MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-CA-00872

IRVIN MORGAN, JR.

APPELLANT

VERSUS

HARRY STEVENS, JR. and
GAYLE J. STEVENS

APPELLEES

CERTIFICATE OF INTERESTED PARTIES

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 Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Irvin Morgan, Jr., Appellant;

2. William P. Starks, II, Attorney for Appellant;

3. Studdard Law Firm, Attorneys for Appellant;

4. Harry Stevens, Jr., Appellee;

5. Luanne Stark Thompson, Attorney for Appellee, Harry Stevens, Jr.;

6. Carnathan, Malski & McAuley, Attorneys for Appellee, Harry Stevens, Jr.;

7. Gayle J. Stevens, Appellee;

8. Jim Waide, Esq., Attorney for Appellee Gayle J. Stevens;

9. Ron L .Woodruff, Esq., Attorney for Appellee Gayle J. Stevens; and

10. Waide & Associates, P.A., Attorneys for Appellee Gayle J. Stevens.

This the 21st day of December, 2007.

RON L. WOODRUFF

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STATEMENT REGARDING ORAL ARGUMENT

Gayle Stevens believes that this appeal involves a purely legal issue that does not warrant the need for oral argument.

STATEMENT OF THE CASE

A. Statement of the Proceedings

1. On January 20, 2005, Irvin Morgan filed his Complaint in the Clay County Circuit Court against Harry Stevens and Gayle Stevens, claiming demand note, fraud, piercing the corporate veil, and breach of fiduciary duty. [R:9]

2. On February 16, 2005, Morgan filed his Amended Complaint, against the same defendants, alleging the same causes on action. [R:35]

3. On February 25, 2005, Gayle Stevens filed an Answer and Affirmative Defenses to Morgan's Amended Complaint [R:43], and her Cross Claim against Defendant Harry Stevens. [R:50]

4. On May 1, 2005, Harry Stevens filed a Motion, with Brief, for Summary Judgment arguing that there was no "Demand Note" attached to the Complaint, and none exists, therefore the action is time barred. [R:59; R:65]

5. On May 17, 2005 Gayle Stevens filed a Motion for Summary Judgment, claiming that the Statute of Limitations had expired, and the action was barred by the Statute of Frauds. [R:70]

6. On May 25, 2005, Morgan filed a Motion to Stay, and "partially" responded to the Motions for Summary Judgment. [R:79]

7. On September 29, 2005, Gayle Stevens filed a Supplemental Motion for

Summary Judgment. [R:105]

8. On December 27, 2005, Morgan filed a Motion to Compel discovery against Harry Stevens. [R:168]

9. On April 13, 2006, Gayle Stevens filed her Corrected Supplemental Motion for Summary Judgment. [R:187]

10. On August 28, 2006, the District Court issued it Order in regards to Morgan's Motion to Compel and Motion for Continuance. [R:258]

11. On October 3, 2006, Morgan filed his Consolidated Response and Memorandum to Defendants' Motions for Summary Judgment. [R:261]

12. On April 10, 2006, after a hearing, the District Court granted Defendants' Motions for Summary Judgment, holding that the Statute of Limitations had run before the filing of the Complaint. [R:313]

13. On May 18, 2007, Morgan filed his Notice of Appeal with this Court. [R:323]

B. Statement of the Facts

Irvin Morgan and Gayle Stevens were married for almost twenty years with the marriage ending in 1984. [R:224] Thereafter, Gayle married Harry Stevens. [R:196]

Beginning in 1990, Harry Stevens owned 100% of a store in West Point, Mississippi, named Lincoln Furniture Company. [R:225] Gayle Stevens does not

have, nor has she ever had, an ownership interest in Lincoln Furniture, Inc., a corporation with limited liability. (R:225, 295)

Irwin Morgan made six loans to Lincoln Furniture between November 1992 and January 1998, totaling $141,000. [R:37, 228]

