

IN THE SUPREME COURT OF MISSISSIPPI

COPY

COMMUNITY BANK

PLAINTIFF/APPELLANT

v.

CAUSE NO. 2008-CA-01521

DONNA STUCKEY

DEFENDANT/APPELLEE

**INTERLOCUTORY APPEAL
FROM THE CIRCUIT COURT OF COVINGTON COUNTY**

BRIEF OF APPELLANT COMMUNITY BANK

ORAL ARGUMENT REQUESTED

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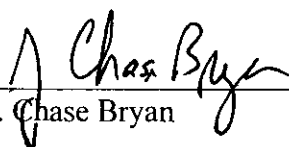
DONNA STUCKEY

DEFENDANT/APPELLEE

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 this Court may evaluate possible disqualification or recusal.

1. Community Bank, Appellant.
2. Donna Stuckey, Appellee.
3. J. Chase Bryan, Alan W. Perry, and the law firm of Forman Perry Watkins Krutz & Tardy LLP, attorneys for Appellants.
4. Clay L. Slay and the law firm of Adams & Edens, P.A., attorneys for Appellants.
5. David Shoemake and Shoemake & Blackledge, PLLC, attorneys for Appellee.
6. Mike Stuckey, husband of the Appellee and previously a co-defendant in the underlying replevin action filed by Community Bank whose claims have now been ordered to arbitration.
7. William H. Jones, attorney for Mike Stuckey.
8. Raymond McAlpin, a former employee of Community Bank against whom the Stuckeys have asserted claims in this action.
9. Gerald D. Garner, Esq., attorney for Raymond McAlpin.



J. Chase Bryan

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STATEMENT OF THE ISSUES

1. Donna Stuckey is bound to arbitrate her claims against Community Bank by her signature on the May 12, 2003, Arbitration Agreement.
2. Even if Donna Stuckey did not sign the May 12, 2003, Arbitration Agreement, she is bound to arbitrate her claims because she is a third-party beneficiary of numerous loan documents at issue in this suit.
3. Even if Donna Stuckey did not sign the May 12, 2003, Arbitration Agreement, she is bound to arbitrate her claims under the doctrine of equitable estoppel.

STATEMENT OF THE CASE

Community Bank filed this suit as a basic replevin action in an attempt to obtain possession of the property offered by Mike and Donna Stuckey ("the Stuckeys") as collateral in support of certain loans made to their cattle business. (R. 7). In response, the Stuckeys each filed a separate counterclaim in which they alleged – for the first time - that many of the signatures of Donna Stuckey are forged on the underlying loan documents, and that these loans were obtained through fraud and duress perpetrated by a former employee of the Bank. (R. 79). Further, they both allege that this employee misrepresented certain aspects regarding an 11-acre parcel of property and convinced them to buy this parcel for residential development. (R. 81-83). Specifically, they claim that the former employee of the Bank made material representations that the parcel could be developed for residential homes, but that these representations were false and that the Stuckeys are now left holding the parcel of property without the ability to develop it or sell the one home that they have already constructed on the property. (R. 81-83).

The documents for the purchase of this parcel of property were signed on May 12, 2003, and included an Arbitration Agreement ("agreement"). (R. 117; R.E. at C). The agreement provides, *inter alia*, as follows :

Dispute Resolution: Any claim, dispute or controversy between Customer and Bank, including Bank's employees, officers, directors, agents, parent companies, subsidiary companies, sister companies, successors, assigns, other affiliated entities or persons (collectively, "Covered Persons"), (whether in contract, tort, or otherwise, whether pre-existing, present or future, and including statutory, common law, intentional tort of equitable claims), arising from or relating to any matter, including, but not limited to, the Transaction, any past or future interactions, business or dealings between the parties or between Customer and the Covered Persons or any application, advertisements, promotions, or oral or written statements related to the Transaction, any goods or services furnished in connection with the Transaction or the terms of financing, the relationships with respect to the Transaction (including to the full extent permitted by applicable law, relationships and dealing with third parties who are not signatories to the Transaction or this Agreement) or the validity, enforceability or scope of this

Agreement (collectively, "Claim"), shall be resolved, upon the unilateral or joint election of Customer or Bank or said Covered Persons, respectively, by binding arbitration, as hereinafter provided, pursuant to the Rules of the National Arbitration Forum ("NAF") in effect at the time the Claim is asserted. A party who has asserted a Claim in a lawsuit in court may elect arbitration with respect to any Claim(s) subsequently asserted in the lawsuit by any other party or parties.

