

**IN THE SUPREME COURT OF MISSISSIPPI**

**EMC MORTGAGE CORPORATION**

**APPELLANT**

**V.**

**CAUSE NO. 2008-IA-00170-SCT  
CONSOLIDATED WITH 2008-IA-324**

**BETTYE C. CARMICHAEL**

**APPELLEE**

**CONSOLIDATED APPEALS  
FROM THE CIRCUIT COURT OF HINDS COUNTY  
FIRST JUDICIAL DISTRICT**

**BRIEF FOR THE APPELLEE**

**ORAL ARGUMENT NOT REQUESTED**

**Roy J. Perilloux, MSB # 04115  
James Eldred Renfroe, MSB # 10096  
Perilloux & Associates, P.A.  
648 Lakeland East Drive  
Suite A  
Flowood, Mississippi 39232  
601.932.1011**

**IN THE SUPREME COURT OF MISSISSIPPI**

**EMC MORTGAGE CORPORATION**

**APPELLANT**

**V.**

**CAUSE NO. 2008-IA-00170-SCT  
CONSOLIDATED WITH 2008-IA-324**

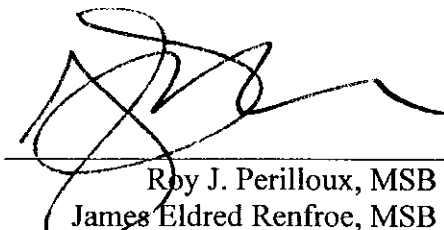
**BETTYE C. CARMICHAEL**

**APPELLEE**

**CERTIFICATE OF INTERESTED PARTIES**

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. Honorable Winston Kidd, Hinds County Circuit Judge;
2. EMC Mortgage Corporation, Appellant;
3. Bettye C. Carmichael, Appellee;
4. J. Chase Bryan, C. York Craig, III, Mandie B. Robinson, and the law firm of Forman Perry Watkins Krutz & Tardy LLP, Attorneys for Appellant.
5. Roy J. Perrilloux, James Eldred Renfroe, and the law firm of Perilloux & Associates, P.A., Attorneys for the Appellee.



Roy J. Perrilloux, MSB # 04115  
James Eldred Renfroe, MSB # 10096  
Perilloux & Associates, P.A.  
648 Lakeland East Drive  
Suite A  
Flowood, Mississippi 39232  
601.932.1011

## **TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PARTIES .....	2
TABLE OF CONTENTS .....	3
TABLE OF AUTHORITIES .....	4
STATEMENT OF THE ISSUES .....	5
STATEMENT OF THE CASE .....	6
A. Nature of the Case .....	6
B. Course of Proceedings and Disposition of the Court Below .....	6
C. Statement of the Facts .....	7
STANDARD OF REVIEW .....	8
SUMMARY OF THE ARGUMENT .....	9
ARGUMENT .....	10
I. THE CIRCUIT COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS .....	10
II. THE CIRCUIT COURT CORRECTLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION .....	11
A. Appellant Waived Its Right to Arbitration .....	11
B. Arbitration Is Improper .....	11
CONCLUSION .....	14

## **TABLE OF AUTHORITIES**

### **United States Supreme Court Cases**

<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	12
<i>Doctor's Assocs., Inc. v. Casarotto</i> , 517 U.S. 681 (1996).....	12
<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 513 U.S. 265 (1995) .....	12

### **United States District Court Cases**

<i>York v. Georgia-Pac. Corp.</i> , 585 F. Supp. 1265 (N.D. Miss.1984).....	13
<i>FDIC v. Bledsoe</i> , 989 F.2d 805 (CA5 Tex 1993).....	11

