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CERTIFICATE OF INTERESTED PERSONS

**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

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 disqualifications or recusal.

Gary Turner, Appellant
Eddie Longstreet, Appellant
BankFirst Financial Services, Inc., Appellee

Bennie L. Jones, Jr., Esq.
Attorney for the Appellant Gary Turner

Mark Cliett, Esq.
Attorney for the Appellant Eddie Longstreet

Thomas Segrest, Esq.
Attorney for the Appellee BankFirst Financial Services

Hon. Jim Kitchens
Circuit Court Judge

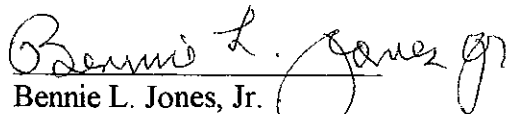

Bennie L. Jones, Jr.
Attorney for Record for
Gary Turner, Appellant
Miss. Bar No. 3185

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STATEMENT OF THE ISSUES

I. Whether the Trial Court Erred When It Granted Summary Judgment to the Appellee and Ruled that the Appellee Was Entitled to a Deficiency Judgment.

II. Whether the Trial Court Erred When It Ruled that the Appellant Failed to Submit Evidence to Support His Affirmative Defense.

STATEMENT OF THE CASE

On or about May 8, 2008, the Appellant and Eddie Longstreet, (hereinafter “Longstreet”) doing business as EL & GT Properties, LLC executed a promissory note payable to BankFirst Financial Services, (hereinafter “Appellee”). The Appellant and Longstreet executed personal guaranties under which they agreed to pay the promissory note to the Appellee. In order to secure the loan, the Appellant and Longstreet executed a deed of trust covering real property located in Clay County, Mississippi in favor of the Appellee. The Appellee foreclosed upon said deed of trust under power of sale on December 16, 2009 and said property was struck off to the purchaser for the sum of \$27,000.00. In connection with the foreclosure, the Appellee charged the Appellant fees and expenses in the sum of \$1,069.68 leaving a balance of \$25,930.32 to be credited to the Appellant’s account. After applying said credit to the Appellant and Longstreet’s account, the Appellee claims that they are entitled to a deficiency judgment in the amount of \$20,570.84. On or about January 27, 2010, the Appellee filed a complaint for a deficiency judgment. In said complaint, the Appellee also asked for an award of attorney’s fees in the amount of \$5,000.00 plus interest at a rate of 8.79% per annum and all costs. The Appellant filed an answer to the complaint on or about March 24, 2010 denying the allegations of the complaint. The Appellee filed a motion for summary judgment with supporting affidavits on or about May 24, 2010. *Transcript pg. 023-029*. The Appellant filed his response to the motion for summary

judgment along with an affidavit in support of said response in which he states that Mr. Pete Hodo, an employee of BankFirst misrepresented to a potential buyer of the property that secured the loan, that a portion of property that the buyer wanted to purchase was not included in the legal description of said property. *Transcript pgs. 032-042*. The Appellant also denied that the cost of fees incurred due to the foreclosure was reasonable and denied that the amount of attorney's fees was reasonable. A hearing was held on the motion for summary judgment on or about August 20, 2010. The trial court entered an order awarding summary judgment to the Appellees on or about November 17, 2010. *Transcript pg. 047-049*. The Appellant timely filed his Notice of Appeal to this court on or about December 10, 2010. *Transcript pg. 051-052*.

SUMMARY OF THE ARGUMENT

The trial court erred when it granted summary judgment to the Appellee because the Appellee failed to establish that it was entitled to a deficiency judgment. The trial court also erred because the court tried the merits of the Appellant's defense on a rule 56 motion for summary judgment. The Appellee did not meet its burden of showing that there was no genuine issue of fact. Also, the trial court failed to extend to the Appellant, the non-movant, the benefit of the doubt regarding the existence of a genuine issue of fact. The Appellant presented un-contradicted proof that Mr. Pete Hodo, an employee, of the Appellee, misrepresented to a potential buyer that the property at issue was not up for sale. The trial court ruled that the Appellant's failure to list the name of the potential buyer in the affidavit and the lack of affidavit from the potential buyer was fatal to the Appellant's defense.

ARGUMENT

I. Whether the Trial Court Erred When It Granted Summary Judgment to the Appellee and Ruled that the Appellee Was Entitled to a Deficiency Judgment.

The official comments to rule 56 of the Mississippi Rules of Civil Procedure provides:

A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given that function, the court examines the affidavits or other evidence introduced on a rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.