...

(R. 117; R.E. at C). Numerous other loans for the Stuckey's farming and construction operations contained the same Arbitration Agreements. (R. 120-274; R.E. at C). Based on this Arbitration Agreement and the others, Community Bank moved to compel arbitration of both of the Stuckeys' claims. (R. 112; R.E. at C). The trial court found the Arbitration Agreements were not unconscionable or unenforceable, and entered an order compelling Mike Stuckey to arbitrate his claims. (R. 299; R.E. at E). As such, the trial court correctly determined that the FAA applies to the contracts at issue in this case, that the broad language of the arbitration agreement covers these claims, and that the arbitration of Mike Stuckey's claims is proper.

However, Donna Stuckey asserted that her claims could not be compelled to arbitration because her signature was forged on each and every arbitration agreement -- including the one for the purchase of the 11-acre parcel of property - despite the fact that she admitted signing the remaining loan documents involved in that May 12, 2003, loan. (R. 286-87).

Because the trial court had previously found that the arbitration agreements were valid, the only remaining question was whether Donna Stuckey actually signed the arbitration agreement, or whether she was bound to arbitrate her claims due to her third party beneficiary status or through principles of equitable estoppel based on the benefit she received from the loans at issue.

On March 7, 2008, the trial court heard oral arguments from the parties regarding Donna Stuckey's claim of forgery on the arbitration agreements. (Transcript at p.1). Community Bank

showed the Court the signature of Ms. Stuckey on the May 12, 2003, Deed of Trust, which she admitted signing, and on which her counterclaims are based. (Transcript at 4; R.E. at G).

Community Bank also showed that its handwriting expert, which readily agreed that some of Donna Stuckey's signatures were forged on other arbitration agreements, testified by Affidavit that her signature on the May 12, 2003, arbitration agreement was *her true signature*.

(Transcript at 11; R.E. at G).

The Court recognized that her signature on, and agreement, to at least one arbitration agreement would be enough to compel arbitration of her claims. (Transcript at 8; R.E. at G). With respect to the arbitration agreement dated May 12, 2003, the trial court noted "I mean, if everything else was a forgery, this still might hook you, this arbitration agreement." (Transcript at 8; R.E. at G).

The trial court further recognized that "... the signature on the deed of trust of May 12, '03, is exactly the same as that on the arbitration agreement of the same date." (Transcript at 11; R.E. at G). The trial court then found, with respect to the signatures of Donna Stuckey, that "[s]ome appear to be forged. My untrained eye can tell me that. Some appear to be genuine. My untrained eye can tell me that." (Transcript at 17; R.E. at G). Lastly, with respect to the May 12, 2003, arbitration agreement, counsel for Donna Stuckey even admitted that the signature "does appear to be hers." (Transcript at 19; R.E. at G).

In other words, the trial court recognized that although some of the signatures of Donna Stuckey were forged, that it appears she *did sign the arbitration agreement connected with the May 12, 2003 loan and deed of trust*. As such, her claims, which allege fraud and misrepresentations regarding the value of that property and certain title defects, etc., are subject to arbitration.

In the least, Donna Stuckey admits that she was aware of the purchase of the property, she signed the deed of trust for the property, and she is now a part-owner of the property. Under the principles of equitable estoppel, she cannot accept the benefits of the contract without accepting all of the provisions – including the arbitration agreement.

SUMMARY OF THE ARGUMENT

The trial court erred in finding that there was not compelling evidence that Donna Stuckey actually executed the May 12, 2003, arbitration agreement along with all the other loan documents of the same date which she admits signing. Further, even in the event that Donna Stuckey did not sign any of the arbitration agreements at issue in this suit, the trial court erred in finding that she is not a third-party beneficiary of any of the loan contracts with Community Bank, so that she could be compelled to arbitrate her claims based on those contracts and the doctrine of equitable estoppel. Because Donna Stuckey's claims are completely based on the May 12, 2003, purchase of the 11-acre parcel of property, and because she is now a part-owner of that very property, the doctrine of equitable estoppel holds that she is estopped from asserting her claims but at the same time, avoiding the arbitration agreement contained as part of those loan documents.

