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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee Alfonso Realty, Inc. certifies the following list of persons have an interest in the outcome of this case. These representations are made in order that the Judges of the Mississippi Supreme Court may evaluate possible disqualifications or recusal:

1. Appellants, Gail & Darris Varnado;
2. Appellee, Alfonso Realty, Inc.;
3. Robert Homes, Jr., P.O. Box 500, Gulfport, MS 39502; Attorney for Appellants, Gail & Darris Varnado;
4. Fred Mannino, Page, Mannino, Peresich & McDermott, PLLC, P.O. Drawer 289, Biloxi, MS 39533; Attorney for Appellee Alfonso Realty, Inc.; and
5. Circuit Judge Jerry O. Terry, P.O. Box 1461, Gulfport, MS 39502; trial court judge.

THIS, the 14th day of December, 2008.



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STATEMENT OF ISSUES

- A. THE LOWER COURT DID NOT ERR WHEN IT FOUND THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT, THEREFORE, ITS GRANT OF SUMMARY JUDGMENT WAS PROPER.
 - 1. The lower court properly concluded that there was no evidence of knowledge on the part of Alfonso Realty of Brown's alleged "memory" problem.
 - 2. The lower court properly concluded that there was no evidence that Alfonso knew or should have known of the differences in the two disclosure statements.
- B. THE LOWER COURT PROPERLY FOUND THAT ALFONSO DID NOT BREACH ITS FIDUCIARY DUTY TO THE PLAINTIFFS.

STATEMENT OF THE CASE

This is a suit by Plaintiffs, Gail and Darris Varnado, against Defendant, Alfonso Realty, Inc., for damages resulting from Alfonso Realty's alleged breach of fiduciary obligation owed to Plaintiffs as their real estate broker/agency and its alleged failure to disclose the unreliable nature of Brown's Disclosure Statement.

After discovery was taken, and before trial, Alfonso Realty filed a Motion for Summary Judgment, which the Circuit Judge granted. An Order and Judgment granting that motion was entered on September 1, 2006.

1. Underlying Facts

Gail and Darris Varnado ("Plaintiffs"), purchased a single family residence from seller Thomas E. Brown ("Brown"), who is now deceased. Defendant Alfonso Realty, Inc. ("Alfonso") was the broker in the real estate transaction. Alfonso agents, Brenda McFall ("McFall"), Diane Albrecht ("Albrecht") and Patti Schankin ("Schankin"), acted as dual agents for both the buyers and the seller. McFall and Albrecht worked together on behalf of Brown and Schankin worked on behalf of the Plaintiffs. The parties reached an agreement to buy and sell the property through an offer made by Gail Varnado on August 10, 2000. The Plaintiffs purchase of the house was contingent upon a building inspection performed by Defendant Michael Jenner ("Jenner") and a termite inspection performed by Defendant Terminator Pest Control. Jenner, who performed the general home inspection, was recommended to the Plaintiffs by one of Alfonso's agents. A general inspection of the property was made by Jenner on August 14, 2000, and a termite inspection was performed by Terminator Pest Control on August 22, 2000. Neither the general inspection report nor the termite inspection report noted serious problems or defects in the property.

Miss. Code Ann. §§ 89-1-501 et seq. requires a seller to submit a disclosure statement prior

to the sale regarding the condition of the property. The facts indicate Brown submitted two disclosure statements, the first one with the initial listing agency and the second with Alfonso. The disclosure statements are inconsistent with regard to prior termite infestation. The initial disclosure statement dated September 21, 1999, indicates the house had been treated for termite infestation. However, on July 13, 2000, Brown filled out a second disclosure statement with Alfonso and denied any treatment for termite infestation.

After taking possession of the property, Plaintiffs found major leaks in the roof and extensive termite damage to the house. Plaintiffs allege that when these problems were reported to Alfonso, one of its agents stated that the seller, Brown, was known to have "serious memory problems." Plaintiffs contend based upon this statement, Alfonso knew or should have known that Brown's disclosure statement was false, misleading and/or unreliable.