### **State of Mississippi Court Cases**

<i>Tucker v. Hinds County</i> , 558 So. 2d 869 (Miss. 1990) .....	8
<i>Favre Property Mgmt. v. Cinque Bambini</i> , 863 So. 2d 1037 (Miss. Ct. App. 2004).....	8
<i>Andrews v. Ford</i> , 990 So. 2d 820 (Miss. Ct. App. 2008).....	8
<i>Great Southern Nat. Bank v. McCullough Environmental Services Inc.</i> , 595 So. 2d 1282 (Miss. 1992).....	10
<i>Pass Termite &amp; Pest Control, Inc. v. Walker</i> , 904 So. 2d 1030 (Miss. 2004) .....	11
<i>East Ford, Inc. v. Taylor</i> , 826 So. 2d 709 (Miss. 2002).....	11
<i>Gulledge v. Shaw</i> , 880 So. 2d 288 (Miss. 2004) .....	13

### **State of Mississippi Statutes**

Mississippi Code Annotated Sec. 89-3-1 of 1972.....	10
---	----

### **STATEMENT OF THE ISSUES**

1. Whether the circuit court erred when it denied Appellant's motion to dismiss?
2. Whether the circuit court erred when it ruled that arbitration was inappropriate?

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

Appellant, EMC Mortgage Corporation, appeals the Hinds County Circuit Court's denial of its motion to dismiss, or in the alternative, to compel arbitration. The Circuit Judge found that a dismissal was unwarranted, and the Appellant actively participated in the litigation process which waived its right to enforce arbitration. (R. 316).

### **B. Course of Proceedings and Disposition in the Court Below**

Appellee, Bettye C. Carmichael ("Mrs. Carmichael"), filed her initial complaint on April 7, 1999, in the Circuit Court for the First Judicial District of Hinds County, Mississippi, requesting United Companies Lending Corporation's ("UCLC") deed of trust on her property be declared null and void due to misrepresentations and fraud. (R. 5).

On May 1, 1999, UCLC filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court in the State of Delaware. Mrs. Carmichael filed a proof of claim in UCLC's bankruptcy proceeding concerning the fraudulent mortgage at issue. UCLC objected to the proof of claim, which the bankruptcy court granted on August 30, 2000. (R. 108-125, 268).

The bankruptcy court subsequently approved an asset purchase agreement between UCLC and the Appellant on September 13, 2000, which included Mrs. Carmichael's mortgage loan; however, there is no bankruptcy order that reforms past liens, only that the Appellant received the assets free of liabilities. The bankruptcy court also entered its order confirming UCLC's reorganization plan that same day. (R. 126-247).

Mrs. Carmichael filed an amended complaint in the circuit court on November 26, 2001, substituting Appellant for UCLC. (R. 14). The Appellant filed their first motion to dismiss for

insufficiency of process and insufficiency of service of process or in the alternative for summary judgment and first asserted the bankruptcy order, which the court denied and an appeal was never taken. (R. 38). Appellant then filed a timely answer to Mrs. Carmichael's amended complaint on June 3, 2005 and in fact filed a *Counter-Complaint* against Mrs. Carmichael including such claims a judicial foreclosure and a money judgment against Mrs. Carmichael for the balance of the note (R. 39). Appellant subsequently filed a *second* motion that is now on appeal seeking a dismissal, or in the alternative, to compel arbitration. (R. 79).

### **C. Statement of the Facts**

On November 5, 1998, Mrs. Carmichael applied with UCLC to refinance the property that is the subject matter of this dispute. A few weeks later, specifically December 1, 1998, UCLC's employee, Lance Persac (who was subsequently plead guilty to mortgage fraud. United States District Court for the Southern District of Mississippi 3:05-cr-00117-HTW-JCS-1), went to Mrs. Carmichael's home to complete the real estate loan closing. (R. 7). At the closing, Mrs. Carmichael signed the documents necessary to complete the closing; neither an attorney nor Notary Public was present and the documents were not notarized in Simpson County, Mississippi. The closing documents were falsely notarized by Co-Defendant Michelle Browning an employee of Bobby Fisher, Jr. (who likewise subsequently plead guilty to mortgage fraud, United States District Court for the Southern District of Mississippi 3:05-cr-00165-HTW-JCS-1) and were backdated in LeFleur County, Mississippi, and reflected that they were signed in a different county than the county of Mrs. Carmichael's home, in violation of the Truth-In-Lending Act and state law. (R. 8). As previously mentioned, the present suit was filed on April 7, 1999, in response to this fraudulent loan closing. (R. 5).