ARGUMENT

I. DONNA STUCKEY SIGNED THE MAY 12, 2003, ARBITRATION AGREEMENT.

In her deposition, Donna Stuckey claimed that her signature on *each and every* arbitration agreement was forged – even while admitting that she signed the other documents included for that same loan. For instance, Donna Stuckey has testified that she signed the Real Estate Deed of Trust in connection with the May 12, 2003 purchase of property, but denies signing the Arbitration Agreement that was included in that loan packet. (R. 313; R.E. at F). Because the signatures on these arbitration documents – along with several other loan documents – appeared to be identical to the ones that Donna Stuckey has admitted signing, Community Bank retained the services of a handwriting expert to inspect the alleged forged signatures.

Grant Sperry, a Forensic Document Examiner, has reviewed Donna Stuckey's undisputed signatures on loan documents as well as her signature on an Affidavit. (R. 327-29; R.E. at F). While finding that many of the signatures were forged by Mike Stuckey on many of the loan documents, Sperry has also concluded that the signature on several of the loan documents – including several arbitration agreements - *are, in fact, the true and correct signatures of Donna Stuckey*, including the arbitration agreement in connection with the May 12, 2003, Deed of Trust. (R. 327-29; R.E. at F).

At the hearing of this matter, the trial Judge agreed that Donna Stuckey's signature on just one arbitration agreement would be enough to compel arbitration of her claims. (Transcript at 8; R.E. at G). After hearing oral arguments and reviewing the Affidavit testimony of the Bank's handwriting expert, the trial court took the matter under advisement, but eventually noted in a letter that he would deny the motion to compel arbitration of Donna Stuckey's claims. In response to that letter, the Bank filed a Motion to Reconsider, in which it showed again that the

signature on the arbitration agreement in connection with the May 12, 2003, Deed was truly that of Donna Stuckey. (R. 540; R.E. at H).

In response, Donna Stuckey – for the first time – submitted her own Affidavit of a handwriting expert who stated that the signature on that Arbitration Agreement was forged. (R. 588). Shortly thereafter, the trial court entered its order denying the Motion to Reconsider. (R. 800; R.E. at B). In it, the Court found that “there does not exist convincing evidence that Donna Stuckey executed any of the arbitration agreements.” (R. 800; R.E. at B).

The trial court erred in making this factual determination. The May 12, 2003, loan documents were *all one package*. It is incredulous for Donna Stuckey to claim she signed one page within the packet without signing the others. The signature on the Arbitration Agreement signed in connection with the May 12, 2003, loan *is* the signature of Donna Stuckey and – as such, her claims should be compelled to arbitration.

II. DONNA STUCKEY IS BOUND TO ARBITRATE BECAUSE SHE IS A THIRD-PARTY BENEFICIARY OF THE LOANS AT ISSUE

The trial court also found that Donna Stuckey was not bound to arbitrate her claims because she was not a “third-party beneficiary” of the cattle loan contracts at issue in this suit. (R. 800; R.E. at B). However, this is not the case. To begin, Donna Stuckey *is* a third-party beneficiary, and a very signatory, to the loan contracts regarding the May 12, 2003, purchase of property. The very claims asserted against Community Bank by Donna Stuckey *are based on the May 12, 2003, loan for the purchase of the 11-acre parcel of property*. Specifically, both Mike and Donna Stuckey assert that Raymond McAlpin, a former Community Bank employee, made misrepresentations to convince them to purchase the 11-acre parcel of property from Community Bank for residential development. (R. 81-83). They claim they purchased the property, and constructed one residential home for sale on the property, but are now unable to

sell the home. (R. 81-83). Both specifically state that as a result of the alleged misrepresentations and/or omissions, they sustained losses and damage in the amount of the purchase price of the 11-acre parcel, \$30,000 for money spent in dirt work to prepare the lots, and \$75,000 for the construction of the one completed residential home. (R. 81-83). Clearly, Donna Stuckey was a *direct* beneficiary of the May 12, 2003, loan as she now owns that piece of property, and cannot assert claims based on that very loan without accepting the arbitration agreement as part of the loan documents.

