

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2009-CA-01864

**PALMER HOLDINGS, LLC D/B/A
REALTY EXECUTIVES, DELL PALMER
AND TANJA ADAMS**

APPELLANTS

VERSUS

**TAMMIE R. PITTMAN AND
JACOB S. PITTMAN AND
SHAWN M. PITTMAN**

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

APPELLANTS' PRINCIPAL BRIEF

ORAL ARGUMENT NOT REQUESTED

OF COUNSEL:

Daniel D. Ware (MSB # [REDACTED])
C. Louis Clifford IV (MSB [REDACTED])
Ware Clifford Law Firm, PLLC
2625 Ridgewood Road, Suite 100
Jackson, Mississippi 39216
Telephone: (601) 368-9310
Facsimile: (601) 368-9958

Roger L. McGehee, Jr. (MSB [REDACTED])
Roger McGehee, Jr. PLLC
1058 Ridgewood Road, Suite E
Jackson, Mississippi 39211
Telephone: (601) 982-1000
Facsimile: (601) 982-1005

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2009-CA-01864

**PALMER HOLDINGS, LLC D/B/A
REALTY EXECUTIVES, DELL PALMER
AND TANJA ADAMS**

APPELLANTS

VERSUS

**TAMMIE R. PITTMAN AND
JACOB S. PITTMAN AND
SHAWN M. PITTMAN**

APPELLEES

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court of Mississippi may evaluate possible disqualification or recusal.

1. Palmer Holdings, LLC D/B/A Realty Executives, a Mississippi limited liability company, Appellant;
2. Dell Palmer, Appellant;
3. Tanja Adams, Appellant;
4. Daniel D. Ware and C. Louis Clifford IV, Ware Clifford Law Firm, PLLC, attorneys for the Appellants;
5. Roger L. McGehee, Jr. of Roger McGehee, Jr. PLLC, attorney for the Appellants;
6. Tammie R. Pittman, Appellee;
7. Jacob S. Pittman, Appellee;
8. Shawn M. Pittman, Appellee;
9. Donald W. Boykin, Attorney for Appellees;
10. Sean Farnham, Defendant in Default;

11. Judge Tomie T. Green, Hinds County Circuit Court Judge.

Respectfully submitted,

A handwritten signature in black ink, reading "Daniel D. Ware". The signature is written in a cursive style with a large, stylized "D" and a long, sweeping underline.

Daniel D. Ware

One of the Attorneys for the Appellants

STATEMENT REGARDING ORAL ARGUMENT

The issue presented for appeal in this matter can be resolved on the basis of the record and the briefs of the parties. Oral argument is therefore unnecessary.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	ii
STATEMENT REGARDING ORAL ARGUMENT.....	iv
TABLE OF CONTENTS.....	v
TABLE OF AUTHORITIES	vi
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
A. Nature of the Case.....	2
B. Course of Proceedings and Disposition in the Court Below.....	3
C. Statement of the Facts	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. STANDARD OF REVIEW	7
II. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION DISMISS OR, IN THE ALTERNATIVE, MOTION TO ENFORCE ARBITRATION AND INCORRECTLY HELD THAT THE ARBITRATION PROVISION IN THE REAL ESTATE CONTRACT DOES NOT APPLY TO A DISPUTE BETWEEN THE BUYERS AND THE REAL ESTATE BROKER/AGENT.....	7
A. Nonsignatories to a Contract can be bound by an Arbitration Agreement.	7
B. Defendants as the Real Estate Broker/Agent are Third-Party Beneficiaries to the Contract for the Sale of Real Estate.	8
C. Defendants were disclosed dual agents to the buyer and seller and as such enjoyed a close legal relationship.....	9
D. Defendants herein are entitled to enforcement of the arbitration pursuant to the holdings in <i>Century 21 Maselle and Associates, Inc. v. Smith and Fradella v. Seaberry.</i>	10
CONCLUSION.....	13
CERTIFICATE OF SERVICE	I

