Flagstar for not appearing at a docket call or trial when no notice of such docket calls or trial settings had ever been sent by the Circuit Clerk to Flagstar. The trial court premised the default judgment and judgment on the belief the "clerk duly notified all the parties of the trial date" (TR. 2; R.E. 97) and that Flagstar failed to appear at the trial. (R. 1426; R.E. 11). The record shows, however, that 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). Rather, the clerk only sent notices to counsel for the answering defendants, and each time the clerk did not send a notice to Flagstar. The specific basis for the court's ruling of default and subsequent denial of the motion to set aside default is contrary to the record itself. The trial court also erred in issuing a "default judgment" when the Plaintiffs had not first sought an entry of default under Miss. R. Civ. P. 55(a). One of the purposes of an entry of default is to then provide the defaulting party with notice of a hearing before the court ascertains the measure of recovery and enters a default judgment. See Comment to Miss. R Civ. P. 55. Flagstar was not afforded this opportunity because of the trial court's mistaken belief that trial notices were previously sent to Flagstar.

Having initially erred in entering a default judgment against Flagstar on the basis of Flagstar not appearing at docket calls for which it never received notice from the Clerk, the trial court abused its discretion when it failed to apply the factors in determining whether to set aside a default judgment. The Mississippi Supreme Court has articulated a three-prong balancing test in determining whether to set aside a default judgment: (a) whether the defendant has good cause for the default; (b) whether the defendant has a colorable defense to the merits of the claim; and (c) the nature and extent of prejudice which may be suffered by the plaintiff if the judgment is set aside. *McCain v. Dauzat*, 791 So. 2d at 843; *Williams v. Kilgore*, 618 So. 2d 51, 55 (Miss. 1992). It was not necessary that Flagstar satisfy all three prongs of the balancing test; rather, a satisfactory showing of merit as to any one of the three prongs would be sufficient to justify relief from a default judgment. *See American Cable Corp.*, 754 So. 2d at 555. Yet the trial court did not address these factors at all in denying the motion to set aside, and abused its discretion by ignoring these factors.

"Good cause" existed for the "default" by Flagstar due to a faulty service of process by mail. However, 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 three docket calls allowed it to misconstrue those issues as a "good cause for default" issue. The trial court wholly failed to address the good cause reason for any default in the first place: Flagstar was not served properly. "Before 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). Plaintiffs' attempt to serve the non-resident corporation by certified mail to Gladner under Miss. R. Civ. P. 4(c)(5) was not effective service because it was not signed for by Gladner or any other agent or officer authorized to receive service of process. Rather, a mail

clerk who did not have authority to accept service of process, who was not an agent for Gladner, and who was not authorized to sign restricted delivery mail addressed to Gladner (R. 1356, 1365-66; R.E. 17, 26-27) initialed the receipt. This very issue of a summons and complaint via certified mail being signed for by a mail clerk instead of the corporate officer to whom addressed was decided in *Brown v. Bristol-Myers Squibb Co.*, 2002 WL 34213425 (S.D. Miss. 2002), as insufficient service of process. In *Brown* the court, relying on Mississippi law, held, "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. Further the *Brown* court held the default judgment was void since service of process was defective. *Id.* at *5.

Moreover, Flagstar had a colorable defense to the merits of Plaintiffs' claims, and the Mississippi Supreme court has repeatedly stated this is the most important factor in deciding whether to set aside a default. *Allstate Ins. Co. v. Green*, 794 So. 2d 170, 174 (Miss. 2001); *Bailey v. Georgia Cotton Goods Co.*, 543 So. 2d 180, 182 (Miss. 1989); *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.'"); *see also American Cable Corp.*, 754 So. 2d at 555. The claim against Flagstar in the Complaint was tied only to an alleged relationship with AmeriGo Mortgage and Chris Shirley who provided information to Flagstar, and was thus founded on vicarious liability only. AmeriGo and Shirley were granted summary judgment with the finding that the Plaintiffs had no grounds to oppose the summary judgment. (R. 1337; R.E. 88). Since Flagstar's liability was premised vicariously on AmeriGo and Shirley's alleged liability, dismissal of AmeriGo and Shirley

precluded a finding of liability against Flagstar. *See Richardson v. New Century Mortgage Corp.*, 2005 WL 154026 *9-10 (N.D. Miss. 2005) (mortgage lender not liable for broker's actions). *See also Lewis v. Lynn*, 236 F.3d 766, 768 (5th Cir. 2001)(when defending party establishes that plaintiff has no cause of action, this defense generally inures to benefit of defaulting defendant.); *Davis v. National Mortgage Corp.*, 349 F.2d 175, 178 (2nd Cir. 1965) (when liability of defendants was alleged to be joint, dismissal of complaint for lack of proof disposed of case against all defendants including those who had defaulted). The trial court abused its discretion in ignoring the colorable defense of Flagstar.

The final prong that was met is "absence of prejudice" to Plaintiffs in having a hearing on the merits as to Flagstar. Plaintiffs presumably based whatever unknown cause of action against Flagstar on the same facts as asserted against AmeriGo and Shirley, and those facts and claims were addressed in AmeriGo's summary judgment motion and exhibits. Plaintiffs waited for over two and a half years before the default judgment was entered against Flagstar, and Flagstar filed a motion to set aside a little over a month after the default judgment. This court should find no prejudice to Plaintiffs under *American Cable Corp.*, 752 So. 2d at 555, and *City of Jackson v. Presley*, 942 So. 2d 777, ¶29 (Miss. 2006).

The trial court abused its discretion in not setting aside the default judgment and this Court should not let this injustice stand. Further, default against Flagstar should be set aside to prevent "jackpot justice." Alternatively, the trial court's damage award is not supported by properly admitted evidence and the judgment as to $500,000.00 damages "jointly and severally" should be set aside to allow for a hearing on the issue of allocation of damages as to Flagstar.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The Mississippi appellate courts review a decision whether to set aside a default judgment on an abuse of discretion standard. *Stanford v. Parker*, 822 So. 2d 886, 887-88 ¶6 (Miss. 2002); *McCain v. Dauzat*, 791 So. 2d 839, 842 (Miss. 2001)("[w]hen reviewing the denial of a motion to set aside a default judgment, [the Mississippi Supreme Court] will disturb the ruling where the trial court has abused its discretion."). "While the trial court has considerable discretion, this discretion is neither 'unfettered' nor is it 'boundless.'" *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545 (¶ 27) (Miss. Ct. App. 2000); see also *Chassaniol v. Bank of Kilmichael*, 626 So. 2d 127, 135 (Miss. 1993). The *McCain* court declared that "[t]o be sure, default judgments are not favored and trial courts should not be grudging in the granting of orders vacating such judgment where showings within the rules have arguably been made." 791 So. 2d at 842 (*citing Guaranty Nat'l Ins. Co. v. Pittman,* 501 So. 2d 377, 388 (Miss. 1987)).