2. Proceedings in Circuit Court

The Plaintiffs named several Defendants in their Complaint and Amended Complaint (R-23): Terminator Pest Control, the original termite inspection company retained by Brown which had failed to report the prior termite damage and treatment; the home inspector, Michael Jenner, retained by the Varnados on Alfonso Realty's recommendation, who had failed to report the dilapidated and leaky roof; Vic Porter, the appraiser who had done Brown's appraisal without reporting on the damage; Brown himself, for providing the false Disclosure Statement, and Alfonso Realty. Alfonso Realty is the only Defendant who did not reach a settlement with the Varnados. Instead, they obtained a summary judgment dismissing them from the suit. The summary judgment (RE-020), issued on September 1, 2006, became final and appealable on January 18, 2008, pursuant to MRCP Rule 54(b), once all of the other Defendants had been dismissed.

SUMMARY OF THE ARGUMENT

The lower court properly found that summary judgment was appropriate in this case. The Plaintiffs have failed to come forward with any evidence that Mr. Brown had a memory problem or that Alfonso had knowledge of any memory problem on the part of Mr. Brown. Furthermore, there is no evidence that Alfonso knew or should have known that there was a prior disclosure statement or that there were differences in the two disclosure statements. Finally, there is no evidence of a breach of fiduciary duty by Alfonso.

In order to survive summary judgment, the Plaintiffs must provide evidence which would show that there is a genuine issue of material fact. While the evidence must be viewed in the light most favorable to the Plaintiffs, the Plaintiffs cannot survive summary judgment by making assertions which are unsupported by the evidence.

ARGUMENT

A. THE LOWER COURT DID NOT ERR WHEN IT FOUND THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT, THEREFORE, ITS GRANT OF SUMMARY JUDGMENT WAS PROPER.

A Motion for Summary Judgment should be granted where (1) there is no genuine issue of material fact and (2) the moving party is entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c). Although numerous immaterial facts may be controverted, only those which affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Summers v. St. Andrew's Episcopal School, Inc., 759 So.2d 1203, 1208 (Miss. 2000). In considering a Motion for Summary Judgment, the Trial Court views all evidence in the light most favorable to the non-moving party. Byrne v. Wal-mart Stores, Inc., 877 So.2d 462, 465 (Miss. Ct. App. 2003).

The granting of summary judgment by the trial court is reviewed de novo on appeal. Delahoussaye v. Mary Mahoney's, Inc., 696 So.2d 689, 690 (Miss. 1997); Germany v. Denbury Onshore, LLC, 984 So.2d 270 (Miss. 2008).

1. The lower court properly concluded that there was no evidence of knowledge on the part of Alfonso Realty of Brown's alleged "memory" problem.

Plaintiffs allege that following the sale when they reported certain problems with the house to Alfonso, Brenda McFall, an agent for Alfonso, stated Brown had "serious 'memory problems'."¹ (R. at 26). Plaintiffs argue that based upon this statement, Alfonso knew Brown's disclosure statement was unreliable. However, there is no evidence of a memory problem on the part of Brown and no evidence that Alfonso knew or should of known of an alleged memory problem.

¹ As the Plaintiffs' agent, it is admitted that Alfonso was the Plaintiffs' fiduciary, requiring full disclosures, frankness and honesty in the dealings between them. Blanks v. Sadka, 133 So.2d 291, 293 (Miss. 1961).

At her deposition, Gail Varnado was asked whether she had any information or knowledge that Brown had any problem with his memory. Mrs. Varnado stated there were problems in the house (i.e. water leaked from the roof into the garage, there had been drilling for termites previously) that were inconsistent with statements made by Brown on his disclosure statement. Specifically, Mrs. Varnado stated:

So these – two things with this water coming in the garage when I specifically asked him if water flowed in that garage, he told me, no, it did not. When I asked him – and on his disclosure statement if it ever had rot, he said, no. It stated on his disclosure statement that he never had any rot, never had any termite damage, when it was very obvious once we tore that off, of course, he did. The house had been drilled. You don't drill this house without making a whole lot of noise drilling these holes into this baseboard of this house and not know that it's been drilled.