TABLE OF AUTHORITIES

Cases

<i>Adams v. Greenpoint Credit, LLC</i> , 943 So.2d 703 (Miss. 2006).....	9
<i>B.C. Rogers Poultry, Inc. v. Wedgeworth</i> , 911 So.2d 483 (Miss. 2005)	7
<i>Burns v. Washington Savings</i> , 251 Miss. 789, 171 So.2d 322 (1965).....	8, 9
<i>Cavagnaro v. Coldwell Banker Alfonso Realty, Inc.</i> , 995 So.2d 754 (Miss. Ct. App. 2008).....	10
<i>Century 21 Maselle and Associates, Inc. v. Smith</i> , 965 So.2d 1031 (Miss. 2007)	7, 10
<i>Cleveland v. Mann</i> , 942 So.2d 108 (Miss. 2006)	8
<i>Fradella v. Seaberry</i> 952 So.2d 165 (Miss. 2007).....	8, 11, 12
<i>Interocean Ship. Co. v. Nat’l Ship. & Trading Corp.</i> , 523 F.2d 527 (2d Cir. 1975).	8
<i>J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.</i> , 863 F.2d 315 (4 th Cir. 1988)	8
<i>Lane v. Outstalet</i> , 873 So.2d 92 (Miss. 2004).	9
<i>Qualcomm Inc. v. American Wireless License Group, LLC</i> , 980 So.2d 261 (Miss. 2007)	7
<i>Simmons Housing, Inc. v. Shelton ex. rel. Shelton</i> , 36 So.3d 1283 (Miss. 2010).....	7, 9
<i>Smith Barney, Inc. v. Henry</i> , 775 So.2d 722 (Miss. 2001).	8, 12
<i>Sullivan v. Protex Weatherproofing, Inc.</i> , 913 So.2d 256 (Miss. 2005);	8, 12
<i>Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.</i> , 10 F.3d 753 (11 th Cir. 1993)	8
<i>Terminix Int’l, Inc. v. Rice</i> , 904 So.2d 1051 (Miss. 2004).....	7, 8
<i>Washington Mut. Fin. Group, LLC v. Bailey</i> , 364 F.3d 260 (5 th Cir. 2004).....	8
<i>Varnado v. Alfonso Realty, Inc.</i> , 16 So.3d 746 (Miss. Ct. App. 2009).....	10
<i>Whalen v. Bistes</i> , 45 So.3d 290 (Miss. Ct. App. 2010)	9, 10

Statutes

Miss. Code Ann. § 73-35-21.....	9
---------------------------------	---

STATEMENT OF THE ISSUES

The central issue presented in this appeal is whether the Circuit Court erred and incorrectly held that the arbitration provision in the Contract for the Purchase of Real Estate and Contract Addendum dated May 15, 2007 does not apply to a dispute between the buyers and the real estate broker/agents and, therefore, incorrectly denied Defendants' Motion to Dismiss or, in the Alternative, Motion to Enforce Arbitration and the Motion to Stay Proceedings and Discovery.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal following the Circuit Court of the First Judicial District of Hinds County, Mississippi's denial of the Defendants, Dell Palmer, Palmer Holdings, LLC, d/b/a Realty Executives and Tanja Adams' Motion to Dismiss or, in the Alternative, Motion to Enforce Arbitration and the Motion to Stay Proceedings and Discovery. On May 15, 2007, the Plaintiffs and Sean Farnham entered into the Contract for Purchase of Real Estate. The aforesaid Defendants were the agents of the Plaintiffs (buyers) and became disclosed dual agents of both the buyers and seller to the Contract for Purchase of Real Estate. The instant real estate was purchased by the Plaintiffs and the loan closing was held on August 15, 2007 and the buyer conveyed title of the property to Plaintiffs.

Defendants thereafter brought an action in the Circuit Court of the First Judicial District of Hinds County, Mississippi against the Defendants and buyer wherein they alleged causes of action for fraud, negligence and/or gross negligence, constructive fraud and rescission. The Circuit Court denied Defendants' Motion to Dismiss or, in the Alternative, Motion to Enforce Arbitration and the Motion to Stay Proceedings and Discovery. The Defendants argue the lower court's denial of the Motion to Dismiss or, in the Alternative, Motion to Enforce Arbitration and the Motion to Stay Proceedings and Discovery is in error because while Defendants were not signatories to the aforesaid contract, they are entitled to binding arbitration under ordinary principles of contract and agency. The Defendants as agent first for the Plaintiffs and then the disclosed dual agent for the Plaintiffs and Seller, enjoyed a close legal relationship with both signatories to the contract. Defendants are also entitled to arbitration as they are third-party beneficiaries to the contract.