A different standard may apply to the lower court's error before the denial of the motion to set aside default judgment, because the lower court did not base the default judgment on proper evidence in the record. 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 (Miss. 2002) (if plain error in court's finding, appellate court can address).

II. FLAGSTAR IS ENTITLED TO RELIEF FROM THE DEFAULT JUDGMENT.

A. Trial Court Erred in Issuing a Default Judgment.

The trial court in the present case erred by entering a default judgment against Flagstar for not appearing at a docket call or trial when no notice of any trial setting was sent by the

Circuit Clerk to Flagstar. The trial court also erred by entering the "default judgment" even though the plaintiffs had not sought entry of default against Flagstar.[5]

1. The Trial Court Erred When It Entered Default Judgment Purportedly for Failure to Appear at Trial or Docket Call.

The trial court entered a default judgment against Flagstar based on Rule 55(b), which provides:

> In all cases the party entitled to a judgment by default shall apply to the court therefore. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing of such application; however, judgment by default may be entered by the court on the day the case is set for trial without such three days' notice.

Miss. R. Civ. P. 55(b). The trial court erred when it entered a default judgment against Flagstar solely for not appearing at the docket call or trial because Flagstar was never sent any notice of trial setting by the Circuit Clerk. In the default judgment the trial court held:

> 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, it is therefore
>
> ORDERED AND ADJUDGED that Default Judgment be and is hereby entered against the Defendant, Flagstar Bank FSB . . .

(R. 1344; R.E. 9) (emphasis added). In the subsequent September 29 hearing on damages the trial court again noted:

> Let the record show that this case was set for trial and the Clerk duly notified all the parties of the trial date. And not only have the defendants, Michael Burks and Flagstar Bank, not filed anything in this

[5] Although Plaintiffs sought an entry of default on September 11, 2006, against the property seller Michael Burks, they did not seek entry of default against Flagstar. (R. 1366A-1367; R.E. 28-31).

> matter, but neither defendant appeared on the date the case was set for trial. On that date the Court found under Rule 56 [sic] that they were not only in default on failing to file an answer but, also, in failure to appear at the trial.

(Sept. 29, 2006 TR. at 2; R.E. 97)(Emphasis added).

In the Judgment entered on September 29, 2006, the trial court again emphasized it was based on "the case having been called for trial on the merits and neither Defendant appeared for trial on the merits." (R. 1345; R.E. 10). In denying Flagstar's Motion to Set Aside Default Judgments the trial court stated:

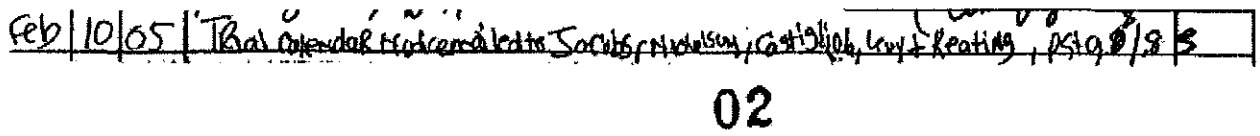
> The basis for the Judgment was that the defendant failed to appear for a trial on the merits, and that on three different docket calls, the defendant had failed to appear, or make any announcement. After entry of the judgment, and consistent with M.R.C.P. 55, this Court held a hearing on damages, where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

(R. 1426; R.E.11).

The trial court erroneously based the default judgment and judgment -- and the denial of the motion to set aside the "default judgments" -- on the mistaken belief that on three different occasions the Clerk had "called" Flagstar for the docket. Yet, the record is clear *the Clerk of the Court did not send any notice to Flagstar on any of the three or four occasions that the trial court issued notices of trial settings.* The record does not support the "basis" on which the trial judge relied in entering default judgment and in thereafter denying the motion to set aside the default.

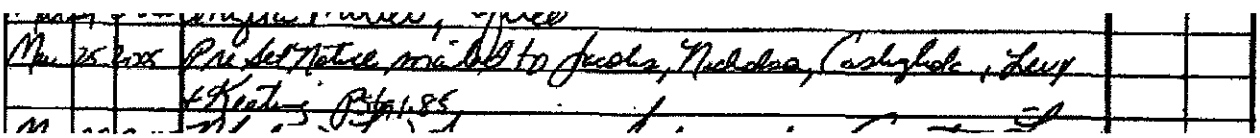
The trial court signed a Notice of Cases on Trial Calendar on February 10, 2005, for the call of the trial docket on March 14, 2005, but the Notice does not identify Flagstar as a defendant and the docket sheet does not indicate the clerk sent the trial calendar to Flagstar.

(R. 2, 225; R.E. 2, 70). The Clerk's docket entries reveal the notice was sent only to "Jacobs" (Catherine H. Jacobs, counsel for plaintiffs Danos), "Nicholson" (Gail Nicholson of NICHOLSON & NICHOLSON, counsel for Angela Miller and Coldwell Banker Country Properties), "Castigliola" (Vincent Castigliola of BRYAN, NELSON, SCHROEDER, CASTIGLIOLA & BANAHAN, counsel for Allstate Property & Casualty Insurance), "Levy" (Terry Levy of DANIEL, COKER, HORTON & BELL, counsel for Country Living Ins., Inc.), and "Keating" (Hugh Keating of DUKES, DUKES, KEATING AND FANECA, counsel for AmeriGo Mortgage and Chris Shirley):



02

(R. 2; R.E. 70). Thereafter a Notice of Pre-Setting for Trial was entered by the Clerk on March 25, 2005 (R. 264; R.E. 71), but again it is clear the Clerk only sent the notice to "Jacobs" (Catherine H. Jacobs, counsel for plaintiffs Danos), "Nicholson" (Gail Nicholson, counsel for Angela Miller and Coldwell Banker Country Properties), "Castigliola" (Vincent Castigliola, counsel for Allstate Property & Casualty Insurance), "Levy" (Terry Levy, counsel for Country Living Ins., Inc.), and "Keating" (Hugh Keating, counsel for AmeriGo Mortgage and Chris Shirley):