### **STANDARD OF REVIEW**

This Court must determine whether the circuit court correctly denied Appellant's motion to dismiss, or alternatively, to compel arbitration.

The review of a motion to dismiss for failure to state a claim upon which relief can be granted is done *de novo*. This Court disfavors a 12(b)(6) motion to dismiss as it should only be granted if the plaintiff cannot prove any set of facts in support of its claim. This motion challenges the legal sufficiency of a complaint, which raises a question of law. On review, the complaint's allegations must be taken as true and be construed in a manner most favorable to the non-moving party. *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990); *Favre Property Mgmt. v. Cinque Bambini*, 863 So. 2d 1037, 1042 (Miss. Ct. App. 2004).

Should it be found that the circuit court did not err and dismissal was inappropriate, this Court must also determine whether arbitration is proper. The review of the grant or denial of a request to compel arbitration is also done *de novo*. *Andrews v. Ford*, 990 So. 2d 820, 822 (Miss. Ct. App. 2008).



### **SUMMARY OF THE ARGUMENT**

Mrs. Carmichael has established a valid claim for relief, and therefore Appellant's motion to dismiss is improper. Even though Appellant purchased the mortgage to the present property in bankruptcy free and clear of all claims, Mrs. Carmichael still has a right to bring suit because that deed of trust is void as a matter of law. A purchaser of a lien from bankruptcy cannot have superior lien rights. If the underlying lien is defective then the purchaser can only obtain a defective lien. Since Appellant has previously been put on notice that the deed of trust is void, and because the closing documents are unconscionable and fraudulent, the Circuit Court correctly found that Mrs. Carmichael had a right to bring suit and denied Appellant's motion to dismiss.

The Circuit Court also correctly denied Appellant's motion to compel arbitration. The court found that Appellant waited too long to request arbitration, which prejudiced Mrs. Carmichael. Furthermore, Appellant has participated in the litigation in that a Counter-Claim is currently pending by Appellant against Mrs. Carmichael. Even if arbitration was not waived, application of the United States Supreme Court's test to determine whether compelled arbitration is appropriate to the case at hand shows that the arbitration agreement was not executed to the benefit of Appellant, and contract defenses such as fraud and unconscionability prevent the application of such an agreement.

The Circuit Court correctly denied Appellant's motion to dismiss, or in that alternative, to compel arbitration. As such, this Court should affirm the ruling.

## ARGUMENT

### **I. THE CIRCUIT COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS**

Claims alleging misrepresentation and fraud are fact based questions, and therefore, they are inappropriate for disposition at the 12(b)(6) or summary judgment stage. *Great Southern Nat. Bank v. McCullough Environmental Services Inc.*, 595 So. 2d 1282, 1289 (Miss. 1992). The closing documents that Mrs. Carmichael executed were falsely notarized, procedurally and substantively unconscionable, and signed as a result of fraud. Since the deed of trust, which is the subject of this litigation, was fraudulently obtained, this Court should affirm the Circuit Court and deny Appellant's motion to dismiss.

Mrs. Carmichael acknowledges that Appellant purchased the mortgage at issue in a bulk package free and clear of all claims; however, Mrs. Carmichael still has a right to pursue her claim that the deed of trust is void. The Appellant had actual knowledge of the defective deed of trust and as such, does not stand in the shoes of a bona fide purchaser. Appellant has received actual notice that the deed of trust has been void since its execution. Therefore, even though Appellant purchased the mortgage from UCLC's bankruptcy, it purchased a deed of trust that could not hold it constituted a valid lien on Mrs. Carmichael's property.

Pursuant to Mississippi Code Annotated Sec. 89-3-1 of 1972 "a written instrument of or concerning the sale of lands . . . shall not be admitted to record in the clerk's office unless proof duly certified by an officer competent to take the same in the manner direct.." As there still exists the issue that the deed of trust was not properly acknowledged, an issue that still remains before the Court, then Mrs. Carmichaels position is that Appellants bulk asset purchase would not affect this litigation as they have purchased a defective deed of trust that pursuant to state law, should not be of record.