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

On May 18, 2009, Plaintiffs, Tammie R. Pittman, Jacob S. Pittman and Shawn M. Pittman, filed their Complaint in the Circuit Court of the First Judicial District of Hinds County, Mississippi against Sean Farnham, Dell Palmer, Palmer Holdings, LLC D/B/A Realty Executives and Tanja Adams, alleging causes of action for fraud, negligence and/or gross negligence, constructive fraud and rescission. [R. 4-17]. Defendants Dell Palmer, Palmer Holdings, LLC D/B/A Realty Executives and Tanja Adams in response to the Pittmans' Complaint, on July 22, 2009 filed their Motion to Dismiss or, in the Alternative, Motion to Enforce Arbitration and Memorandum Brief in Support Thereof and their Motion to Stay Proceedings and Discovery. [R. 38-56]. On October 20, 2009, a hearing was held on the Motion to Dismiss or, in the Alternative, Motion to Enforce Arbitration and the Motion to Stay Proceedings and Discovery. Circuit Court Judge Tomie Green signed an Order denying both the Motion to Dismiss or, in the Alternative, Motion to Enforce Arbitration and the Motion to Stay Proceedings and Discovery on October 28, 2009 and said order was entered on the minutes of the Circuit Court of the First Judicial District of Hinds County, Mississippi on October 29, 2009. [R. 72-73]. Thereafter, in response to the Order denying the Motion to Dismiss or, in the Alternative, Motion to Enforce Arbitration and the Motion to Stay Proceedings and Discovery, Appellants timely perfected their appeal to this Court.¹ [R. 74-75].

C. Statement of the Facts.

The claims made the basis of this civil action against Defendants, Dell Palmer, Palmer Holdings, LLC, d/b/a Realty Executives and Tanja Adams, arose out of the purchase of a house by the Plaintiffs, Tammie R. Pittman, Jacob S. Pittman and Shawn M. Pittman (hereinafter "the

¹ On November 17, 2009 Defendants, Dell Palmer, Palmer Holdings, LLC D/B/A Realty Executives and Tanja Adams filed a Petition for Interlocutory Appeal. On December 30, 2009, the Supreme Court of Mississippi entered an Order accepting the Petition for Interlocutory Appeal as a Notice of Appeal.

Pittmans” or “Plaintiffs”). In August, 2007, the Pittmans were seeking to purchase a house. The Pittmans utilized the services of Realty Executives and its agent, Tanja Adams, to assist in the search for a house. Dell Palmer was the real estate broker at Realty Executives. Tanja Adams showed the Plaintiffs a home located at 618 Williams Road, Florence, Mississippi. The subject house was owned by Sean Farnham. Defendants were disclosed dual agents for the buyers and seller to the instant transaction.

On May 15, 2007, the Pittmans and Sean Farnham entered the Contract for Purchase of Real Estate. [R. 42-45]. The home was ultimately purchased by the Pittmans. The Contract for Purchase of Real Estate entered into between the Pittmans and Sean Farnham contains an Arbitration provision as set forth in Paragraph 12 of the Contract for the Purchase of Real Estate dated May 15, 2007 which states:

ARBITRATION: Except for issues relating to title and ownership, environmental liability, and zoning, which shall not be subject to the requirements of this paragraph, in the event of any other dispute between Buyer and Seller arising out of this contract, the parties agree that any controversy or claim between them arising out of or relating to this Contract shall be settled exclusively by arbitration. The requested arbitration shall take place within thirty (30) days after written notification is received by the other party, at a place designated by the arbitrator. The arbitrator shall be selected from the Mississippi Bar Association’s panel of mediators or other mutually acceptable arbitration service. Each party shall pay a proportionate share of the fees associated with the arbitration including the cost of the arbitrator. The decision of the arbitrator shall be a final and binding resolution of the disagreement which may be entered as a judgment by any court of competent jurisdiction. Neither party shall sue the other where the basis of the suit is this Contract other than for enforcement of the arbitrator’s decision. In no event shall either party be liable to the other for indirect, special or consequential damages or loss of anticipated profits.

