

2010-GA-0998 E

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.

Gary Turner - Appellant

Eddie Longstreet - Appellant

EL & GT Properties, LLC - Appellant

Bankfirst Financial Services - Appellee

Bennie L. Jones, Jr., Esq. - Attorney for Appellant Gary Turner  
and Appellant EL & GT Properties, LLC

Mark Cliett, Esq. - Attorney for Appellant Eddie Longstreet

Thomas L. Segrest, Esq. - Attorney for Appellee  
Bankfirst Financial Services

Hon. Jim Kitchens, Circuit Judge



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THOMAS L. SEGREST  
MR. [REDACTED]  
GRAHAM & SEGREST PLLC  
P.O. BOX 1442  
COLUMBUS, MS 39703-1442  
(662) 328-1126  
  
ATTORNEY FOR APPELLEE,  
BANKFIRST FINANCIAL SERVICES

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## STATEMENT OF ISSUES

### **WHETHER OR NOT THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE.**

## STATEMENT OF THE CASE

### **A. NATURE OF THE CASE**

Plaintiff brought this action in the Circuit Court of Clay County, Mississippi against Defendants for recovery of a deficiency balance on a promissory note remaining after foreclosure of the deed of trust securing the note. Defendants answered and thereafter, Plaintiff filed a motion for summary judgment which was granted by the trial court. Defendants have appealed from the summary judgment.

### **B. STATEMENT OF FACTS**

On May 8, 2008, Defendant EL & GT Properties, LLC, a Mississippi limited liability company owned by individual defendants Gary Turner and Eddie Longstreet, executed a promissory note payable to Plaintiff Bankfirst Financial Services for the principal sum of \$39,124.00. To secure the indebtedness, EL & GT Properties, LLC executed a deed of trust in favor of Plaintiff covering certain real property located in Clay County, Mississippi and the individual defendants Gary Turner and Eddie Longstreet each executed a personal guaranty in favor of Plaintiff.

On December 16, 2009, Plaintiff foreclosed the deed of trust under power of sale and the property was struck off to Plaintiff, as purchaser, for the sum of \$27,000.00. In connection with the foreclosure, Plaintiff incurred fees and expenses in the sum of \$1,069.83, leaving a net of \$25,930.32 to be credited against the balance due under the promissory note. After application of the credit, the balance due and owing under said promissory note was in the sum of \$20,570.84, together with a reasonable attorney's fee, as provided in the note.

Thereafter, on or about January 27, 2010, Plaintiff brought suit against the three defendants in the Circuit Court of Clay County, Mississippi seeking to recover the deficiency balance of \$20,570.84, together with interest at the rate of 8.79% as provided in the note and reasonable attorney's fees, as also provided in the note, which Plaintiff alleged to be in the sum of \$5,000.00 (APPELLEE'S R.E. 1; R. 7). Thereafter, Defendants EL & GT Properties, LLC and Gary Turner filed a joint answer to the complaint in which they admitted the execution of the note and denied generally the remaining allegations of the complaint. The answer also set forth "boilerplate" affirmative defenses, without alleging any facts in support of any of the defenses (APPELLEE'S R.E. 10; R. 17).

Defendant Eddie Longstreet thereafter filed an answer in which he admitted the execution of the note, the personal guaranties and the deed of trust, but denied the remaining allegations of the complaint upon lack of knowledge (APPELLEE'S R.E. 13; R. 20).

After issue was joined, Plaintiff filed a motion for summary judgment with supporting affidavits executed by the Branch President of Bankfirst Financial Services as to the making of the loan and the foreclosure of the deed of trust and by Plaintiff's counsel as to the reasonableness of the attorney's fees sought in the deficiency action (APPELLEE'S R.E. 16; R. 23).