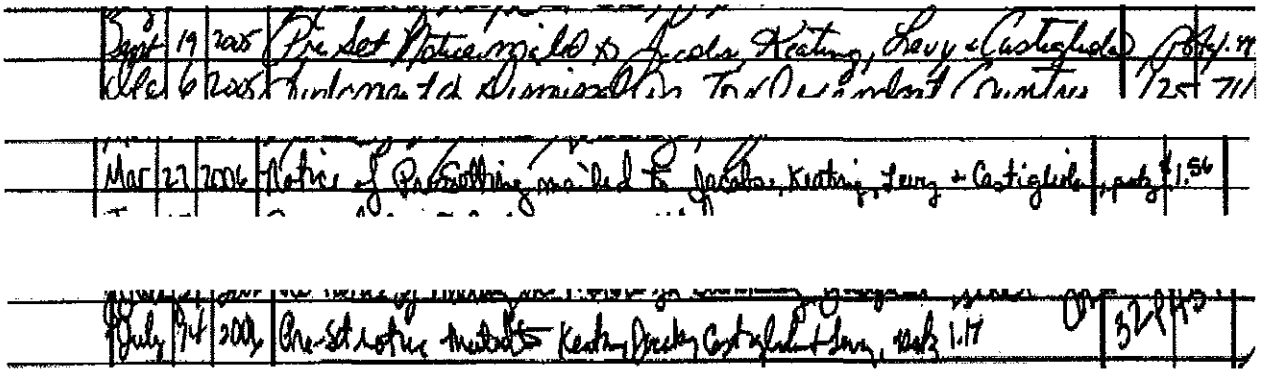


(R. 3; R.E. 3)

The trial court dismissed Nicholson's clients Angela Miller and Coldwell Banker on June 6, 2005. (R. 569). Thereafter, on three other occasions[6] the trial court signed notices of

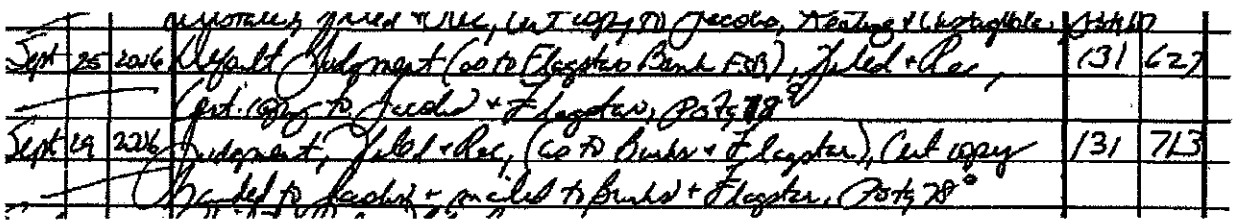
[6] The re-settings were due to motions for continuance being granted (R. 864, 887, 898), and the re-setting of hearings on the other defendants summary judgment motions. (R. 853, 871, 909, 913). The second and

pre-setting the trial calendar (R. 850, 873, 912; R.E. 72-74), but each time the Clerk did not send a notice to Flagstar.



(R. 4; R.E. 4).

Yet, *after* the default judgment was entered in September 2006, the Clerk had no problem in sending a notice to Flagstar Bank:



(R. 5; R.E. 5).

The "facts" on which the trial judge specifically based his initial ruling of default and his subsequent denial of the motion to set aside default are not supported by the record, and a reading of the Clerk's docket entries would have shown the error that the Clerk did not notify Flagstar of any of the trial settings. The trial court committed clear and plain error in concluding that Flagstar failed to appear after notice of the trial and docket calls.

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third notices were sent to "Levy" as counsel for Country Living even though Country Living had been dismissed in December 2005. (R. 851-852)

2. Trial Court Erred In Issuing Default Judgment When There Had Been No Entry Of Default.

Miss. R. Civ. P. 55(b) states that **"[i]n all cases** the party entitled to a judgment by default **shall** apply to the court therefor." *Id.* (emphasis added). By its clear language, "Rule 55 contemplates and requires that a party seeking the default of an adversary must make written application to the court therefor, setting forth the grounds therefor. [citation omitted] When this has not been done, the court has no authority to enter the default." *Smith v. Everett*, 483 So. 2d 325, 327-28 (Miss. 1986); *see also Vining v. Mississippi State Bar Association*, 508 So. 2d 1047, 1048 (Miss. 1987) ("A party seeking a default judgment must make a written application to the Court."); *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 387 (Miss. 1987) (Rule 55 (b) "provides that judgment may be entered upon a party's default only upon application to the court.").

The record reflects that the Plaintiffs never applied for an Entry of Default against Flagstar under Miss. R. Civ. P. 55(a), even though they did so against Michael Burks. Plaintiffs offered no justification for failing to do so. The Comment to Rule 55 reads:

> The purpose of Rule 55 is to provide a uniform procedure for acting upon and setting aside actions upon parties' defaults.
>
> Prior 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.

Comment to Miss. R. Civ. P. 55. One of the purposes of an entry of default is to then 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.

Flagstar was never afforded the opportunity to contest any "default" because of the trial court's mistaken belief the trial notices were sent to Flagstar, as noted above. The trial court erred in entering a default judgment when there had been no entry of default. Further, the trial court mistook whether Flagstar should have received entry of default before a default judgment for whether there was even a default -- or at least "good cause" for a default -- in the first place.

B. Trial Court Failed to Balance Factors In Determining Whether To Set Aside A Default Judgment and Abused Its Discretion.

Having initially erred in entering a default judgment against Flagstar on the basis of Flagstar not appearing at docket calls for which it never received notice from the Clerk, the trial court abused its discretion when it wholly failed to balance the factors in determining whether to set aside a default judgment. Mississippi courts "recognize and seriously consider the importance of litigants having a trial on the merits and the fact that any error made by the trial judge should be in the direction of setting aside a default judgment and proceeding with trial." *Leach v. Shelter Ins. Co.*, 909 So. 2d 1283, 1288 (Miss. Ct. App. 2005).

As the Mississippi Supreme Court has consistently recognized, "'[d]efault judgments are **not** favored, and trial judges have traditionally been lenient when it comes to relieving a party of the burden of a default judgment.'" *King v. Sigrest,* 641 So. 2d 1158, 1161 (Miss. 1994), quoting *Bell v. City of Bay St. Louis*, 467 So. 2d 657, 661 (Miss. 1985) (emphasis added). "The decision to grant or set aside a default judgment is addressed to the sound discretion of the trial court." *Tatum v. Barrentine*, 797 So. 2d 223, 227 (Miss. 2001) (citing *Williams v. Kilgore*, 618 So. 2d 51, 55 (Miss. 1992)). However, the trial court's "discretion is neither 'unfettered' nor is it 'boundless.'" *Chassaniol v. Bank of Kilmichael*, 626 So. 2d 127, 135 (Miss. 1993); *see also*

McCain v. Dauzat, 791 So. 2d 839 (Miss. 2001) (same); *American Cable Corp.*, 754 So. 2d at 552. The trial court's discretion must be exercised in accordance with 55(c) and 60(b) of the Mississippi Rules of Civil Procedure. *Tatum*, 797 So. 2d at 227.

