

**IN THE SUPREME COURT OF MISSISSIPPI
2010-CA-01198**

**Eddie Longstreet d/b/a EL and GT Properties, LLC and
Gary Turner d/b/a EL and GT Properties, LLC**

APPELLANTS

Vs.

BankFirst Financial Services, Inc.

APPELLEE

REPLY BRIEF OF THE APPELLANT

**APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSISSIPPI
ORAL ARGUMENT IS NOT REQUESTED**

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TABLE OF CASES AND AUTHORITIES

Page No.

Cases

Allen v. Mac Tools, Inc., 671 So.2d 636, 640 (Miss. 1996).....	1
Hartman v. McInnis, 996 So.2d 704, 711 (Miss. 2007).....	2
Lowery v. Guaranty Bank and Trust Co., 592 So.2d 79, 83 (Miss. 1991).....	3
Weathers v. Metropolitan Life Insurance Co., 14 S.3d 688, 691 (Miss. 2009).....	1

Authorities

Rule 56 Mississippi Rules of Civil Procedure.....	1
---	---

TABLE OF CONTENTS

	<u>Page No.</u>
Table of Cases and Authorities.....	I.
Table of Contents.....	II.
Arguments.....	1-4
Conclusion.....	4
Certificate of Service.....	6

I. THE TRIAL COURT DID ERR IN GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF/APPELLEE

The trial court erred when it awarded summary judgment to the Plaintiff/Appellee because it failed to find that the Appellee was entitled to a deficiency judgment. Under rule 56 of the Mississippi Rules of Civil Procedure, a motion for summary judgment lies only when there is no genuine issue of material fact. Pursuant to Rule 56 of the Mississippi Rules of Civil Procedure, summary judgment "shall be rendered forthwith 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." *Weathers v. Metropolitan Life Insurance Co.*, 14 So.3d 688, 691 (Miss. 2009). The moving party bears the burden of demonstrating there is no genuine issue of material fact." *Id.* The Miss. Supreme Court also has held that "[w]here there is doubt whether a fact issue exists, the non-moving party is the beneficiary of that doubt." *Id.* Citing *Allen v. Mac Tools, Inc.*, 671 So.2d 636, 640 (Miss.1996).

In this case, the genuine issue of material fact is whether a deficiency exists entitling the Appellee to a deficiency judgment. There was simply no evidence produced to establish this fact. Therefore, a genuine issue of material fact exists.

The Appellee erred when they assert that the Appellant did not dispute the entitlement of the Appellee to a deficiency judgment before the trial court. The Appellant Eddie Longstreet raised this issue before the trial court and argued it at the hearing on the Appelle's motion for summary judgment held on August 20, 2010 in Columbus, Mississippi. The Appellant joined in the argument made by the other Appellant Eddie Longstreet disputing the entitlement of the

Appellee to a deficiency judgment. *Hearing Transcript pg. 18*. This issue was properly raised and before the trial court and is therefore properly before this court. The Appellant did in fact deny in his answer to the Complaint filed by the Appellee that the Appellee is entitled to a deficiency judgment. *Record pgs. 017-018*. The Appellee's assertion to the contrary is not supported by the record.

The Appellee has simply failed to provide any evidence to establish that they are entitled to a deficiency judgment by law. The right to a deficiency judgment depends on the facts and circumstances of each case and since the mortgaged premises constitute the primary fund for the payment of the mortgage debt, it is only where the mortgagee had endeavored to collect it out of the land that a just judgment for judgment of deficiency can be entered. *Hartman v. McInnis, 996 So.2d 704, 711 (Miss. 2007)*. The mortgagee must show whether the value of the property satisfies the debt of the mortgagor or creates a surplus. *Id.* Where the foreclosing creditor buys at foreclosure, it must give the debtor fair credit for the commercially reasonable value of the collateral. *Id.* To determine the adequacy of the purchase price in satisfying the debt, the mortgagee must establish the fair market value of the property. *Id.* Fair market value has been defined as "the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." *Id.* The determination of the fair market value of a question for the trier of fact and the Supreme Court will respect the trial court's findings of fact when they are supported by reasonable evidence in the record and are not manifestly wrong. *Id.* The burden is on the mortgagee to establish fair market value from which it can be determined whether a deficiency exists. *Id. At 712*. The Appellee failed to produce any evidence of the fair market

value of the property sold. The trial court made no finding as to the fair market value of the property sold and thus there was no way to make a determination as to the existence of a deficiency.

The Appellee's allegations that the Affidavits submitted by the Appellants were too vague to demonstrate the existence is material fact simply defies logic. The potential sale of this property by the Appellant must have taken place before the foreclosure and sale of the property that is the subject of this lawsuit. The potential sale occurred while the Appellants were still its lawful and rightful owners. The Appellee has never denied that that the conversation between Hodo and the Appellants ever transpired as set out in the affidavits of the Appellants. They simply state that the affidavits are vague and offer no counter affidavit to deny any of the statements and or assertions made therein.

The affidavits of the Appellants are not insufficient as a matter of law to constitute a defense and are issues of material fact. Contrary to the Appellee's assertion that there was no fiduciary duty owed by Pete Hodo to the Appellants, the affidavits submitted by the Appellants show quite the opposite. This Court has held that a fiduciary duty may arise in a legal, moral, domestic or personal context, where there appears "on the one side an overmastering influence, or on the other weakness, dependence, or trust, justifiably reposed. *Lowery v. Guaranty Bank and Trust Co.*, 592 So.2d 79, 83 (Miss. 1991) citation omitted. Additionally, a confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger. *Id.*

The affidavits submitted by the Appellants establish the existence of such relationship.

The Appellants state that Mr. Hodo has been their loan officer and financial advisor for ten years and that they have done business with him when he was employed by a different bank and by the Appellee. Therefore, the Appellants were justified in the trust that they reposed in Mr. Hodo as he has acted as their financial advisor and loan officer for ten years and for three or four years while working for the Appellee.

The Appellee alleges that the Appellants, as owners of the real property were charged with knowing the location and nature of that property. However, the Appellee as financial advisor and loan officer had a concomitant responsibility to know the same as this knowledge would necessarily have a bearing upon any transactions related to the subject property. The presence of a material fact does avoid summary judgment. The fact that Mr. Hodo caused the Appellants to lose a sale that would have enabled them to pay for the subject property and avoid default is material in that it shows that the Appellee is to blame for any alleged default and that they should not be allowed to profit by this act.

CONCLUSION

The trial court erred when it awarded the Appellee summary judgment. The Appellee simply did not produce any evidence to establish that it was entitled to a deficiency judgment much less that it was entitled to summary judgment on the issue. The Appellant has consistently denied that the Appellee was entitled to a deficiency judgment and did so in his answer to the complaint and joining in with co-Appellant's arguments that there was no proof of the existence of a deficiency or that the Appellee was entitled to a deficiency judgment. The actions of the Appellee, via Pete Hodo, caused the Appellants to default, that is the subject of this lawsuit and they should not be allowed to profit by their willful acts. Therefore, the Appellant

respectfully requests that this Court reverse the trial court's grant of summary judgment.

Respectfully Submitted,

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