Prior to the hearing on the motion for summary judgment, Defendants EL & GT Properties, LLC and Gary Turner filed a response denying that summary judgment would be proper and alleging that there existed genuine issues of material fact. All of the Defendants filed identical counter-affidavits in which they admitted execution of the promissory note by EL & GT Properties, LLC and admitted further that individual Defendants Eddie Longstreet and Gary Turner executed personal guaranties in favor of the Plaintiff and that EL & GT Properties, LLC executed a deed of trust to Plaintiff covering certain Clay County, Mississippi real property. In their counter-affidavits, all three

Defendants further admitted that Plaintiff foreclosed the deed of trust and struck off the real property to the purchaser thereof for the sum of \$27,000.00. Neither of the counter-affidavits made by the Defendants raised the issue of commercial reasonableness of the foreclosure sale or the sufficiency of the amount realized at the sale. Each Defendant did raise the issue of the reasonableness of the fees and expenses in the sum of \$1,069.68 incurred by Plaintiff in the foreclosure and the reasonableness of the attorney's fee of \$5,000.00 sought by Plaintiff in its complaint for a deficiency judgment. Each Defendant also stated in the counter-affidavit that the interest rate of 8.79% per annum was "too high" (APPELLEE'S R.E. 23, 27; R. 37, 43).

Each counter-affidavit also contained vague allegations to the effect that Pete Hodo, a loan officer of Plaintiff, gave individual Defendants Gary Turner and Eddie Longstreet erroneous information as to the amount of property owned by EL & GT Properties, LLC and pledged to the bank. The Defendants contend that this erroneous information caused them to lose a potential sale of the property and that Plaintiff should not be permitted to recover the deficiency balance.

After a hearing, the trial court granted Plaintiff's motion for summary judgment, holding that the vague allegations in the counter-affidavits concerning purported statements by the loan officer, Pete Hodo, were insufficient to demonstrate a genuine issue of material fact (APPELLANTS' R.E. 2; R. 47).

#### SUMMARY OF THE ARGUMENT

Based upon the pleadings and the affidavits and counter-affidavits filed in connection with Plaintiff's motion for summary judgment, the trial court was correct in holding that there existed no genuine issue of material fact and that Plaintiff was entitled to judgment against Defendants as a matter of law. The only issues raised in the counter-affidavits filed by Defendants were (1) the reasonableness of the fees and expenses incurred in the foreclosure and the reasonableness of the

attorney's fees sought by Plaintiff in the complaint for deficiency judgment and (2) the alleged actions of Pete Hodo, which Defendants contend amounted to an affirmative defense. It is respectfully submitted that the reasonableness of the fees and expenses incurred in the foreclosure and the reasonableness of the fees sought in the deficiency action are issues of law that are properly determined by the trial Judge. *Gilchrist Tractor Company, Inc. V. Stribling*, 192 So.2d 409 (Miss. 1967). With respect to the issues raised in the counter-affidavits concerning alleged statements made by the loan officer, Pete Hodo, it is respectfully submitted that such allegations (1) are so vague, incomplete and devoid of detail they are insufficient to demonstrate a genuine issue of material fact, (2) even if true, would not constitute a defense to Plaintiff's claim, and (3) would, in any event, be an affirmative defense, which the Defendants did not plead.

#### ARGUMENT

##### **THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO PLAINTIFF.**

Mississippi Rule of Civil Procedure 56 provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P 56(c) (West 1998). The standard set by Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also *Young v. Tennessee R. Pulp & Paper Co.*, 640 F. Supp. 1162, 1165 (N.D. Miss. 1986), *aff'd*, 812 F.2d 1403 (5<sup>th</sup> Cir. 1987); *Dawkins &*



Co. v. L&L Planting Co., 602 So. 2d 838, 841 (Miss. 1992).<sup>1</sup>

The party moving for summary judgment bears the initial responsibility to inform the Court of the basis for its motion, and to identify the portions of the record which demonstrate the absence of a genuine issue of material fact. Celotex, 477 U. S. at 323; Palmer v. Biloxi Regional Medical Ctr., Inc., 564 So. 2d 1346, 1355 (Miss. 1990). The movant need not, however, negate the non-movant's claims. Celotex, 477 U. S. at 323. On issues as to which the non-movant bears the burden of proof at trial, the movant need only point to the absence of evidence to support the non-moving party's claims. Id. at 323-24; Fruchter v. Lynch Oil Co., 522 So. 2d 195, 201 (Miss. 1988).