The Mississippi Supreme Court has articulated a three-prong balancing test in determining whether to set aside a default judgment pursuant to Rule 60(b):

a. whether the defendant has good cause for default;

b. whether the defendant has a colorable defense to the merits of the claim; and

c. the nature and extent of prejudice which may be suffered by the plaintiff if the judgment is set aside.

McCain v. Dauzat, 791 So. 2d at 843; *Williams*, 618 So. 2d at 55; *International Paper Co. v. Basila*, 460 So. 2d 1202 (Miss. 1984).

Although Flagstar addressed all three of the *McCain* factors in its motion to set aside (R. 1355-1363; R.E. 16-24), the trial court did not address the second and third factors in its opinion and erred in its statement of facts concerning the first prong. Instead, the trial court was unduly preoccupied with whether there should have been an entry of default, misconstruing that for the "good cause" argument, and held simply that "neither an application or a clerk's entry of default was needed in light of the facts." (R. 1428; R.E. 13). The trial court did not address the true factors required by *McCain*. Further, it was not necessary that Flagstar satisfy all three prongs of the balancing test; rather, a satisfactory showing of merit as to any one of the three prongs would be sufficient to justify relief from a default judgment. *See American Cable Corp.*, 754 So. 2d at 555 ¶ 41.

1. Good Cause Existed for "Default" Due to Ineffective Service of Process.

The trial court was diverted by the notion that Flagstar had failed to appear at three docket calls, such that the trial court did not properly consider the good cause for default that

was shown. The trial court stated Flagstar's "chief argument regarding good cause" to set aside the default was that "the record is void as to any entry of default" (R. 1427; R.E. 12), but the trial court wholly failed to address the "good cause" reason for any default in the first place: Flagstar was not served properly. Flagstar had a legitimate reason for failing to file a timely answer -- it was not properly served and the complaint did not reach someone who was knowledgeable about answering a complaint. "*Before 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. "A court must have jurisdiction, proper service of process, in order to enter a default judgment against a party. *Arnold v. Miller*, 26 Miss. (4 Cushm.) 152, 155 (1853). Otherwise, the default judgment is void. *Id.* If a default judgment is void, the trial court has no discretion and must set the judgment aside." *McCain*, 791 So. 2d at 842. The trial court abused its discretion in failing to consider the lack of proper service of process on Flagstar.

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. 1355-1356, 1365-1366; R.E. 16-17, 26-27). Flagstar is not a resident corporation of Mississippi, it does not have branches or offices in Mississippi, nor does it have a registered agent for service of process in Mississippi. (R. 1356; R.E. 17). Plaintiffs attempted to serve the non-resident corporation Flagstar under Miss. R. Civ. P. 4(c)(5) by certified mail, restricted delivery, to Albert Gladner the registered agent of Flagstar in Michigan. (R. 111-112; R.E. 68-69). However, the Return Receipt shows that the mail to Flagstar was not signed for by Gladner (R. 112; R.E. 69), but rather by Romeo Pena, a mail clerk with Flagstar who did not have authority to accept service of process for Flagstar and who was not an agent for Albert Gladner and not authorized to sign restricted delivery mail

addressed to Gladner. (R. 1356, 1365-66; R.E. 17, 26-27). Pena was not an officer, general agent or managing agent for Flagstar. (R. 1356, 1365-66; R.E. 17, 26-27). Even if they utilize Miss. R. Civ. P. 4(c)(5) for certified mail, the Plaintiffs cannot ignore that Miss. R. Civ. P. 4(d)(4) also controls and requires the Plaintiffs to serve "upon a domestic or foreign corporation . . . 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 service of process." Proper service of process on an officer, general agent or managing agent for Flagstar was not completed over Flagstar.

Plaintiffs contended in their response to the motion to set aside merely that the signature on the Return Receipt "resembled the initials A.G." (R. 1393). It is evident, however, the Return Receipt was not properly completed by Gladner and the facts do not support Plaintiffs' counsel's supposition.

PROOF OF SERVICE - SUMMONS
(Process Server)

Flagstar Bank FSB
Name of Person or Entity Served

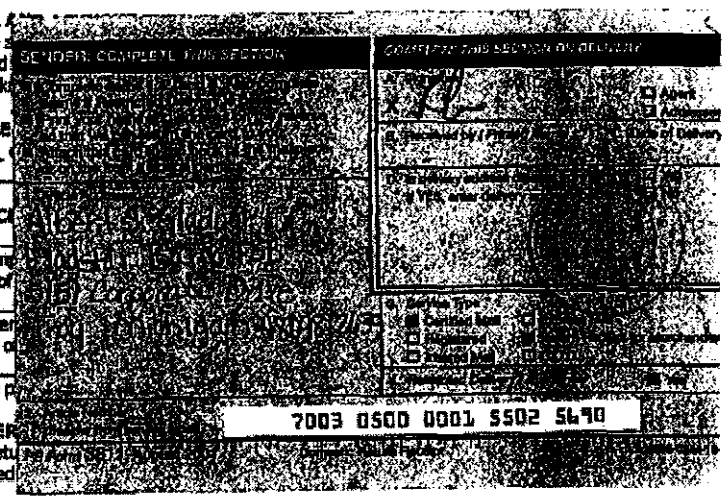
I, the undersigned process server, served the summons and complaint upon the person or entity named above in the manner set forth below:

_____ FIRST CLASS MAIL A
prepaid), on the date
the form of notice and
(Attach completed ack

_____ PERSONAL SERVICE
on the _____
in _____

_____ RESIDENCE SERVIC
the summons and com
usual place of abode of
husband, son, daughter
served above the age o
on the _____
prepaid) copies of the p

X CERTIFIED MAIL SE
prepaid, requiring a retu
return envelope marked



(R. 112; R.E. 69). The Plaintiffs did not properly dispute the Affidavit offered by Flagstar that Albert Gladner did not sign the receipt.

The very issue of the summons and complaint via certified mail being signed for by a mail clerk instead of the corporate officer to whom addressed was decided in *Brown v. Bristol-Myers Squibb Co.*, 2002 WL 34213425 (S.D. Miss. 2002). As the court found:

> 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.* See *Kolikas 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 . . . .

Brown v. Bristol-Myers Squibb Co., 2002 WL 34213425 at *3 (S.D. Miss. 2002) (emphasis added). Further, the court held that a default judgment against that defendant was void since the service of process was ineffective:

> 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. *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.").