So he had knowledge of that. Now **whether he forget it because he had a memory problem or whether he lied about it, I just do not know**, but he was not telling the truth one way or the other about those things, sir.

In addition to the fact that – because at the time when I met Mr. Brown, I did not feel he had a memory problem when I met him, but Brenda told me he had a memory problem. ... So something is going on with that recollection about all the damage in that house, sir. He is either lying or he has a memory problem or maybe there is a combination of both.

(Depo. of Gail Varnado, Exh. "C" at 160-64). Mrs. Varnado also testified that she had never met Brown prior to the purchase of the home and had no dealings with him after the purchase. (Exhibit "C" at 164).

The three Alfonso agents all testified that they had no reason to believe that Mr. Brown had a memory problem. Alfonso agent McFall, who Plaintiffs claim made the statement regarding Brown's memory problem, testified as follows:

Q. At that point, [Mrs. Varnado] says...that you indicated that Brown had a memory problem. Do you recall that?

A. I don't recall saying [Brown] had a memory problem, at all. It's not in my character to make a judgment of that, of anyone that I'm representing, and I wasn't around the

man long enough to be able to say. What I did say - I do remember - was that he had lost his wife and daughter, within a six-month period, and if I had been in the same situation, I wouldn't know if I would remember everything.

Q. Both [Plaintiffs] say that they recall you saying, after you mentioned that he had a memory problem, that you expounded on that a little bit, by saying that it was, like, a long-term memory problem, or a short-term memory problem, something along those lines. Do you recall saying anything like that?

A. No sir.

(Depo. of Brenda McFall, Exhibit "F" at 7-8). McFall went on to testify that she did not know Brown before he listed his house with Alfonso. Likewise, Alfonso agents Patti Schankin and Diane Albrecht both testified they had no knowledge of a memory problem on the part of Brown nor did they know Brown prior to the sale of his home. (Depo. of Patti Schankin, Exhibit "E" at 60; Depo. of Diane Albright, Exhibit "D" at 11-13, 28). Brown's son, Thomas Brown, Jr., who obviously knew Brown both before and after the sale of the house, testified that his father did not have a memory problem and "could remember a lot of stuff" that he, Thomas Brown, Jr., could not. (Depo. of Thomas Brown, Jr., Exhibit "A" at 44-45).

There is simply no evidence, whatsoever, that Mr. Brown had a memory problem. There is no evidence now and the Plaintiffs will not have any evidence later of a memory problem. As the Mississippi Supreme Court stated in Commercial Bank,

The rule [56(c)] does not provide for evidence which *might* be introduced or developed at trial. The party resisting summary judgment must produce any such evidence in opposition to the motion.

Commercial Bank v. Hearn, 923 So. 2d 202, 210 (Miss. 2006). In Commercial Bank, at issue was whether a bank employee was acting within the scope of his employment. Id. The bank provided deposition testimony that the employee was not acting within the scope of his employment. Id. The Court held that in order for the Hearn to show the existence of genuine disputed issues of material

fact, they were required to produce evidence to the contrary. Id. Instead of bringing forth evidence that the bank employee was acting within the scope of his employment, as they were required to do by Rule 56, the Hearnss simply disagreed with the bank. Id. The Court held that summary judgment should have been granted in favor of the moving party, since the Hearnss failed to produce evidence on the required elements. Id.

In the instant case, the only mention of a memory problem at all is the Varnados' claim that Brenda McFall stated that Mr. Brown had such a problem. The fact of the matter is that none of the parties to this real estate transaction knew Mr. Brown well enough to determine that he had a memory problem. The Varnados' claim that Brenda McFall made such a statement certainly does not constitute the kind of evidence necessary to defeat a summary judgment motion. The fact that the Varnados believe Mr. Brown had a memory problem while no one else felt they knew him well enough to make such a statement, does not create a genuine issue of material fact.