Morgan testified that he solicited Ms. Stevens about loaning the money to Lincoln Furniture; "I called Gayle. And I asked her reckon they could use the money." (R:9-10, 220) Morgan testified that he was loaning the money to Lincoln Furniture, not Gayle Stevens, individually. (R:216-20, 226-30) Morgan testified that Gayle Stevens made no personal guarantee for the loan. [R:214-15, 221] In response to the question, "Did she say, well, if Lincoln Furniture can't pay it back, I'll pay the money back?", Morgan responded, "No." [R:214] Further, Morgan testified that it was a "verbal agreement." [R:219]

The last repayment was made in 2001. [R:313]

In February 2002, Lincoln Furniture went out of business. [R:295] Lincoln Furniture, Inc., was dissolved and is no longer in existence. (R:244)

SUMMARY OF THE ARGUMENT

What Morgan contends is a loan document is not. Neither is it a negotiable instrument, a promissory note, or a demand note. It does not have "an unconditional promise to pay a sum certain in money on demand or at a definite time." It is not

"signed by the maker, contain an unconditional promise to pay a sum certain in money, on demand or at a definite time, to order or to bearer." It does not even have a "payee", nor does it say "pay to bearer." Instead, it is at best an acknowledgment of an unwritten contract with a three year statute of limitations which had expired prior to the lawsuit being filed.

Because the loans are unwritten contracts, and not a demand note, the statute of limitations began to run at the time of loan.

Irvin Morgan admitted in his deposition that Gayle Stevens did not commit fraud, or fraudulent concealment, concerning the loans at issue.

The motion to compel is directed at Harry Stevens, not Gayle Stevens.

STANDARD OF REVIEW

This Court reviews de novo the action of a trial court in sustaining motions for summary judgment, without giving any deference to the action of the trial court. *See Doe v. Stegall*, 757 So.2d 201, 204 (Miss. 2000); *see also Richardson v. Methodist Hosp. of Hattiesburg, Inc.*, 807 So.2d 1244, 1246 (Miss. 2002); *McArthur v. Ingalls Shipbuilding Inc.*, 879 So.2d 500, 502 (Miss. App. 2004).

ARGUMENT I.

THE CIRCUIT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT

This appeal concerns an unwritten contract for a series of loans from Irwin Morgan to Lincoln Furniture between 1992 and 1998, each bearing interest of between seven or eight percent. Unfortunately, Lincoln Furniture went out of business in 2002, and only part of the loans were repaid. In his Complaint, Morgan alleges that no payment was made by Lincoln Furniture on these loans after March 1, 2002.

A. What Statute of Limitations Applies

Under Mississippi law, an unwritten contract has a statute of limitations of three years:

> Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three (3) years next after the cause of such action accrued, and not after, except that an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after.

Miss. Code Ann. § 15-1-29

Morgan's argument is that this loan should be considered a "negotiable instrument", such as a "demand note", as contemplated by the UCC. As this Court can clearly see, the document that Morgan relies upon does NOT qualify as a promise to pay, a negotiable instrument or a demand note. [R:18]

According to Miss. Code Ann. § 75-3-103 (a)(9), "Promise" means a written

undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation." It should be noted, Chapter 3, is titled, "Uniform Commercial Code--**Negotiable Instruments**."

In the UNIFORM COMMERCIAL CODE COMMENT to Miss. Code Ann. § 75-3-103, it states, "The last sentence of subsection (a)(9) is intended to make it clear that an I.O.U. or other written acknowledgment of indebtedness is not a note unless there is also an undertaking to pay the obligation."

According to Miss. Code Ann. § 75-3-104 (e) "An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either."

According to the UNIFORM COMMERCIAL CODE COMMENT to Miss. Code Ann. § 75-3-104:

> The definition of "negotiable instrument" defines the scope of Article 3 since Section 3-102 states: "This Article applies to negotiable instruments." The definition in Section 3-104(a) incorporates other definitions in Article 3. An instrument is either a "promise," defined in Section 3-103(a)(9), or "order," defined in Section 3-103(a)(6). A promise is a written undertaking to pay money signed by the person undertaking to pay. An order is a written instruction to pay money signed by the person giving the instruction. Thus, the term "negotiable

> instrument" is limited to a signed writing that orders or promises payment of money.