There exists a lien on Mrs. Carmichael's property held by Appellant that was procured through fraud and improperly notarized. Because Appellant has taken no remedial measures to remove this lien from the land records of Simpson County, and the deed of trust is void as a matter of law, it is committing the same unconscionable acts and omissions as its bankrupt predecessor.

As Appellant receive the Carmichael loan under a bankruptcy purchase, and as they had actual notice of this litigation, then as assignee of the deed trust they cannot assume superior rights. The Fifth Circuit Court of Appeals has specifically enumerated the following:

An assignee stands in the shoes of his assignor.

*FDIC v. Bledsoe*, 989 F.2d 805 (CA5 Tex 1993)

Mrs. Carmichael has established a valid claim that presents a question of fact for a jury. Because Appellant purchased Mrs. Carmichael's mortgage in UCLC's bankruptcy, it is a necessary party to the present litigation. And although Appellant purchased the mortgage free and clear of all claims, this does not allow them to enforce a deed of trust that is void as a matter of Mississippi law. As such, Mrs. Carmichael has a recoverable claim, and Appellant's motion to dismiss is improper.

## **II. THE CIRCUIT COURT CORRECTLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION**

### **A. Appellant Waived Its Right to Arbitration.**

The Circuit Court found that Appellant waived its right to enforce the arbitration agreement as a result of not immediately filing a motion to compel arbitration and actively participating in the litigation process to the detriment of Mrs. Carmichael. (R. 316). Mrs. Carmichael added Appellant as a defendant in her amended complaint on November 26, 2001. Appellant eventually answered the complaint on June 3, 2005 and filed a Counter-Complaint

against Mrs. Carmichael.<sup>1</sup> Not until January 31, 2007 did Appellant move to dismiss, or in the alternative, compel arbitration. An arbitration clause is waived when a party waives the right to arbitrate when it actively participates in a lawsuit or takes other action inconsistent with the right to arbitration. In the case at hand, Appellant has an ongoing suit in this case against Mrs. Carmichael. Waiver can be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party. *Pass Termite & Pest Control, Inc. v. Walker*, 904 So. 2d 1030, 1035 (Miss. 2004). In *Walker*, this Court cited a 237-day delay before invoking arbitration as a factor in finding that arbitration had been waived. *Id.* Appellant waited 607 days after answering the complaint to move for arbitration. In fact, Appellant has had the opportunity to stay the proceedings to request arbitration since it became a party to the present suit in 2001. The Circuit Court correctly determined that Appellant waived whatever right it had to arbitrate.

**B. Arbitration is Improper.**

Even if Appellant did not waive arbitration, it still should not be implemented in the present case. The United States Supreme Court has set down a two-pronged test in determining the validity of a motion to compel arbitration. *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002). The first prong considers (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement. The second prong determines whether legal constraints external to the parties' agreement foreclosed arbitration of those claims. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). The arbitration agreement in the present case fails both prongs, making it inappropriate for this Court to compel arbitration.

---

<sup>1</sup> Appellant did raise mediation and arbitration as defenses in its answer. However, no motion to stay proceedings to compel arbitration was made until more than a year and a half later.

The first prong of the test initially determines whether there is a valid arbitration agreement. Mrs. Carmichael signed the arbitration agreement with UCLC. Mrs. Carmichael did not sign an arbitration agreement with the Appellant. Appellant has asserted that their purchase agreement with UCLC in bankruptcy was limited to only an asset purchase. (Appellate Brief 7). Appellant maintains that it is the beneficiary of the arbitration agreement, but not subject to liability for the resulting actions of the agreement between UCLC and Mrs. Carmichael. Appellant has mistakenly attempted to selectively assert rights to parts of the agreement that benefit them, but disclaim components of the agreement that hold them liable. As such, a valid arbitration agreement between Appellant and Mrs. Carmichael does not exist. The first prong of the test is not met.