The Plaintiffs put great emphasis on the alleged statement by Brenda McFall that Mr. Brown had a "memory problem." Understandably so since this alleged statement is the only "evidence" they have of wrongdoing on the part of Alfonso on the "memory" issue. It is simply not enough. Even if the Court, in viewing the allegations in the light most favorable to the Plaintiffs, accepts that this statement was made, this statement is not enough "evidence" to defeat Alfonso's motion for summary judgment.² The lower court was correct when it held:

² While it is true, that the Court must view the evidence in the light most favorable to the Plaintiffs, the Plaintiffs cannot create assumptions for the Court which it must accept as "undisputed facts." On pages 9-10, and again on pages 17-18 of their Brief, the Plaintiffs list ten (10) "material facts" which it presents to the Court as undisputed. Alfonso concedes that numbers one (1) and four (4) are undisputed. While Alfonso agrees that the second Disclosure by Brown was untrue, it neither knew nor did it have reason to know, of this fact at the time of the sale. Alfonso will not address the other eight (8) statements individually. The

It is true in a motion for summary judgment, all evidence must be viewed in the light most favorable to the non-moving party. However, instead of providing any evidence of a memory problem on the part of Brown, Plaintiffs simply disagree with Alfonso over an alleged statement by an agent. Rule 56 of the Mississippi Rules of Civil Procedure does not provide for evidence which might be introduced or developed at trial. *Commercial Bank v. Hearn*, 923 So.2d 202, 210 (Miss. 2006). The party opposing summary judgment must produce any such evidence in opposition to the motion. *Id.* at 210. There is no evidence that Brown had a memory problem nor is there evidence that Alfonso had knowledge of any memory problem on the part of Brown.

(R. at 142).

In sum, the lower court properly found that there was no genuine issue of material fact as to any alleged “memory problem” on the part of Mr. Brown; therefore the lower court’s grant of summary judgment should be affirmed.

2. The lower court properly concluded that there was no evidence that Alfonso knew or should have known of the differences in the two disclosure statements.

Not only is there no evidence of Mr. Brown having a memory problem, there is no evidence to support the Varnados’ claim that Alfonso knew or should have known that Mr. Brown could not or did not properly fill out the disclosure statement. The Alfonso agents involved had minimal contact with Mr. Brown. They all testified that they had no dealings with Mr. Brown outside of this single real estate transaction. Neither of the listing agents, Brenda McFall and Diane Albrecht, had any reason to believe that Mr. Brown did not properly fill out his disclosure statement. The Plaintiffs cannot come forward with any evidence to show that the Alfonso knew or should have known of a memory problem or that Mr. Brown, because of that knowledge, would not be able to properly fill out the disclosure statement.

Plaintiffs may not survive summary judgment by making up issues of fact for which they have absolutely no evidence. Such bald assertions, without any factual support, are not enough to survive summary judgment.

The Plaintiffs imply that Alfonso knew there were differences in the disclosure statement Mr. Brown prepared with a previous listing agency and the one he prepared when he listed the house with Alfonso. In their Response to Summary Judgment Motion, the Plaintiffs state that “[p]rior to the sale, Alfonso showed the Plaintiffs only the second Disclosure.”³ (R. at 76). Alfonso had no knowledge of problems with the house nor did it have any reason to believe there were problems with the house until the Varnados contacted Patti Schankin after purchasing and taking possession of the home. Once it became aware of the problems, as reported by the Varnados, Alfonso contacted the previous listing agent, Gregg Haney, in order to obtain a copy of the Disclosure Statement that was filed with the initial listing. Patti Schankin testified that “it was after the fact. I never saw this [Gregg Haney’s] seller’s disclosure either, until after the problems.” (Depo. of Patti Schankin, Exhibit “E” at 11-12). Diane Albrecht and Brenda McFall also testified that they never saw the first disclosure statement until after they became aware of the problems with the house. (Depo. of Diane Albrecht, Exhibit “D” at 6-8; Depo. of Brenda McFall, Exhibit “F” at 9-11).