In this case, it is clearly not a negotiable instrument because there is no "promise" to pay. It merely states the amount and date of each loan, with no promise to repay, and no person to whom it should be paid.

Further, "By section 2657, Code 1930, notes must be payable to order or bearer, and it is not subject to dispute that, when a note is payable to order, the payee must be named. See, also, section 2664, Code 1930." *Moore v. Vaughn*, 150 So. 372, 373 (Miss. 1933). In this case, it is undisputed there is no payee named on the document that Morgan claims is a negotiable instrument. [R:18]

Further,

> To be negotiable, an instrument must be in writing, signed by the maker, contain an unconditional promise to pay a sum certain in money, on demand or at a definite time, to order or to bearer. Tex. Bus. & Com. Code § 3.104(a) (Vernon 1968); *Hinckley v. Eggers,* 587 S.W.2d 448, 450 (Tex. Civ. App.-Dallas 1979, writ ref'd n.r.e.).

Resolution Trust Corp. v. Oaks Apartments Joint Venture, 966 F.2d 995, 1001 n.8 (5th Cir. 1992).

Further,

> One of the elements required by Section 75-3-104 for a writing to be considered a promissory note is an unconditional promise to pay a sum

> certain in money on demand or at a definite time. If a writing contains neither, it would not constitute a promissory note and would only be a simple contract.

Op. Atty. Gen. No. 2000-0053, Gunn, February 11, 2000.

In sum, what Morgan contends is a loan document is not. Neither is it a negotiable instrument, a promissory note, or a demand note. It does not have "an unconditional promise to pay a sum certain in money on demand or at a definite time." It is not "signed by the maker; it does not contain an unconditional promise to pay a sum certain in money, on demand or at a definite time, to order or to bearer." It does not even have a "payee", nor does it say "pay to bearer."

Thus, the UCC statutes relied upon by Morgan have no application to this case. At best, the document that Morgan argues is a negotiable instrument, .i.e, demand note, is an acknowledgment of an unwritten contract regarding a series of loans, subject to the three year statute of limitations of Miss. Code Ann. § 15-1-29. The document relied upon by Morgan is nothing more than an acknowledgment of the debt.

The District Court correctly determined that the three year statute of limitations applied and dismissed the case as untimely.

B. When Did the Cause of Action Accrue

1. Breach of Written Demand Note

As shown in the previous section, since this is not a negotiable instrument, a promissory note or demand note, the UCC provisions of the Mississippi Code do not apply.

Since this is an unwritten contract, the statute of limitations began to run at the time of execution. Thus, for the latest loan, January 1998, the statute of limitations would have run in January 2001. For the other loans, it would have expired earlier. It is undisputed that Morgan did not file his Complaint until January 2005, four years later.

Even if this was a demand note, "demand notes become due and payable as of the date of execution, with no demand being necessary." *U.S. Fidelity & Guaranty Co. v. Krebs*, 190 So.2d 857, 860 (Miss. 1966). Thus, the outcome would be no different for Morgan.

This might be abrogated by UCC § cited by NT

2. Fraud Claim

According to the Mississippi Supreme Court:

> The Mississippi Code Annotated § 15-1-49 (Rev.2003) imposes a three year statute of limitations on claims for fraud. "A fraud claim accrues upon the completion of the sale induced by false representation or upon

the consummation of the fraud." *Dunn v. Dent,* 169 Miss. 574, 153 So. 798 (Miss.1934). Therefore, the statute of limitations begins to run when a person, with reasonable diligence, first knew or should have known of the fraud. Miss.Code Ann. § 15-1-67 (Rev.2003). The Parkers entered into the contract with Horace Mann on January 25, 1997. They had three years from that date to file suit; therefore, this claim should have been filed prior to January 25, 2000.

¶ 8. However, fraudulent concealment tolls the statute of limitations for a cause of action. *Robinson v. Cobb,* 763 So.2d 883, 887 (¶ 18) (Miss.2000). **For the Parkers to establish fraudulent concealment they must show an act or some type of conduct designed to prevent the discovery of this claim**. *Reich v. Jesco, Inc.*, 526 So.2d 550, 552 (Miss.1988). **The Parkers must prove that Horace Mann and Hawkins engaged in affirmative acts of concealment, and that even though the Parkers acted with due diligence they were unable to discover it prior to the running of the statute of limitations.** ***Id.*** The terms were written into the policy so there was no affirmative act to prevent this discovery. *Stephens v. Equitable Life Assur. Society of U.S.*, 850 So.2d 78, 84 (¶ 20) (Miss.2003).

