

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

PILOT DEVELOPMENT, LLC, and
JAMES L. DEUPREE,

Plaintiffs,

CAPITALSOUTH BANK, fka BANK OF
ALABAMA, FIRST COMMERCIAL BANK,
and JOSEPH L. FOUNTAIN, et al.,

Defendants.

CV-2008-903269



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Jefferson County, Alabama
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Judge of Probate- Alan L. King

ORDER ON MOTION FOR SUMMARY JUDGMENT

This case comes before the Court on the Motion for Summary Judgment filed by Defendant/Counterclaim Plaintiff First Commercial Bank ("First Commercial") and Defendant Joseph L. Fountain (collectively, the "Defendants"). Having considered the briefs and evidentiary submissions filed by the parties and oral arguments made during the hearing conducted by the Court on October 24, 2011, the Court finds that no genuine issue of material fact exists, and the Defendants are entitled to a judgment as a matter of law on the claims brought by Plaintiffs Pilot Development, LLC ("Pilot"), and James L. Deupree ("Deupree") (collectively, the "Plaintiffs") and on First Commercial's counterclaims.

A. *First Commercial is entitled to a judgment on its counterclaims.*

First Commercial submitted evidence supporting its counterclaims against Plaintiffs Pilot and Deupree for the amounts owed on their loans, including the outstanding indebtedness and charges due under the loans, the loan documents and the personal guaranty executed by Deupree. Plaintiffs do not dispute First Commercial's evidence. Because there is no genuine issue of material fact, First Commercial is entitled to judgment as a matter of law. See Allen v. Tyson Foods, 121 F.3d 642, 646 (11th Cir. 1997) (To avoid summary judgment, "the nonmovant must

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‘demonstrate that there is indeed a material issue of fact that precludes” it.).

First Commercial submitted evidence that Plaintiffs owe First Commercial \$581,869.27, for principal, interest, and other charges on their loans. Furthermore, First Commercial’s loan agreement with Pilot provides that Pilot will pay a reasonable attorneys’ fee in the event that First Commercial hires an attorney to enforce the agreement. As of the date of filing its summary judgment motion, First Commercial had accrued \$77,430.20 in attorneys’ fees and costs in this litigation. Because the attorneys’ fees incurred by First Commercial are reasonable, Pilot owes their reimbursement to First Commercial pursuant to the terms of its loan agreement. First Commercial is entitled to a judgment as a matter of law against both Pilot and Deupree for the amounts owing, in addition to interest and a reasonable attorneys’ fee for a total of \$659,299.47, plus interest and costs.

B. Plaintiffs have dismissed or failed to support Counts I-III and VI-IX of their Complaint, leaving only two claims against Defendants.

Plaintiffs’ Complaint asserts nine counts against the Defendants and CapitalSouth Bank. While this case was pending before the United States District Court for the Northern District of Alabama, the Plaintiffs dismissed “all claims asserted by Plaintiffs against the FDIC, CapitalSouth Bank or Bank of Alabama and ... all claims asserted by Plaintiffs against Defendant Joseph L. Fountain that arose or accrued during, or relate in any manner to, Joseph L. Fountain’s employment by Bank of Alabama, CapitalSouth Bank or Bank of Alabama.” (Dckt. 30, Case No. 2:09-cv-02332-AKK). In doing so, Plaintiffs dismissed the following Counts of the Complaint as to the FDIC and Fountain: I (Deceit); II (Fraudulent Deceit); III (Fraud); VII (Negligent Hiring, Training, Retention and Supervision); and IX (Intentional Interference with Contract/Business Relations).