Upon comparison of the two disclosure statements, there were differences in what Brown reported with regard to prior termite treatment and the age of the roof. No one at Alfonso had any knowledge of these differences, nor had any reason to believe there would have been differences, until after the problems with the house were reported by the Varnados. In an effort to get to the bottom of the problem, someone at Alfonso requested the first disclosure statement from the original listing agency. Alfonso did not give the first disclosure statement to the Plaintiffs prior to the sale because it did not have that statement, contrary to the Plaintiffs’ implications. Alfonso did not know or have any reason to know of the prior termite damage or the condition of the roof until it received

³ In the Disclosure Statement he prepared for the listing with Alfonso Realty, Mr. Brown denied prior termite issues.

the Disclosure Statement from Gregg Haney. No one at Alfonso had any reason to believe that they should have even looked at the prior Disclosure Statement because no one had any reason to believe that Mr. Brown would have inaccurately completed the Disclosure Statement when listing the property with Alfonso.

The lower court properly found that there was simply no evidence to show that Alfonso knew of the first disclosure statement or of the differences in the two disclosures, stating:

[n]o one with Alfonso had knowledge of the differences in the statements nor had any reason to believe there would have been differences until the problems with the house were brought to Alfonso's attention *after* the sale. There is simply no evidence Alfonso should have known Brown's disclosure statement was false or unreliable.

(R. at 142). In sum, the lower court properly found that there was no genuine issue of material fact as to whether Alfonso knew or should have known of problems with the disclosure statement, since there was no evidence of such knowledge; therefore the lower court's grant of summary judgment should be affirmed.

B. THE LOWER COURT PROPERLY FOUND THAT ALFONSO DID NOT BREACH ITS FIDUCIARY DUTY TO THE PLAINTIFFS.

Plaintiffs contend Alfonso breached its fiduciary duty to Plaintiffs. Specifically, Plaintiffs contend as follows:

Because of their status as fiduciaries, Alfonso and its agents were required to exercise the highest degree of care toward the Plaintiffs. This means that if Alfonso had any reason whatsoever to believe that Mr. Brown's Disclosure Statement was not correct, or might be tainted by a "memory problem" - or was suspect due to anything else for that matter - then Alfonso should have notified or warned Plaintiffs of such. If they failed to do so, this would be a breach of their fiduciary duty to the Plaintiffs.

(R. at 81). As stated previously, there is no evidence Alfonso knew or had reason to believe Brown's disclosure statement was incorrect. Thus, the lower court properly found that this allegation is without merit.

CONCLUSION

The trial court properly found that summary judgment was appropriate in this case. Accordingly, Defendant Alfonso Realty, Inc. requests that this Court affirm the judgment of the final judgment of Circuit Judge Terry.

Respectfully submitted,

ALFONSO REALTY, INC.

BY: PAGE, MANNINO, PERESICH,
& MCDERMOTT, P.L.L.C.

BY:


FRED MANNINO, MSB 

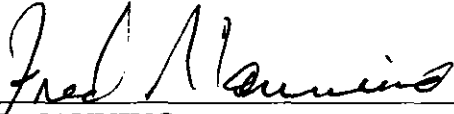
CERTIFICATE OF SERVICE

I, FRED MANNINO of the law firm of PAGE, MANNINO, PERESICH & MCDERMOTT, P.L.L.C., do hereby certify that I have this date mailed, by United States mail, postage prepaid, the original and three copies of the foregoing Brief of Appellee, Alfonso Realty, Inc. to the Clerk of the Supreme Court of the State of Mississippi at P.O. Box 249, Jackson, Mississippi, 39205, and one true and correct copy of the same to the following:

Robert O. Homes, Jr., Esquire
P.O. Box 500
Gulfport, MS 39502

Honorable Jerry O. Terry
Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39501

THIS, the 11th day of December, 2008.



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