On May 18, 2009, the Pittmans filed their Complaint against Sean Farnham, Dell Palmer, Palmer Holdings, LLC D/B/A Realty Executives and Tanja Adams, alleging causes of action for fraud, negligence and/or gross negligence, constructive fraud and rescission. [R. 4-17]

SUMMARY OF THE ARGUMENT

On May 15, 2007, the Plaintiffs and Sean Farnham (seller) entered into the Contract for Purchase of Real Estate. Defendants, Dell Palmer, Palmer Holdings, LLC, d/b/a Realty Executives and Tanja Adams were the broker/agent of the Plaintiffs (buyers) and became disclosed dual agent of both the buyers and seller to the Contract for Purchase of Real Estate. The instant real estate was purchased by the Plaintiffs and the loan closing was held on August 15, 2007 and the buyer conveyed title of the property to Plaintiffs. On May 18, 2009, Plaintiffs filed their Complaint in the Circuit Court of the First Judicial District of Hinds County, Mississippi against Sean Farnham, Dell Palmer, Palmer Holdings, LLC D/B/A Realty Executives and Tanja Adams, alleging causes of action for fraud, negligence and/or gross negligence, constructive fraud and rescission. Defendants filed a Motion to Dismiss or, in the Alternative, Motion to Enforce Arbitration and Memorandum Brief in Support Thereof as well as a Motion to Stay Proceedings and Discovery. A hearing was held and the Circuit Court of the First Judicial District of Hinds County, Mississippi erroneously denied the Defendants motions.

Mississippi law expressly provides that that a nonsignatory to a contract can be bound by an arbitration agreement under ordinary principles of contract and agency. The Defendants as the Real Estate Broker/Agent herein were Third-Party Beneficiaries to the Contract for the Sale of Real Estate as they clearly benefited from the contract through commissions and other obligations. In addition, Defendants were disclosed dual agents to the buyer and seller and as such enjoyed a close legal relationship which allows them to enforce the instant arbitration agreement. Defendants herein are also entitled to the enforcement of arbitration pursuant to the holdings in the cases of *Century 21 Maselle and Associates, Inc. v. Smith* and *Fradella v. Seaberry*. The Circuit Court erred in denying the motion to enforce arbitration and accordingly this Court should reverse the circuit court's ruling and remand this case to the Circuit Court with

instructions to compel the Plaintiffs and Defendants to submit to this matter to arbitration.

ARGUMENT

I. STANDARD OF REVIEW.

The Supreme Court of Mississippi reviews questions of law *de novo*. *Century 21 Maselle and Associates, Inc. v. Smith*, 965 So.2d 1031, 1035 (Miss. 2007) (citations omitted). “The grant or denial of a motion to compel arbitration is reviewed *de novo*.” *Simmons Housing, Inc. v. Shelton ex. rel. Shelton*, 36 So.3d 1283, 1286 (Miss. 2010) (citations omitted).

II. THE TRIAL COURT ERRED IN DENYING APPELLANTS’ MOTION DISMISS OR, IN THE ALTERNATIVE, MOTION TO ENFORCE ARBITRATION AND INCORRECTLY HELD THAT THE ARBITRATION PROVISION IN THE REAL ESTATE CONTRACT DOES NOT APPLY TO A DISPUTE BETWEEN THE BUYERS AND THE REAL ESTATE BROKER/AGENT.

Arbitration agreements are favored and enforceable in the State of Mississippi. The Supreme Court of Mississippi has adopted a “‘liberal federal policy favoring arbitration agreements’ and will liberally construe agreements with a presumption in favor of arbitration” *Qualcomm Inc. v. American Wireless License Group, LLC*, 980 So.2d 261, 268-269 (Miss. 2007) citing *Terminix Int’l, Inc. v. Rice*, 904 So.2d 1051, 1054 (Miss. 2004). “[A] party generally is not required to arbitrate disputes unless that party previously agreed to do so.” *Simmons Housing, Inc. v. Shelton ex. rel. Shelton*, 36 So.3d at 1286. There are, however, well recognized exceptions to this rule. *Id.*