Unfortunately for Appellant, the courts have demanded accountability by preventing this selectivity in the second prong of the test as well. The United States Supreme Court has ruled that applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996). The Court emphasized that when reviewing an arbitration clause, it had to be viewed on equal footing as the entire contract. *Casarotto*, 517 U.S. at 686 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)). Thus, if the entire contract was subject to contract defenses, the arbitration clause within that contract would be as well. The deed of trust in the present case was falsely notarized, procedurally and substantively unconscionable, and signed by Mrs. Carmichael as a result of fraud.

By falsely executing and swearing to the notarized deed of trust, and not obtaining proper identification of persons signing said documents, the Notary Public breached her primary duty rendering all documents null and void as a violation of state law. Additionally, the Notary

Public, and not Mrs. Carmichael, is liable for such documents that were falsely certified. *See Gullledge v. Shaw*, 880 So. 2d 288, 294 (Miss. 2004) (“A notary and its sureties are liable where the notary makes a false certificate and injury results there from”).

Both procedural and substantive unconscionability existed at the deed of trust’s execution when UCLC fraudulently induced Mrs. Carmichael into signing the closing documents. Procedural unconscionability is found through evidence of “a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms.” *York v. Georgia-Pac. Corp.*, 585 F. Supp. 1265, 1278 (N.D. Miss.1984). Again, UCLC and its employees abused their relationship with Mrs. Carmichael by not explaining the closing documents prior to her signing, thereby exercising superior business knowledge, exploiting her age and lack of business prowess, and conspiring to defraud her. They also intentionally concealed material facts to Mrs. Carmichael about her options, preventing her from considering her alternatives. Substantive unconscionability is evident by showing the terms of the arbitration agreement to be oppressive. *Id.* UCLC included fees that were exorbitant and contrary to the usual and customary amount in such industry dealings.

The terms and circumstances surrounding Mrs. Carmichael’s loan closing reveal ample evidence of fraud, unconscionability, and abuse that warrant negating a contract. The deed of trust and arbitration agreement are void and should not be enforced.

### **CONCLUSION**

Because the deed of trust was obtained through fraud, it was void at its execution. The Mississippi Supreme Court views claims alleging misrepresentation and fraud as fact based questions, and has held that they are inappropriate for disposition at the 12(b)(6) stage.

Appellant's claim that it bought the mortgage package free and clear of claims does not release it from litigation regarding a fraudulent, and therefore void, deed of trust. Further, enforcing a deed obtained through fraud, especially when Appellant had actual notice the deed was void, would be unconscionable and against the precedent of justice. Mrs. Carmichael has shown that a valid claim for relief exists, and for that reason this Court should affirm the Circuit Court, and deny Appellant's motion to dismiss.

Additionally, the arbitration agreement in the deed of trust is unenforceable. Due to Appellant's excessive delay before invoking arbitration, the Circuit Court properly found that arbitration had been waived. Furthermore, since the deed of trust at issue is subject to defenses such as fraud and unconscionability, the arbitration agreement is ineffectual. This court should also deny Appellant's motion to compel arbitration.

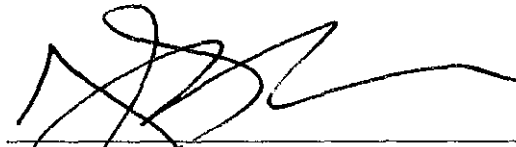
**CERTIFICATE OF FILING AND SERVICE**

I, the undersigned, do hereby certify that I have this day filed an original and three copies of the foregoing Brief of Appellee and have served a true and correct copy via United States Mail, postage prepaid, on the following:

J. Chase Bryan  
C. York Craig, III  
Mandie B. Robinson  
Attorneys for the Appellant  
Forman Perry Watkins Krutz & Tardy LLP  
City Centre Building, Suite 100  
200 South Lamar Street  
P.O. Box 22608  
Jackson, Mississippi 39225-2608

Honorable Winston Kidd  
Hinds County Circuit Judge  
P.O. Box 327  
Jackson, Mississippi 39205

SO CERTIFIED, this the 9<sup>th</sup> day of February 2009.



Roy J. Perilloux, MSB # 04115  
James Eldred Renfroe, MSB # 10096  
Perilloux & Associates, P.A.  
648 Lakeland East Drive  
Suite A  
Flowood, Mississippi 39232  
601.932.1011