There was a disputed fact issue as to whether the Appellee has a right to a deficiency judgment. No evidence was presented establishing that the Appellee was entitled to a deficiency judgment. A creditor has no right to a deficiency judgment until he satisfies the court that it would be equitable, in the light of the sale price, to authorize a deficiency judgment. *Hartman v. McInnis*, 996 So.2d 704, 711 (Miss. 2007) citing *Wansley v. First National Bank*, 566 So.2d 1218, 1226 (Miss. 1990); *Federal Land Bank v. Wolfe*, 560 So.2d 137, 141 (Miss. 1989); *Lake Hillsdale Estates, Inc. v. Galloway*, 473 So.2d 461, 466 (Miss. 1986). Something more than the price paid at the foreclosure and the amount of the indebtedness must be demonstrated before the mortgagee is entitled to a deficiency judgment. *Wansley v. First National Bank*, 566 So.2d at 1224 (Miss. 1990). Every aspect of the sale, including the method, advertising, time, place and terms, must be commercially reasonable. *Id.* At 1225. This is an objective standard. *Id.* There was no evidence presented of any kind establishing that the Appellee is entitled to a deficiency

judgment.

Contrary to the trial court's assertion to the contrary, the Appellant never admitted to owing the Appellee a deficiency judgment in the amount of \$20,570.84. The Appellant denied this allegation in his answer filed in the trial court on or about March 24, 2010. *See Trial Record pg. 018*. There was no evidence presented to show that the Appellee was entitled to a deficiency judgment. The Appellee failed to present any evidence regarding the method, advertising, time, place, terms or other aspects of the sale. Without such showing, the Appellee has been unable to show that it was entitled to a deficiency judgment. Therefore, the trial court erred when it ruled that the Appellee was entitled to a deficiency judgment and granted the Appellee's motion for summary judgment.

II. Whether the Trial Court Erred When It Ruled that the Appellant Failed to Submit Evidence to Support His Affirmative Defense.

The Appellant alleged in an affidavit that he had a potential buyer for the property that was foreclosed upon by the Appellee and that Pete Hodo, an employee of the Appellee, misrepresented the amount of land available for sale to a potential buyer of the property. The court ruled that this defense failed because the Appellant failed to give the name of the potential buyer and because there was no affidavit from the potential buyer attesting to these facts. This ruling is erroneous because under summary judgment, the only question before the court is whether there is any genuine issue of material fact. As is stated in the official comments to rule 56, "the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried". The burden of demonstrating that no genuine issue of fact exists is on the

moving party, and the non-movant is given the benefit of the doubt. *Dailey v. Methodist*, 790 So.2d 903, 917 (Miss. 2001). To survive summary judgment, the non-movant must show that a genuine issue of material fact exists. *Id.*

In this case, the Appellant raised the affirmative defense of having lost a potential buyer for the property at issue due to the actions of Mr. Pete Hodo, an employee of the Appellee bank. The Appellee did not present any evidence to contradict the Appellant's defense. This shows that the Appellant had raised a material issue of fact in his affirmative defense of loss of potential buyer due to the actions of Mr. Hodo. The Appellee did not meet its burden of demonstrating that no genuine issue of fact exists by not introducing any evidence to contradict the affidavit presented to the court by the Appellant. Also, the trial court did give the Appellant the benefit of the doubt. Therefore, the Appellant respectfully requests that this Court reverse the summary judgment entered for the Appellee in this case.

CONCLUSION

The trial court erred when it granted summary judgment to the Appellee. The Appellee failed to meet its burden of proving there was no genuine issue of fact entitling it to summary judgment. The Appellee failed to present any evidence or prove that it was entitled to a deficiency judgment. Also, the trial court erred when it held that the Appellant's affidavit was insufficient to support his defense of loss of potential buyer because the buyer's name was not listed and because there was no affidavit from the buyer. This ruling was erroneous because the evidence presented by the Appellant was not contradicted by the Appellee nor was the issue of the merits of the defense before the court. The trial court failed to give the non-movant the benefit of the doubt as to whether there was a genuine issue of fact. Therefore, the Appellant respectfully

requests that this Court reverse the summary judgment awarded to the Appellee. The Appellant prays for any and all relief to which he is entitled.

Respectfully Submitted,

Gary Turner, Appellant

By: Bennie L. Jones, Jr.

Bennie L. Jones, Jr.
Attorney for the Appellant, Gary Turner
Miss. Bar No. [REDACTED]

CERTIFICATE OF SERVICE

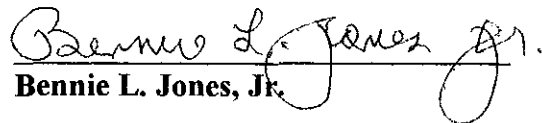
I, Bennie L. Jones, Jr., do hereby certify that I have this day served a true and correct copy of the above and foregoing Appellant's Brief on the following by U.S. mail, postage prepaid:

Hon. Jim Kitchens
Circuit Court Judge
P.O. Box 1387
Columbus, Miss. 39705

Thomas Segrest, Esq.
Graham and Segrest, LLC
Attorneys at Law
P.O. Box 1442
Columbus, Miss. 39703-1442
Attorney for the Appellee

Mark A. Cliett, Esq.
Attorney at Law
P.O. Box 1463
West Point, Miss. 39773
Attorney for Appellant Eddie Longstreet

So certified on this the 20 day of June, 2011.


Bennie L. Jones, Jr.