A. Nonsignatories to a Contract can be bound by an Arbitration Agreement.

Under Mississippi law “[a] nonsignatory to a contract may be bound to an arbitration agreement under ordinary principles of contract and agency.” *Id.* The Supreme Court of Mississippi has addressed the issue of nonsignatories to a contract in an arbitration setting. The Court in *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483, 491-92 (Miss. 2005), stated, in pertinent part, that:

[S]tate law principles might provide for the arbitration of disputes between a nonsignatory and a signatory to a contract, where there are allegations of substantially interdependent and concerted misconduct. A non-signatory should have standing to compel arbitration where the non-signatory has close legal relationship, such as alter ego, parent/subsidiary, or agency relationship, with a signatory to an agreement. *See Terminix Int'l, Inc. v. Rice*, 904 So.2d 1051 (Miss. 2004) quoting *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir.2004) ("A nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency.") *See also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); *Interocean Ship. Co. v. Nat'l Ship. & Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975).

See also Fradella v. Seaberry 952 So.2d 165, 175 (Miss. 2007) (more fully discussed *infra*); *Cleveland v. Mann*, 942 So.2d 108, 119 (Miss. 2006); *Sullivan v. Protex Weatherproofing, Inc.*, 913 So.2d 256, 260-61 (Miss. 2005); *Smith Barney, Inc. v. Henry*, 775 So.2d 722, 727 (Miss. 2001).

B. Defendants as the Real Estate Broker/Agent are Third-Party Beneficiaries to the Contract for the Sale of Real Estate.

"Third-party beneficiary status arises from the terms of the contract" *Burns v. Washington Savings*, 251 Miss. 789, 796, 171 So.2d 322, 325 (1965) (citation omitted). The *Burns* Court while recognizing a cause of action belonging to a third party beneficiary, articulated the difference between an intended and incidental beneficiary to a contract. *Burns*, 171 So. 2d at 325. The Court instructed, "[w]here the contract is primarily for the benefit of the parties thereto, the mere fact that a third person would be incidentally benefited does not give him a right to sue for its breach." *Id.* However, a third party may bring a cause of action where the parties enter into a contract for a third party's benefit or, "at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms." *Id.* The *Burns* Court instructed that a person is an intended beneficiary: "(1) When the terms of the contract are expressly broad enough to include the third party either by name as one of a specified class, and (2) the said third party was evidently within the intent of the term so used,

the said third party will be within its benefits if (3) the promisee had, in fact, a substantial or articulate interest in the welfare of the said third party in respect to the subject of the contract.” *Id.* A third-party beneficiary also must benefit directly from the contract. *Simmons Housing, Inc. v. Shelton ex. rel. Shelton*, 36 So.3d at 1286 (citing *Adams v. Greenpoint Credit, LLC*, 943 So.2d 703, 708 (Miss. 2006)).

The contract herein was entered into for the benefit of the Defendants, or at least a benefit was the direct result of that performance under the contract and within the contemplation of the signatory parties. The Defendants were the disclosed dual agent for this real estate transaction. Defendants’ third-party beneficiary status is evidenced in the contract which provides for payment, and the terms of payment, of commission to Dell Palmer, Palmer Holdings, LLC, d/b/a Realty Executives and Tanja Adams. Furthermore, the Real Estate Contract created a legal obligation or duty on the part of the signatory promisees to pay said commission to Defendants as agreed. Finally, the signatory promisees’ obligation to pay this commission is a legal duty which connects Dell Palmer, Palmer Holdings, LLC, d/b/a Realty Executives and Tanja Adams with the entire Contract for the Sale of Real Estate Contract, including its arbitration provision.

C. Defendants were disclosed dual agents to the buyer and seller and as such enjoyed a close legal relationship.

As alleged in Plaintiffs’ Complaint the Defendants were originally the broker/agent for the Plaintiffs. [R. 5]. Defendants were also a disclosed dual agent in the transaction in this case. Miss. Code Ann. § 73-35-21 permits dual agency representation by real estate professionals as long as the dual representation occurs with the knowledge of all parties. The Mississippi Court of Appeals has previously set forth the following standard of care required for a real-estate agent and stated:

The standard of care of an agent has been described as “a duty to use the degree of diligence and care which a reasonably prudent person would ordinarily exercise in the transaction of his own business.” More specifically, “a business

agent represents that he understands the usages of the business in which he is employed. One undertaking a matter involving special knowledge ordinarily thereby represents that he has the special knowledge required, and undertakes that so far as necessary to keep in touch with events, he will do so.”