Parker v. Horace Mann Life Ins. Co., 949 So.2d 57, 59 (Miss. App.2006) (emphasis added.)

Morgan has not alleged, nor can he show, an act or some type of conduct designed to prevent the discovery of his claim on the part of Gayle Stevens. Morgan did not allege any affirmative acts of concealment against Gayle Stevens, and admitted as much:

Morgan testified:

Q. . . . what are you claiming Gayle Stevens knowingly did that she

shouldn't have done that caused you damage?

A. I can't say that Gayle knew she was doing anything wrong because I don't believe she would have done anything.

Q. You were her husband for many years. Did you find her to be a person of integrity?

A. Yeah.

Q. I mean, from your experience with Gayle, would she have ever tried to do anything to cheat the father of her children out of his money?

A. No. I don't feel like she would have done it. She has had a nervous breakdown over it.

(R:231)

Further:

Q. . . . Can you tell me anything that she told you that was false?

A. Yes. But it wasn't intentional.

Q. Tell me what it was that was false?

A. She told me on a couple of occasions that if something happened to her and Harry, that the kids would get whatever they had. Okay. Now there's no chance of my money or whatever he winds up with.

Q. But she told you it was true at the time. They were married?

A. Right.

(R:232)

Morgan further testified:

Q. Tell me anything else that you are claiming that Gayle said to you that was untrue? A false representation where she basically lied to you concerning this lawsuit?

A. I don't have anything.

[R:233]

Morgan further testified:

Q. So you don't believe she intentionally lied to you during this entire issue about this money loaned to Lincoln Furniture, do you?

A. No.

Q. I mean, she told you things that turned out to be not true later?

A. Oh, yeah.

Q. But at the time she told you them, do you believe she believed that they were true?

A. Correct. Because she was working there and the three kids and she wouldn't – she wouldn't do anything to hurt the kids.

[R:234-35]

Finally:

Q. Are you claiming that Gayle Stevens tricked you into loaning that money to Lincoln Furniture?

A. Tricked me?

Q. Yes.

A. No. No way.

[R:235]

To prove fraud under Mississippi law, Morgan must show by clear and convincing evidence:

(1) a representation;
(2) that is false;
(3) that is material;
(4) that the speaker knew was false or was ignorant of the truth;
(5) the speaker's intent that the listener act on the representation in the manner reasonably contemplated;
(6) the listener's ignorance of the statement's falsity;
(7) the listener's reliance on the statement as true;

(8) the listener's right to rely on the statement; and

(9) the listener's proximate injury as a consequence.

Gray v. Caldwell, 904 So.2d 212, 215 (Miss. App. 2005) (citing *In re Estate of Law,* 869 So.2d 1027(¶ 4) (Miss.2004)).

In this case, Morgan cannot show by clear and convincing evidence that Gayle Stevens committed fraud or fraudulent concealment. Morgan approached Gayle Stevens each time about loaning money to Lincoln Furniture. Gayle Stevens never made a false misrepresentation, nor ever would, by Morgan's own admission, inducing the loan, or to conceal the loans.

This issue on appeal is without merit.

ARGUMENT II.

WHETHER THE COURT ABUSED ITS DISCRETION IN DENYING MORGAN'S MOTION TO COMPEL DOES NOT CONCERN GAYLE STEVENS.

This issue concerns a discovery dispute between Irvin Morgan and Harry Stevens. Gayle Stevens fully participated in written discovery and depositions.

CONCLUSION

For all the reasons stated herein, Gayle Stevens asks this Court to affirm the decision of the District Court granting summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ron L. Woodruff, attorney for Appellee Gayle J. Stevens, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing, as well as a 3.5 WP Disk, to the following:

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THIS the 21st day of December, 2007.

RON L. WOODRUFF