2002 WL 34213425 at *5. When confronted with the same factual circumstances as exist in the present case, a court construing Mississippi law has held that service of process was not effective and a default judgment was void and should have been set aside.

Likewise, good cause for default is shown if the defendant appeared in the action but was not properly served with notice before a hearing on the application for default judgment. *Johnson v. Weston Lumber & Bldg. Supply Co.*, 566 So. 2d 466 (Miss. 1990). *See* MS Practice §15-13.

Plaintiffs' response to the motion to set aside judgment in the court below asserted Flagstar never followed up on a letter sent to Plaintiffs' counsel. (R. 1398; R.E. 52). The "letter" (R. 1402; R.E. 56) was sent by an "operations coordinator" in the legal department - not by a lawyer nor by Albert Gladner - who simply informed Plaintiffs' counsel the Danos loan account was sold to Chase Manhattan Mortgage, Inc. in 2001 and provided Chase Manhattan Mortgage, Inc.'s address and phone number. The letter then stated, "Please contact me if you have any further issues you wish to address regarding this matter," and the writer gave his phone number. (R. 1402; R.E. 56). But Plaintiffs' counsel never contacted the letter writer and she never informed him there were any further issues to address after he had directed her to the mortgage holder since 2001. She never informed the letter writer or Flagstar that the summons was more than an inquiry about a mortgage or that the letter did not resolve the question the Danos family had about the Flagstar "loan account." For two and a half years her silence led Flagstar to believe its letter providing the identity of the current mortgage holder was sufficient and that there were no further issues to address. In *Brown v. Bristol-Myers Squibb Co.* the

court found that even if the certified mail with summons and complaint did make its way to the addressee, still proper service was not effective and the default judgment should not stand. *Brown,* 2002 WL 34213425 at *3 (although certified mail did make its way to person to whom it was addressed, and summons and complaint were actually received by proper person to receive process on defendant's behalf, "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."). As the Mississippi Supreme Court has held, "even actual knowledge of a suit does not excuse proper service of process. *Mansour v. Charmax Industries, Inc.*, 680 So. 2d 852, 855 (Miss. 1996); *Brown v. Riley*, 580 So. 2d 1234, 1237 (Miss.1991).

The law allows a default judgment to be set aside when a party has shown good cause for the default. Flagstar was not properly served with process. Accordingly, good cause existed for the "default" by Flagstar and the trial court was in error and abused its discretion in refusing to set aside the default.

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

The trial court in the present case made no mention of Flagstar's asserted defenses and barely addressed what the Mississippi Supreme Court has determined to be the most important factor for this Court to consider 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; *Bailey v. Georgia Cotton Goods Co.*, 543 So. 2d 180, 182 (Miss.1989) (same); *see also American Cable Corp.*, 754 So. 2d at 555 ("If any one of the three factors in the balancing test outweighs the other in

importance, it is this one [colorable defense]"). Yet Flagstar's argument and proof as to its defense that summary judgment in favor of AmeriGo and Chris Shirley precluded any liability of Flagstar (R. 1358-1362, 1374-75) was simply ignored by the trial court in an abuse of discretion.

This is not a case where the only proof of a colorable defense is a short denial of all allegations or a bald affidavit of the defendant. Here, the record before default judgment already established the more than colorable defense of Flagstar. Summary judgment had already been granted to all other answering defendants, including the only links to Flagstar in the Complaint: AmeriGo and Chris Shirley. The trial court need only have looked at the language of the Complaint itself -- already in the record -- to see that a claim against Flagstar could not stand in light of the court's dismissal of AmeriGo and Chris Shirley. In the Complaint (R. 13-23), the only substantive mention of Flagstar is in Count VI of the Complaint, Paragraph 45, for which the cause of action is not identified:

> 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). No conduct by Flagstar was alleged in any manner; Plaintiffs simply alleged that information by others was submitted to Flagstar. (*See Id.*).

The Plaintiffs' response to the motion to set aside on this point was a passing comment, merely one sentence: "In this case, there is nothing in the record to support this Defendant's contention that a colorable defense exists." (R. 1399; R.E. 53). But the record that was in existence before the default was entered does show more than just a "colorable" defense for Flagstar.

The defendants AmeriGo and Chris Shirley filed an extensive summary judgment motion in August 2005, later amending it (R. 592-841, 916-1170; see R.E. 75-83) identifying the various issues of law that precluded judgment against AmeriGo and Shirley. Plaintiffs did not oppose the motion and the trial court's order stated "plaintiffs have no grounds to oppose the motion." (R. 1337; R.E. 88). The trial court granted summary judgment (*Id.*), and no appeal was taken from that Order. According to 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. In regard to the summary judgment motions by the answering defendants including AmeriGo and Shirley, the trial court had been provided with deposition testimony by the Danos Plaintiffs. When asked about specific representations by Shirley or AmeriGo that the Danoses relied on, Calvin Danos answered: "I guess to be sure everything was right, everything was straight, everything, the whole contract, the whole thing." (R. 1060). When asked specifically about paragraph 45 of the Complaint - the only paragraph mentioning Flagstar -- and whether there was any "false and erroneous information" submitted, Calvin 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 could not offer any further specific instances. *Id.* He did not identify any information submitted by Flagstar. Chris Shirley testified that information was given to Flagstar for funding the mortgage,[7] and that no information was submitted by Flagstar to the Danoses. (R. 1008-1009).

[7] The Plaintiffs had never pled any misrepresentations by Flagstar, and Flagstar was not a party to the Seller's Disclosure Statement (R. 24-25 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 and EX 2 to Sept. 29, 2006 hearing). Flagstar was simply a pass-through lender who received information to fund the loan.

The Plaintiffs confessed the AmeriGo summary judgment motion and that they had no grounds to oppose it, and AmeriGo and Shirley's dismissal on summary judgment is a final judicial finding that no genuine issue of material fact existed as to AmeriGo or Shirley's liability to Plaintiffs. To the extent the Danos family seeks to impose vicarious liability upon Flagstar for any alleged acts of broker AmeriGo or Shirley, the Danoses' claims must necessarily fail. *See Richardson v. New Century Mortgage Corp.*, 2005 WL 154026 *9-10 (N.D. Miss. 2005)(mortgage lender not liable for broker's actions). In *Richardson* the court found:

> 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 154026 at *9-10. Since Flagstar's alleged liability was premised vicariously on Chris Shirley's liability, Flagstar could not be held liable for the broker to whom summary judgment had been granted.