Whalen v. Bistes, 45 So.3d 290, 293-94 (Miss. Ct. App. 2010) (citing *Varnado v. Alfonso Realty, Inc.*, 16 So.3d 746, 750 (¶ 16) (Miss. Ct. App. 2009) (quoting *Cavagnaro v. Coldwell Banker Alfonso Realty, Inc.*, 995 So.2d 754, 758 (¶ 12) (Miss. Ct. App. 2008)).

“In matters involving a dual agency, the agent must act ‘with a heightened sense of duty and conduct to assure that he serves both masters’ interests fully.” *Id.* (quoting *Lane v. Outstalet*, 873 So.2d 92, 97 (¶20) (Miss. 2004). Although Defendants were nonsignatories to the Contract for the Purchase of Real Estate herein, the Defendants were a disclosed dual agent in the transaction and, thus, under the principles of agency, as well as the standard of care and duties imposed on real-estate agents; the Defendants are entitled to the benefit of the arbitration provision in the contract.

D. Defendants herein are entitled to enforcement of the arbitration pursuant to the holdings in *Century 21 Maselle and Associates, Inc. v. Smith and Fradella v. Seaberry*.

The facts in *Century 21 Maselle and Associates, Inc. v. Smith* are analogous to the facts in the case at bar. 965 So.2d at 1033. In *Century 21 Maselle and Associates, Inc.* the seller entered into a contract to sell his home to purchasers. *Id.* The broker and its agent represented the purchasers. *Id.* The agent signed the Contract as “[b]roker [a]ssociate.” *Id.* The Contract for the sale of the house in *Century 21 Maselle and Associates, Inc.* contained an arbitration clause. *Id.* Thereafter, the purchasers of real estate brought a civil action against the broker, her employer and others to recover for negligence and fraudulent inducement. *Id.* The broker and its agent filed a motion to compel arbitration which was denied by the Circuit Court. *Id.* On appeal, the Supreme Court of Mississippi reversed and remanded the case “with directions to compel the parties ... to submit to arbitration consistent with the Contract.” *Id.* at 1039.

The Plaintiffs asserted in the Circuit Court that Dell Palmer, Palmer Holdings, LLC, d/b/a Realty Executives and Tanja Adams are not entitled to arbitration because they are not signatories of the Contract for the Sale of Real Estate and Contract Addendum which contains the arbitration provision. Defendants Dell Palmer, Dell Palmer, Palmer Holdings, LLC, d/b/a Realty Executives and Tanja Adams are Entitled to Enforcement of Arbitration Provision as Parties, or Alternatively, as Nonsignatory Parties to the Contract for the Sale of Real Estate and Contract Addendum pursuant to the case of *Fradella v. Seaberry*, 952 So.2d 165 (Miss. 2007) .

In *Fradella v. Seaberry*, the Sellers (Sammy and Joy Germany) decided to sell their property and listed it with Michelle Fradella, an agent associated with Prudential Gardner Realtors. *Id.* at 166. The Seaberrys (hereinafter “Buyers”) became interested in purchasing the Sellers’ property, and the Buyers and the Sellers entered into a written, dual agency contract whereby they agreed that Fradella and her agency would serve the role of dual agent for both parties. *Id.* A Contract for the Sale and Purchase of Real Estate was executed by the Sellers and Buyers, neither Fradella, nor anyone on behalf of Prudential Gardner Realtors signed the real estate contract. *Id.* at 167. Shortly the closing, the Seaberrys hired a surveyor and learned that the deed description of the property was less than described in the appraisal. *Id.* The Seaberrys filed suit against Fradella, Prudential Gardner Realtors, the Sellers and others for breach of contract and rescission asserting that the acreage of the property was less than what had been represented. *Id.* There after Fradella and Prudential Gardner Realtors filed a motion to compel arbitration. *Id.* The Chancellor denied the motion to compel arbitration. *Id.* at 167-168. Fradella and Prudential Gardner Realtors appealed and the Mississippi Court of Appeals affirmed. *Id.* at 169-170.