In addition, the trial court's holding that Donna Stuckey could not be a "third-party beneficiary" under the other cattle loan contracts was erroneous. The trial court stated that its decision was based on the fact that Donna Stuckey did not have any interest in the cattle operation. However, this fact was simply not true. According to Donna Stuckey's own Answer and Counterclaim, "the cattle operation was in the name of Stuckey Farms" and "Donna Stuckey, was an owner of an interest in Stuckey Farms." (R. 83). These "cattle" loans provided operating capital that kept the cattle farm in business and has provided benefits and livelihood to the Stuckeys.

Therefore, not only was Donna Stuckey a direct beneficiary of the property loan, but she was clearly a third-party beneficiary of all the cattle loans. As such, she cannot avoid the numerous arbitration agreements in connection with these loans at issue in this suit. Therefore, Donna Stuckey is a third party beneficiary of each of the arbitration loans regardless of her signatures. As a third-party beneficiary, she cannot accept the benefits of these loans and reject the burdens of them. *See, Terminex International, Inc. v. Rice*, 904 So. 2d 1051, 1058 (Miss. Dec. 9, 2004) ("[t]o allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment

of the Arbitration Act.”)(quoting *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004)(attached in the Appendix of Authorities). These contractual “burdens” include the arbitration provisions.

Under Mississippi law, “arbitration agreements can be enforced against non-signatories if such non-signatory is a third-party beneficiary.” *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720, at ¶ 21 (Miss. Ct. App. Aug. 28, 2007)(attached in the Appendix of Authorities)(quoting *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006)). According to this Court, “the *right of the third party beneficiary* to maintain an action on the contract *must spring from the terms of the contract itself*.” *Adams*, 943 So. 2d at 708-09 (emphasis in original) (citing 17A C.J.S. *Contracts* 519(4) (1963); see also *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000)(noting a Second Circuit opinion finding that a non-signatory can be bound by showing a “direct benefit” from or “pursuing a ‘claim . . . integrally related to the contract containing the arbitration clause.’”)(quoting *Thomson-CSF, S.A. v. American Arbitration Ass’n*, 64 F.3d 773, 778-80 (2d Cir. 1995)(both attached in the Appendix of Authorities).

Donna Stuckey’s claim that she signed only some of the contracts involved in each loan, and did not sign the connected arbitration agreements, does not prevent the application of these principles. See, *Sullivan v. Protex Weatherproofing, Inc.*, 2005 WL 729536 (Miss. March 31, 2005)(employee bound to arbitrate claims based on Asset Purchase Agreement where arbitration clause was found in a separate Employment Agreement)(attached in the Appendix of Authorities).

In this case, the loans were sought and entered into to assist the Stuckeys’ cattle farming operation, of which Donna was a co-owner, or for the purchase of property for which Donna

Stuckey is also a co-owner - *by her own admission*. The loan proceeds provided operating capital that kept the cattle farm running. Further, Donna Stuckey received the benefit of the purchase of the May 12, 2003, property by obtaining ownership and a Deed to real property located in Smith County, Mississippi, jointly in her name. In short, Donna Stuckey has accepted the benefits of all of the loans containing the arbitration agreements and cannot reject the burden of arbitration when it does not suit her needs. *See, American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)(attached in the Appendix of Authorities).

III. DONNA STUCKEY IS BOUND TO ARBITRATE UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL

Under similar principles, Donna Stuckey is also estopped from claiming that the arbitration agreements at issue do not apply to her, when she has brought her causes of action *based on the loans containing the very arbitration agreements she attempts to disclaim*. Under principles of equitable estoppel, Donna Stuckey is likewise bound by the provisions of the arbitration agreements which have bound the claims of Mike Stuckey.

This Court recently addressed this same issue in *Terminex International, supra*. In *Terminex*, homeowners sued the pest control company for breach of contract, fraudulent inducement, negligence, etc. The husband had signed the arbitration agreement at issue, while the wife had not. The Rices argued that the wife's claims could not be subject to arbitration, as she was a non-signatory to the contract. However, the Court found that a non-signatory to an arbitration agreement may be bound to the agreement "if so dictated by the ordinary principles of contract and agency." *Id.* at ¶27 (citing *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004)). The Court found that the wife's claims were also subject to arbitration, *even though* it was her husband that signed the contract for pest control services. In fact, this Court noted "[i]t is doubtful that the Rices actually hope to succeed with this argument,

since Cynthia would have no standing or right to sue Terminex at all. Terminex would owe her no contractual duty and thus could not be liable to her for contractual damages.” *Id.* at n.3.