Moreover, there was no agency or employment relationship between AmeriGo Mortgage, Chris Shirley and Flagstar (R. 1361-62; R.E. 22-23), and 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). Even if there had been some question as to "agency,"[8] Flagstar still had a colorable defense because "a 'colorable'

[8] Flagstar is aware that Plaintiffs may claim, as they did in the lower court, a hearsay and self-serving "confidential" letter authored by Plaintiffs' counsel asserting AmeriGo's counsel had said "to the effect that Chris Shirley was acting on behalf of Flagstar Bank when he obtained the information necessary to close the loan." (R. 1394, 1403; R.E. 57). Yet Plaintiffs never offered any such testimony to the trial court at the "hearing on default

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)).

Furthermore, in its order denying the motion to set aside default the trial court referenced the "factual background detailed in [the] Court's Memorandum Opinion and Order, on Allstate's Motion for Summary Judgment, in the present case" (R. 1426; R.E. 11), thus the factual background relating to that motion was made a part of the trial court's order denying the motion to set aside. The evidence presented to -- and accepted by -- the trial court is thus pertinent to the motion to set aside. In the Memorandum Opinion and Order on Allstate's Motion for Summary Judgment (R. 1339-1343) the trial court found,

> Here, the Court finds that any alleged failure to properly inspect by Allstate, before issuing the policy, which resulted in damages, is outside the circle of foreseeability. *While obtaining insurance was a prerequisite to obtaining financing, there is no evidence that the plaintiffs would not have consummated the purchase with another insurer, or sought alternative financing.*

(R. 1342; R.E. 93) (emphasis added). The Fifth Circuit Court of Appeals has held that where "a defending party establishes that plaintiff has no cause of action . . . this defense generally inures to the benefit of a defaulting defendant." *Lewis v. Lynn*, 236 F.3d 766, 768 (5th Cir. 2001). "The policy rationale for this rule is that it would be 'incongruous' and 'unfair' to allow some defendants to prevail, while not providing the same benefit to similarly situated defendants." *Id. See also Davis v. National Mortgage Corp.*, 349 F.2d 175, 178 (2nd Cir.

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judgment," thus the supposed testimony by AmeriGo or Shirley did not materialize. As in the Complaint, no conduct by Flagstar was alleged in any manner; Plaintiffs simply alleged that information by others was submitted to Flagstar8. (R. 22). It was undisputed at that time that AmeriGo and Shirley had received information and had arranged for Flagstar to fund the loan for AmeriGo, which would involve a sale of the loan from AmeriGo to Flagstar immediately after closing. (R. 996-997, 1002, 1008-1009). Plaintiffs' self-serving hearsay is hardly sufficient to defeat the overwhelming evidence that Flagstar indeed had a "colorable defense" to the merits of the case.

1965) (when liability of defendants was alleged to be joint, dismissal of complaint for lack of proof disposed of case against all defendants including those who had defaulted).

Furthermore, one need only look at the actual "proof" Plaintiffs submitted in the September 29 damages hearing before the trial court to see that Flagstar would have more than a colorable defense. In the hearing Jamie Danos offered only an unelaborated "yes" to a non-specific question posed to her, which in no way identified Flagstar or any conduct of Flagstar or any harm allegedly caused by Flagstar. (TR. at 11; R.E. 106). The Plaintiffs did not offer any evidence of misrepresentations by Flagstar nor of any damages attributable to Flagstar. (TR. 1-14; R.E. 95-109). 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).

"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 v. Huffman*, 509 So. 2d 870, 876 (Miss. 1987) (quoting *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d at 388). *See also Shannon v. Henson*, 499 So. 2d 758, 763 (Miss. 1986); *Bryant, Inc. v. Walters*, 493 So. 2d 933, 937 (Miss. 1986); *International Paper Co. v. Basila*, 460 So. 2d 1202, 1204 (Miss. 1984). "The importance of litigants having a trial on the merits should always be a serious consideration by a trial judge in such matters. Thus, any error made by a trial judge should be in the direction of setting aside a default judgment and proceeding with trial." *Allstate*, 794 So. 2d at 174 (quoting *Clark v. City of Pascagoula*, 507 So. 2d 70, 77 (Miss. 1987)).

The trial judge abused its discretion in 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. No Prejudice To Plaintiffs In Having Hearing Or Trial On The Merits Against Flagstar.

Where the subject matter of a suit is one that does not change over the life of the suit, such as a suit based on documents rather than eye witness testimony, no prejudice exists for setting aside a default judgment. *King,* 641 So. 2d at 1163 (court not impressed with the prejudice claimed by plaintiff). In the present suit the allegations against Flagstar are nearly all documentary in nature.

Two recent cases support the view that the Plaintiffs would not be unduly prejudiced by setting aside the default and allowing a hearing or trial on the merits as to Flagstar to proceed. In *City of Jackson v. Presley*, 942 So. 2d 777, ¶29 (Miss. 2006), the court noted,

> There are several obvious reasons for our conclusion that the plaintiff suffered no prejudice. First of all, the plaintiff made no request for a default judgment. Also, the plaintiff, for over a four-year period, had prepared to try her case on all issues, including the issue of liability. In fact, the plaintiff and her counsel walked into the courtroom on the day of trial, prepared to present evidence on the issue of liability. Little did the plaintiff know that she would be given a "gift" from the trial judge by way of an unsolicited default judgment as to liability.

In *American Cable Corp.* the court held,

> 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.

754 So. 2d at 555.

In the present case Plaintiffs waited for two and a half years into the litigation and after summary judgment or dismissal had been granted to all answering defendants before seeking default against Flagstar. Plaintiffs presumably are basing whatever cause of action against

Flagstar on the same facts as asserted against AmeriGo and Shirley. Flagstar filed its motion to set aside within the same time period as that in *American Cable Corp.*, a little over a month after the circuit court granted the default judgment. The Plaintiffs would not be unduly prejudiced by setting aside the default judgment and allowing the merits to proceed. In contrast, Flagstar would suffer extreme prejudice if the default was not set aside by having to pay the high judgment without being allowed to defend liability and damages in this case.

4. Default Against Flagstar Should Be Set Aside To Prevent Manifest Injustice.

Balancing the equities in this matter, this Court should conclude that relief is needed in this exceptional circumstance. Flagstar has been blindsided with a $500,000.00 (half a million dollars) judgment based on an alleged default when it was not properly served and never received notice of the docket calls. Important judicial policy favors setting aside the default, but the trial court instead denied the motion to set aside with the broad statement, without citation to authority, "Moreover, failure to uphold default judgments would not foster the important judicial policy of finality of judgments." (R. 1428; R.E. 13). What the trial court failed to acknowledge is that there is just as important -- in fact, a more important - judicial policy concerning defaults: "Where there is reasonable doubt as to whether the default should be set aside, the doubt falls in favor of allowing the case to go forward for a decision on the merits." *McCain v. Dauzat*, 791 So. 2d at 843. The Mississippi courts recognize and seriously consider "[t]he importance of litigants having a trial on the merits" and the fact that "any error made by the trial judge should be in the direction of setting aside a default judgment and proceeding with trial." *Stanford v. Parker,* 822 So. 2d at ¶ 31 (citations omitted).