Once the moving party has established the basis for its motion, the non-movant must establish the challenged elements of its claim. Webster v. Mississippi Publisher's Corp., 571 So. 2d 946, 949 (Miss. 1990). In so doing, the non-movant must go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U. S. at 324. "[B]are assertions are simply not enough to avoid summary judgment. The non-movant may not rest upon allegations or denials in his pleadings." Travis v. Stewart, 680 So. 2d 214, 218 (Miss. 1996); see also Murphree v. Federal Ins. Co., 707 So. 2d 523, 529 (Miss. 1997) ("non-movant may not simply allege a material fact in his pleadings in attempting to create an issue that will avoid an adverse rendering of summary judgment."). If the evidence could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U. S. 574, 587 (1986); Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 248 (1986). If the non-movant fails to make a sufficient factual showing as to an essential element of his case, or presents nothing in opposition to a summary judgment motion to indicate that there is merit to his

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<sup>1</sup> "In construing Miss. R. Civ. P. 56, it is appropriate for this Court to rely on federal law." Murphree v. Federal Ins. Co., 707 So. 2d 523, 529 (Miss. 1997) (citing Bourn v. Tomlinson, Inc., 456 So. 2d 747, 749 (Miss. 1984)).

claims, then the movant is entitled to summary judgment. Galloway v. Travelers Inc. Co., 515 So. 2d 678, 683-84 (Miss. 1987).

In the first part of their argument, Defendants contend that the trial court erred in granting summary judgment to Plaintiff because Plaintiff failed to affirmatively present evidence showing that it was entitled to a deficiency judgment. In support, Defendants cite several cases from this Court, including Hartman v. McInnis, 996 So.2d 704 (Miss. 2007). However, neither the answers filed by Defendants in the trial court nor the counter-affidavits contained allegations that disputed the Plaintiff's right to a deficiency judgment due to insufficiency of price realized at the sale or because any part of the sale was not commercially reasonable. Since this issue was not raised in the Court below, it is not properly before this Court. Alley v. Northern Insurance Company, 926 So.2d 906 (Miss. 2006).

The second part of the Defendants' argument concerns the allegations contained in the counter-affidavits that Pete Hodo, the bank's loan officer, gave erroneous information to Defendants Turner and Longstreet, which resulted in the loss of a sale of the subject real property. The two counter-affidavits filed on behalf of the three Defendants contained identical allegations that Pete Hodo, a loan officer with Bankfirst Financial Services, "when told that we had a buyer for the property, informed us that the building and the lot that it was located on was the only land that was part of the transaction. The individual who was interested in buying the building was interested in purchasing the building and the lot and the adjacent lot which was thought to be included in the legal description of the property." Defendants allege that when they advised the purchaser that the adjacent lot was not included, he "backed out of the purchase", although it was later discovered that the adjacent lot was included.

The counter-affidavits filed by the Defendants do not name this "potential purchaser"; they

do not set forth the dates or places of any conversations, so it is impossible to determine whether these alleged conversations took place before or after the foreclosure sale; and they are woefully devoid of any meaningful details. Such vague allegations are insufficient to demonstrate the existence of a genuine issue of material fact. The party opposing a motion for summary judgment, if he wishes to avoid summary entry of adverse judgment, must bring forward significant probative evidence demonstrating existence of a triable issue of fact. Smith v. First Federal Savings and Loan Association of Grenada, 460 So.2d 786 (Miss. 1984). Only sworn denials providing a credible basis therefor in evidentiary fact will suffice to defeat a motion for summary judgment. Pearl River County Board of Supervisors v. South East Collections Agency, Inc., 459 So.2d 783 (Miss. 1984). The party opposing summary judgment must present evidence of sufficient detail to demonstrate the issue. The possibility that evidence will or might be developed later in discovery or at trial is an insufficient basis for denying summary judgment. Glover v. Jackson State University, 968 So.2d 1267 (Miss. 2007).