Similarly, in *Washington Mutual*, a husband and wife sued and the wife insisted that her claims could not be subjected to arbitration based on the agreement signed by her husband. The court held:

In the arbitration context, the doctrine [of estoppel] recognizes that a party may be estopped from asserting that the lack of signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Agreement.

Washington Mutual, 364 F.3d at 268 (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)(citations & quotations omitted)). *See also*, *Smith Barney v. Henry*, 775 So. 2d 722 (Miss. 2001)(holding that Henry, as the heir and/or successor of the signatory, was bound by the arbitration agreements signed by her daughter who opened the Smith Barney accounts).

In the current case, Donna Stuckey has filed causes of action for fraudulent inducement and misrepresentation as well as breaches of fiduciary duty and the duty of good faith and fair dealing. These causes of action are based specifically on contracts **containing arbitration clauses**. These loans were made to Mike and Donna Stuckey for operation of their joint cattle farm and purchase of property for residential development. Clearly, Donna Stuckey’s claims are inextricably interwoven with those of Mike Stuckey. They involve the same contracts, the same factual allegations, the same loan proceeds applied to the same joint cattle operation, the joint purchase of one parcel of property, and the same allegations of fraudulent inducement by the same former Bank employee. As Mike and Donna Stuckey clearly jointly owned and operated

the cattle operation as *one farm* for purposes of obtaining these loans, then the operation should be treated as *one farm* for purposes of suing on the same loans.

When applying these principles to the present case, it is obvious that Donna Stuckey is attempting to “hav[e] it both ways.” *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000)(attached in the Appendix of Authorities); *see also, Washington Mutual*, 364 F.3d at 268 (noting that the doctrine of estoppel prevents a party from “having it both ways” and holding that “[y]et this is precisely what [the non-signatory wife] is attempting to do here: suing based upon one part of a transaction that she says grants her rights while simultaneously attempting to avoid other parts of the same transaction that she views as a burden – namely, the arbitration agreement.”). This is the very situation the principles of equitable estoppel were created to prevent.

Instead, the principles of estoppel dictate that Donna Stuckey is bound to arbitrate her claims just as her co-owner in the cattle farm is bound.

As Donna Stuckey received the benefits of all loans made to support the cattle farm and the purchase and ownership of the 11-acre parcel of property, and has now filed suit alleging breaches of duties allegedly created by those loan contracts, then she is equitably estopped from asserting that her claims are not also covered by the Arbitration Agreements at issue in this case.

CONCLUSION

Donna Stuckey is bound to arbitrate her claims based on her signature on the May 12, 2003, Arbitration Provision. However, even if this Court finds her signature on that agreement is a forgery, then Donna Stuckey is still bound to arbitrate her claims on the basis that she is a third-party beneficiary of all the loans at issue in this suit, and she is equitably estopped from bringing a cause of action against Community Bank based on these loans without accepting the

arbitration agreement that is an inseparable part of these loans. Based on the foregoing, this Court should reverse the trial Court's ruling and hold that Donna Stuckey's claims must be submitted in arbitration.

This the 12th day of January, 2009.

Respectfully submitted,

COMMUNITY BANK OF MISSISSIPPI

By: J. Chase Bryan
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CERTIFICATE OF SERVICE

I, J. Chase Bryan, certify that a copy of the foregoing document was served upon the parties below, by depositing same in the United States Mail, first-class postage prepaid:

HONORABLE ROBERT G. EVANS
CIRCUIT COURT JUDGE OF SMITH COUNTY
P. O. BOX 545
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THIS, the 12th day of January, 2009.


J. CHASE BRYAN

APPENDIX AUTHORITIES

Cases

<i>American Bureau of Shipping v. Tencara Shipyard S.P.A.</i> , 170 F.3d 349, 353 (2d Cir. 1999).....	A
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<i>Trinity Mission of Clinton, LLC v. Barber</i> , 2007 WL 2421720, at ¶ 21 (Miss. Ct. App. Aug. 28, 2007)	F
<i>Washington Mutual Finance Group, LLC v. Bailey</i> , 364 F.3d 260, 268 (5th Cir. 2004)	G