The lower court failed to acknowledge the body of Mississippi law that default judgments are not favored and are distinguishable from other "final judgments" by operation of Miss. R. Civ. P. 55(c). Miss. R. Civ. P. 55(c) specifically provides for a court to set aside a

default judgment, and the trial court was in error in believing the law and policy of this state did not permit setting aside default judgments. As the trial court stated in its March 12, 2007 Memorandum Opinion and Order:

> Lastly, this Court does not adopt the position advocated by the defendant in regards to liberally setting aside default judgments. Setting aside defaults as envisioned by the plaintiff would become merely a perfunctory request. Moreover, failure to uphold default judgments would not foster the important judicial policy of finality of judgment.

(R. 1428; R.E. 13). As specifically provided in Rule 55(c) of the Mississippi Rules of Civil Procedure, the court may, "[f]or good cause shown, . . . set aside an entry of default and, if a judgment by default has been entered, the trial court may likewise set it aside in accordance with Rule 60(b)." Miss. R. Civ. P. 55(c). Rule 60(b), in part, allows relief from a final judgment for accident or mistake or any other reason justifying relief. Miss. R. Civ. P. 60(b)(2) and 60(b)(6).[9] The trial court disregarded the whole body of law in Mississippi under Miss. R. Civ. P. 55(c) concerning the established and well-accepted procedure for setting aside entries of default and default judgments!

Mississippi has been battling the stigma of "jackpot justice", but never has the idea of a jackpot been as evident as this case where a plaintiff suing an out of state defendant without any sufficient claims[10] is awarded a half-million dollars for doing so. Flagstar is and was a purchaser of mortgages from mortgage companies and never interacted with the Plaintiffs

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[9] Contrary to Plaintiffs' assertions made at the time Flagstar sought a stay pending this appeal, Flagstar was not untimely in seeking relief from the default judgment. Miss. R. Civ. P. 55(c) and the Comment to Rule 55 note that "relief from a default judgment must be requested by a formal application as required by Rule 60(b). Rule 60(b) provides that motions under that rule should be made "within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment." Miss. R. Civ. P. 60(b). *See, e.g., American Cable Corp.*, 754 So. 2d at 555 (motion to set aside default judgment filed a little over a month after default judgment entered was considered "fairly prompt" motion to set aside).

[10] It must be remembered that the insurance defendant Allstate and the mortgage defendants Shirley and AmeriGo had been dismissed for insufficient claims. Plaintiff has never shown how its claim against Flagstar differed from its claims against Shirley and AmeriGo for which summary judgment was granted.

whatsoever. Flagstar bought a mortgage from a mortgage broker and it sold the mortgage to another mortgage servicing company within a few months. For this, and this only, Flagstar has been hit with a $500,000.00 judgment.

"Where there is a reasonable doubt as to whether or not a default should be set aside, the doubt should be resolved in favor of opening the judgment and hearing the case on its merits." *McCain,* 791 So. 2d at 843. Flagstar has shown exceptional circumstances to justify setting aside the default judgment and judgment pursuant to Miss. R. Civ. P. 55(c) and 60(b).

III. ALTERNATIVELY, THE TRIAL COURT'S JUDGMENT AND DAMAGE AWARD IS NOT SUPPORTED BY PROPERLY ADMITTED EVIDENCE AND SHOULD BE SET ASIDE TO ALLOW FOR A HEARING ON THE ISSUE OF ALLOCATION OF DAMAGES AS TO FLAGSTAR.

The trial court never articulated any reasons for holding Flagstar liable for $500,000.00 other than not appearing for a trial which the Clerk did not send notice. Neither the Complaint nor the hearing of September 29, 2006 provided a factual basis for such a high amount against Flagstar for the judgment. Flagstar respectfully requests that that this Court reverse the trial court's judgment as to the amount of damages against Flagstar and remand for a new trial or hearing on damages in which apportionment is considered.

A. The September 29 Judgment Should Be Set Aside for Lack of Evidence Against Flagstar.

Plaintiff seeks to gain a windfall by being awarded $500,000.00 without proper proof of allocation of damages against Flagstar. The September 29, 2006 Judgment was rendered because of an erroneous reading of a "default" and the entry of judgment against Burks and Flagstar "jointly and severally" for $500,000.00 was not supported by proper evidence against Flagstar. A trial court's factual findings with respect to an award of damages are only safe on appeal "where they are supported by substantial, credible, and reasonable evidence." *Thompson ex rel. Thompson v. Lee County School Dist.*, 925 So. 2d 57, 62 (Miss. 2006) (citing

City of Jackson v. Perry, 764 So. 2d 373, 376 (Miss. 2000)). The Danos family had "the burden of proving the amount of any damages with reasonable certainty," *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736, ¶ 13 (Miss. 1999), and "[w]hatever the measure of damages, they may be recovered only where and to the extent that the evidence removes their quantum from the realm of speculation and conjecture and transports it through the twilight zone and into the daylight of reasonable certainty." *Id.*

At the September 29, 2006 hearing Plaintiffs' counsel simply linked Flagstar with the seller Michael Burks in a single question (TR. at 4; R.E. 99) -- not an answer -- without ever identifying to the trial court what "representations" were ever made to the Plaintiffs by Flagstar. Thereafter Plaintiffs' counsel questioned the Plaintiffs about physical damage to the mobile home, the growth of mold, and medical bills for health claims due to exposure to mold.[11] (TR. 4-6, 11; R.E. 99-101, 106). The medical bills submitted by the Danoses in the September 29, 2006 hearing included a claim for tonsillectomy for son Gavin Danos (EX 12-E), and it stretches the imagination how a tonsillectomy would be causally linked or foreseeable damages from 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).

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[11] In the hearing Jamie Danos offered only an unelaborated "yes" to a non-specific question posed to her, which in no way identified Flagstar or any conduct of Flagstar or any harm allegedly caused by Flagstar:

Q. And did you try to get people to address that for you so that you could --
A. Yes.
Q. Okay. To address mold issues and no body would help you?
A. No.

(TR. at 11; R.E. 106).