In addition, the allegations concerning Pete Hodo are insufficient as a matter of law to constitute a defense and are therefore not issues of material fact. First, Mr. Hodo, as the bank loan officer, does not occupy a fiduciary capacity in his dealings with the Defendants/borrowers. Hartman v. McInnis, 996 So.2d 704 (Miss. 2007). An arm's length business transaction involving a normal debtor/creditor relationship does not establish a fiduciary relationship and the party asserting the existence of a fiduciary relationship bears the burden of proving its existence by clear and convincing evidence. AmSouth Bank v. Gupta, 838 So.2d 205 (Miss. 2002). The counter-affidavits made by Defendants Turner and Longstreet stated "Pete Hodo had been my financial advisor and loan officer for approximately ten years at a previous bank and at Bankfirst. At the time of the transaction, he had been my loan officer at Bankfirst for three or four years, and we had other

transactions prior to this one”. The affidavits contained no details of a relationship that either individual Defendant had with Pete Hodo that would constitute clear and convincing evidence of the existence of a fiduciary relationship. In *Hartman*, supra, at page 708, this Court stated:

“This Court considers a number of factors in determining whether a fiduciary relationship exists in a commercial transaction, including: whether (1) the parties have shared goals in each other’s commercial activities, (2) one of the parties places justifiable confidence or trust in the other party’s fidelity and (3) the trusted party exercises effective control over the other party.”

Neither affidavit contains any facts which satisfy these requirements.

In addition, it must be remembered that Defendants Turner and Longstreet, through their limited liability company, were the owners of this real property. As such, they are charged with knowledge of the location and nature of the property and may not shift this responsibility to Mr. Hodo or Bankfirst Financial Services. As stated earlier, the presence of fact issues does not per se entitle a party to avoid summary judgment; the Court must be convinced that the fact issue is a material one, one that matters in an outcome determinative sense. *Massey v. Tingle*, 867 So.2d 235 (Miss. 2004). Since the allegations contained in the counter-affidavits, without more, cannot amount to a defense of the deficiency claim, the issues do not involve material facts.

Finally, the affidavits executed by Defendants Turner and Longstreet each stated that the interest rate of 8.7% per annum (although it is the contract rate set forth in the promissory note) is “too high”. In support of this contention, the Defendants state that the rate exceeds the prevailing rates which are approximately 3% to 5%. Of course, the interest rate is a matter of contract and, unless Defendants can establish that it is unlawful, the rate is appropriate and enforceable.

#### CONCLUSION

The trial court did not err when it granted Plaintiff’s motion for summary judgment. Neither the answers of the Defendants nor the counter-affidavits filed in response to Plaintiff’s motion for


summary judgment raise any issue as to the commercial reasonableness of the sale or the adequacy of the sale price at the foreclosure sale. With respect to the allegations that the bank's loan officer, Pete Hodo, gave misleading information concerning the property to Defendants Turner and Longstreet, resulting in the loss of a sale, this defense was not pled by defendants, the counter-affidavits contained no allegations of facts or circumstances that would give rise to a fiduciary relationship between Pete Hodo and the Defendants, and in any event, Defendants Turner and Longstreet, as the owners of the property, are charged with knowledge of the status of their property. Therefore, even if the allegations were sufficiently detailed enough to demonstrate the existence of an issue of fact, the issue would not be one of material fact.

Finally, with respect to the reasonableness of the fees and expenses in the sum of \$1,069.68 incurred by Plaintiff in the foreclosure sale, and the attorney's fees of \$5,000.00 in connection with the deficiency action, it is respectfully submitted that these matters constitute issues of law which may be determined by the trial Judge.

Respectfully submitted,

BANKFIRST FINANCIAL  
SERVICES, APPELLEE

BY: 

THOMAS L. SEGREST,  
Attorney for Appellee  
MB: 

*GRAHAM & SEGREST PLLC*  
*Attorneys at Law*  
*P.O. Box 1442*  
*Columbus, MS 39746-1442*  
*(662) 328-1126*