Additionally, Counts VI (Breach of Fiduciary Duty) and VIII (Negligent Hiring,

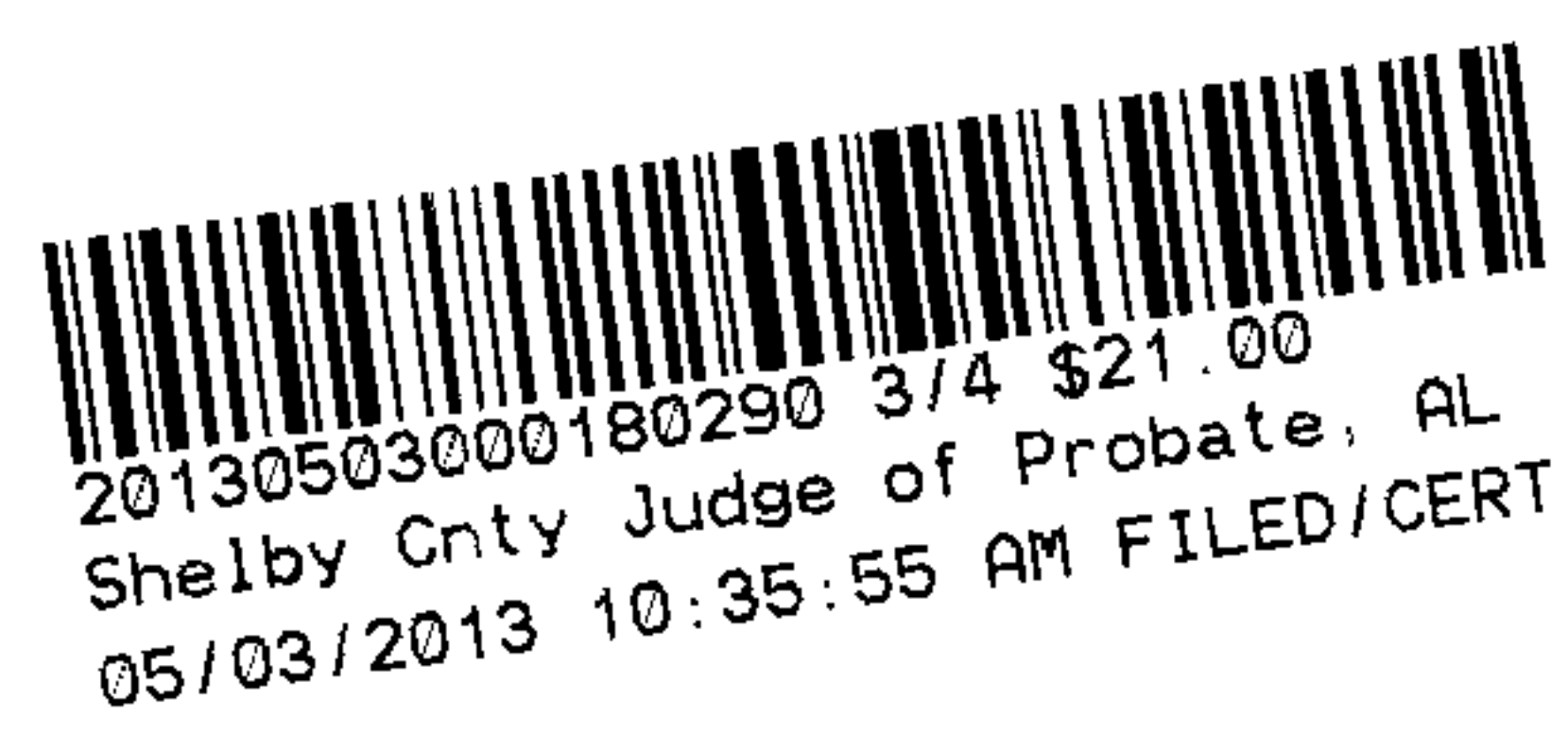
Training, Supervision and Retention) asserted against Defendants are due to be dismissed, as the Plaintiffs failed to controvert or even respond to Defendants' grounds for summary judgment on those counts. See Allen, 121 F.3d at 646. Based on the foregoing, the only remaining claims against Defendants are Counts IV (Suppression) and V (Deceit).

C. *The remaining claims against Defendants are due to be dismissed.*

Plaintiffs' suppression and deceit claims are time-barred. The two-year statute of limitations began to run when Plaintiffs had facts that, upon closer examination, would have led them to discover the alleged deceit and suppression. Jones v. Kassouf & Co., P.C., 949 So. 2d 136, 140 (Ala. 2006); see also §§ 6-2-3 and 38(1), Ala. Code (Supp. 2010); Jones, 949 So. 2d at 140; Kelly v. Connecticut Mut. Life Ins. Co., 628 So. 2d 454, 460 (Ala. 1993); and State Security Life Ins. Co. v. Henson, 262 So. 2d 745 (Ala. 1972).

Deupree is a residential real estate developer with many years of experience. Deupree learned in October 2004 that there was an alleged second appraisal whose values were much lower than the first appraisal conducted only months earlier. Deupree testified that he was "amazed [at] the difference the same appraiser had in two sets of values on the same piece of property," since there had been "no market changes that would affect value to that extent." As an experienced developer with knowledge and understanding of appraisals, a reasonable fact finder would have to conclude that Deupree and Pilot had facts that, upon closer examination, would have led them to discover the alleged deceit and suppression within two (2) years of October 2004. Because the Plaintiffs filed their Complaint in October 2008, almost four years after their deceit and suppression claims accrued, the claims are barred by the applicable statutes of limitation.

Because the Court finds that the statutes of limitation have expired and grants summary



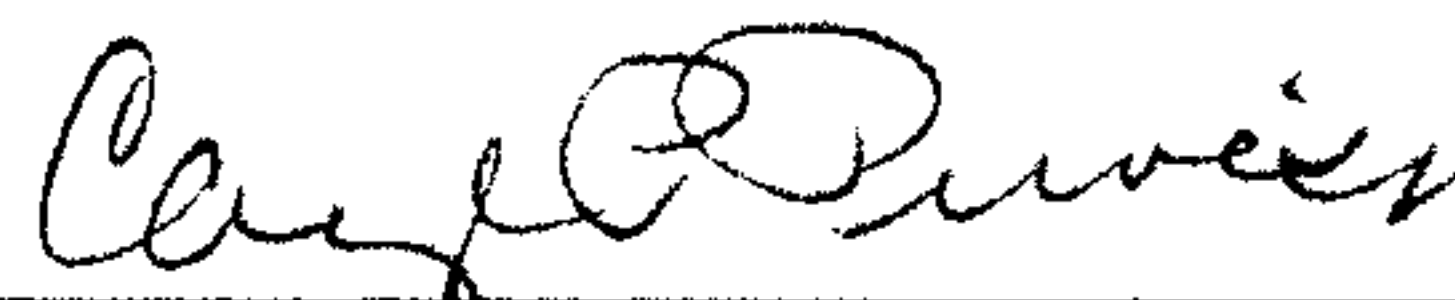
judgment on that ground, it does not reach the remaining grounds for summary judgment asserted by the Defendants.

Accordingly, the Defendants' Motion for Summary judgment is granted; and it is further **ORDERED, ADJUDGED AND DECREED** that First Commercial is entitled to a judgment on its counterclaims against Pilot and Deupree in the amount of \$659,299.47, plus interest and costs; and it is further

ORDERED, ADJUDGED AND DECREED that all counts of the Plaintiffs' Complaint are dismissed with prejudice.

Costs are taxed to the Plaintiffs.

DONE AND ORDERED this 9th day of Dec, 2011.



JUDGE CARYL P. PRIVETT
JEFFERSON COUNTY CIRCUIT COURT

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