The Supreme Court granted a Petition for Writ of Certiorari. In reversing the lower court decisions, this Court stated:

....It is this contract which contained the arbitration clause which is at the heart of today's case. Although not signed by Fradella, or anyone on behalf of Prudential Gardner, this contract clearly created certain rights and responsibilities on the part of Prudential Gardner.

Fradella was indisputably acting as the Seaberrys' real estate agent. Furthermore, the Seaberrys' breach of contract claim is unquestionably intertwined with the duties Fradella was to perform according to the terms and provisions of the real estate contract. But for the real estate contract containing the arbitration clause at issue, the Seaberrys could not bring a claim of breach of contract. Because the Seaberrys rely on the document for their breach of contract claim, they cannot deny Fradella the benefit of the arbitration clause within the real estate contract that she relied upon to delineate her duties and responsibilities with regard to the transaction. When the pertinent documents concerning this real estate transaction are read in their totality, the fact that Fradella, or anyone on behalf of Prudential Gardner, did not sign this contract is of no moment. *Sullivan v. Protex Weatherproofing, Inc.*, 913 So.2d 256, 261 (Miss.2005). *See also Smith Barney, Inc. v. Henry*, 775 So.2d 722, 727 (Miss.2001).

Id. at 175.


Pursuant to the holding in *Fradella v. Seaberry*, 952 So.2d 165 (Miss. 2007) and other cases cited above, Defendants, Dell Palmer, Palmer Holdings, LLC, d/b/a Realty Executives and Tanja Adams are entitled to arbitration even though they are not signatories of the Contract for the Sale of Real Estate and Contract Addendum herein. Should this Court hold that nonsignatory real estate brokers and agents, such as Defendants herein, are not entitled to any rights or enforcement of these type of real estate contracts, then such a holding could call into question and potentially invalidate every real estate contract in the state of Mississippi. Such a holding could have chilling and far reaching consequences in the future and could be used to deny real estate brokers and agents any benefit including commissions, under a Contract for the Purchase of Real Estate simply because they were not a signatory to the contract. Should such a holding be adopted by this Court would essentially abrogate the well recognized rule that a nonsignatory may be bound to an arbitration agreement under ordinary principles of contract and agency.

CONCLUSION



For all of the above and foregoing reasons the decision of the Circuit Court of the First Judicial District of Hinds County, Mississippi denying the Motion to Dismiss or, in the Alternative, Motion to Enforce Arbitration and the Motion to Stay Proceedings and Discovery, should be reversed and this matter should be remanded to the Circuit Court with instructions to compel the Plaintiffs and Defendants to submit to arbitration.

RESPECTFULLY SUBMITTED, this the 20th day of December, 2010.


**PALMER HOLDINGS, LLC D/B/A REALTY
EXECUTIVES, DELL PALMER AND
TANJA ADAMS**

By: 
Daniel D. Ware

OF COUNSEL:

Daniel D. Ware (MSB # 
C. Louis Clifford IV (MSB # 
Ware Clifford Law Firm, PLLC
2625 Ridgewood Road, Suite 100
Jackson, Mississippi 39216
Telephone: (601) 368-9310
Facsimile: (601) 368-9958

and

Roger L. McGehee, Jr. (MSB # 
Roger McGehee, Jr. PLLC
1058 Ridgewood Road, Suite E
Jackson, Mississippi 39211
Telephone: (601) 982-1000
Facsimile: (601) 982-1005

CERTIFICATE OF SERVICE

The undersigned counsel of record for Appellants, hereby certifies that true and correct copies, electronic and paper, of the Appellants' Principal Brief were delivered via hand delivery to the Clerk of the Mississippi Supreme Court and the Mississippi Court of Appeals and via first class postage pre-paid to the following addresses:

Hon. Tomie T. Green
HINDS CO. CIRCUIT COURT JUDGE
Post Office Box 327
Jackson, Mississippi 39205

Donald W. Boykin, Esq.
ATTORNEY AT LAW
515 Court Street
Jackson, Mississippi 39201

SO CERTIFIED this the 20th day of December, 2010.

A handwritten signature in black ink, reading "Daniel D. Ware", written over a horizontal line.

Daniel D. Ware