There was only a passing remark that the mobile home was foreclosed (TR. 6-7; R.E. 101-102),[12] but Plaintiffs counsel - rather than Calvin Danos - testified that in the credit report "there are two foreclosures that have been reported as a result of this, one by Flagstar and one by Chase Manhattan to whom Flagstar sold the loan." (TR. at 9; R.E. 104). Although Plaintiffs' counsel did not make any further argument to the trial court about the credit report, it was marked as Exhibit 11 at the hearing. An examination of EX 11 reveals an online Equifax Credit File for Calvin Danos and for Jamie Danos, purportedly printed as of "9/25/2006," showing Chase Manhattan Mortgage Company as the mortgage holder and that foreclosure process was started by Chase Manhattan. (EX 11 at pp. 1-2, 4, 6; R.E. 112-113, 115, 117). EX 11 also reveals that for the account to Flagstar Bank, Flagstar had reported to the Equifax credit bureau that Calvin Danos "Pays as Agreed" (EX 11 at pp. 2-3; R.E. 113-114). Further, EX 11 notes the Flagstar account was transferred or sold (EX 11 at p. 3; R.E. 114) and that "there was no 81-month payment data available for display" and that, thus, there was no arrearage. Between the unnumbered pages 3 and 4 of EX 11 for Jamie Danos' credit report appears a gap in information, and the last page of EX 11 appears to be placed out of order. Placing the last page of EX 11 before page 4 matches the order of content for Chase Manhattan, and again is noted the foreclosure initiated by Chase Manhattan for the mortgage account opened in 2001. No negative remark on the credit report of EX 11 for either Calvin Danos or Jamie Danos is attributed to Flagstar.

The entirety of the trial court's findings are set forth below, and show that no apportionment was made to separate the actions of Michael Burks -- the actual seller of the

12 The exhibits offered by the Danoses to the trial court showed they had a mortgage insurance rider (EX 6); but they did not offer testimony as to potential mitigation of their claimed damages from foreclosure by means of the mortgage insurance.

allegedly defective mobile home to the Danoses -- from any actions of the pass-through mortgage company Flagstar[13]:

> Let the record show that the Court obviously has taken into consideration all of the special damages that Mr. and Mrs. Danos have testified to. And then the emotional and mental distress that this has caused, which is readily apparent to the Court. And also, that in this case the plaintiffs are Calvin and Jamie Danos and the children, Laura Matherne, Gavin Danos and Marissa Danos. So the Court finds that each plaintiff has suffered physical, as well as emotional damages in this matter. And the Court finds that based on the special damages the fact that neither defendant has made any denial of the allegations, either in the complaint or in the testimony here or in exhibits before the Court, that the Court finds that the plaintiffs should be awarded a judgment in the sum of $500,000.00. And the Court finds that the two defendants, Michael Burks and Flagstar Bank FSB are jointly and severally liable for this judgment of $500,000.00. And the court does hereby enter judgment in favor of the plaintiffs against both defendants jointly and severally in the sum of $500,000.00. All right.

(TR. at 14; R.E. 109).

The judgment of September 29, 2006, was not only erroneous in its factual conclusions that both defendants were "called to trial," it was also not supported by proper evidence against Flagstar for the money judgment of $500,000.00 "jointly and severally" against Flagstar and the other defendant, the seller Burks. The "evidence" was not specific or even related to any

[13] The Deed of Trust introduced by the Plaintiffs at the hearing showed the Lender on the property as Grand Bank for Savings, FSB, a Mississippi corporation headquartered in Hattiesburg, with an amount owed of $58,500.00. (EX 6). The Note signed by the Plaintiffs on May 9, 2001 indicated AmeriGo Mortgage, Inc. of Hattiesburg, MS, was the lender. (EX 6) At the bottom of the Note, after the borrowers had signed, is typed: "Pay to the order of Flagstar Bank, FSB without recourse" and signed by Susie Taylor, Senior Vice President of AmeriGo Mortgage, Inc. (EX 6). A Notice of Servicing Transfer to Flagstar was signed by the Danoses on May 9, 2001. (EX 7). As noted above, EX 11 revealed Chase Manhattan became the mortgage holder in 2001.

alleged conduct of Flagstar, but was simply conclusory remarks of counsel and not properly admitted to show any harm by Flagstar. The testimony and exhibits the trial court received did not support the exorbitant amount against Flagstar, and the trial court abused its discretion when it failed to set the judgment aside.

B. Judgment Should Be Set Aside for Allocation of Damages Rather Than Joint and Several Liability.

Even if the Court should find there was not an adequate showing of good cause to set aside the default judgment, Flagstar respectfully requests that this Court alternatively consider setting aside the default judgment as to the $500,000.00 in damages awarded to Plaintiffs so that the trial court may conduct a proper evidentiary hearing or inquiry on the issue of allocation of damages for the claims against Flagstar, as opposed to the general and more comprehensive claims against Michael Burks. The trial court erroneously imposed "joint and several" liability for the judgment, for which Plaintiffs have attempted to collect entirely from Flagstar. (R. 1493). The trial court did not identify the cause of action against Flagstar for which it was imposing damages, and it did not assess the proportion of damages attributable to Flagstar as opposed to Burks. The two defendants are not one and the same, nor are they agent and principal.

Miss. Code. §85-5-7 requires that "liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault." Miss. Code. §85-5-7 (2002)[14]. As a matter of law the lower court should have made an allocation or apportionment of the damages awarded, thus the trial court erred in not allocating

[14] Appellant is mindful Section 85-5-7 has undergone several changes in the last few years. In the interest of caution, the quotation comes from the 2002 amendment (Miss. Laws. 3rd Exec. Session), effective January 1, 2003, before this suit was brought.

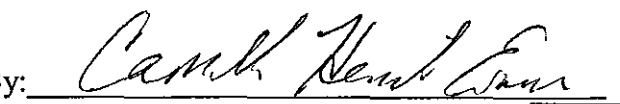
or apportioning under Miss. Code § 85-5-7. The judgment, if not set aside in its entirety, must be set aside for the trial court to properly allocate any damages as to Flagstar.

IV. CONCLUSION

"Jackpot justice" is not justice and should not be upheld by this Court. The balancing of equities in this case favors setting aside the default judgment against Flagstar and allowing a hearing or trial on the merits of Plaintiffs' claims against Flagstar. 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. Flagstar respectfully requests that this Court reverse the trial court's default judgment and judgment of damages and remand the case for a trial on the merits. In the alternative, even if this Court finds that the trial court did not abuse its discretion by entering default judgment that was not supported by the facts in the record, Flagstar respectfully requests that that this Court reverse the trial court's judgment as to the amount of damages against Flagstar and remand for a new trial or hearing on damages in which apportionment under Miss. Code § 85-5-7 is considered.

Respectfully submitted,

FLAGSTAR BANK, FSB

By: 

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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:

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The Honorable R. I. Prichard III
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THIS, the 20th day of November, 2007.

Camille Henick Evans

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