STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 0199

SALVADOR AND ASHLEY DEPAULA

VERSUS

ALLIED HOME MORTGAGE CAPITAL CORPORATION, HOMECOMINGS FINANCIAL, LLC, TERRI-LYNN KILLETT, AND SHANE SMITH

Judgment rendered MAR 21 2013

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Appealed from the
21st Judicial District Court
in and for the Parish of Tangipahoa, Louisiana
Trial Court No. 2008-0002747
Honorable Ernest G. Drake, Jr., Judge

* * * * * *

MARK M. LANE
MANDEVILLE, LA

ATTORNEY FOR
PLAINTIFFS-APPELLANTS
SALVADOR AND ASHLEY
DEPAULA

ROBERT A. KUTCHER
NICOLE S. TYGIER
METAIRIE, LA

ATTORNEYS FOR
DEFENDANT-APPELLEE
SHANE SMITH

WARREN HORN
NEW ORLEANS, LA
and
JOHN P. SCOTT, JR.
BIRMINGHAM, AL

ATTORNEYS FOR
DEFENDANT-APPELLEE
ALLIED HOME MORTGAGE
CAPITAL CORP.

* * * * * *

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

McDonald, J. concurs.

PETTIGREW, J.

In this action, plaintiffs, Salvador and Ashley DePaula, allege mortgage fraud perpetrated against them by defendant Allied Home Mortgage Capital Corporation ("Allied"), several of its former employees, and other co-conspirators. Following the trial court's maintenance of dilatory exceptions raising the objection of prematurity put forth by Allied and its former employee, Shane Smith, the plaintiffs sought writs that were later converted to an appeal. We reverse and remand.

FACTS

In December 2006, Salvador DePaula and his wife, Ashley, were in the process of settling community property with Mr. DePaula's ex-wife, pursuant to a financial settlement entered during the couple's divorce four years earlier. For this reason, Mr. and Mrs. DePaula sought to sell one of Mr. DePaula's separate rental properties and mortgage another rental property in order to secure the sums necessary to effect the settlement with Mr. DePaula's ex-wife. The rental property that Mr. and Mrs. DePaula elected to sell was situated at 449 West McClellan Drive, Ponchatoula, Louisiana ("McClellan Drive property").

Shane Smith and several other individuals had purportedly occupied the McClellan Drive property for some time. Mr. and Mrs. DePaula claim that Mr. Smith advised them that one of his family members wanted to purchase the McClellan Drive property. Mr. Smith was employed as the manager of the Hammond, Louisiana, branch of Allied Home Mortgage Capital Corporation ("Allied"). Mr. and Mrs. DePaula utilized the services of Allied when they mortgaged another one of their unencumbered rental properties as security for a loan.[1]

After some negotiation, Mr. and Mrs. DePaula ultimately agreed to sell the McClellan Drive property for $93,000.00 to Mary M. Maleckar. Mr. Smith, through his employment with Allied, prepared the loan closing documents with the assistance of

[1] According to his affidavit, executed April 11, 2011, Mr. Smith attested to the fact that he was employed by Allied as the Branch Manager of Allied's office in Hammond, Louisiana, from June 2002 until April 2008.

Terri-Lynn Killet, a loan processor with Allied. On December 14, 2006, Mr. DePaula executed an Act of Sale with Kimberly L. Bates, who was purportedly acting as a mandatary for the true buyer, Ms. Maleckar. Ms. Maleckar purportedly financed her purchase through a mortgage with Allied on the property for the full purchase price, $93,000.00. Chad B. Ham served as the title attorney and reviewed and recorded the documents related to the sale and mortgage. Mr. DePaula later received a draft for $92,125.00, which represented the proceeds from the sale of the McClellan Drive property less closing costs and fees.

In a further attempt to satisfy the financial settlement owed to Mr. DePaula's ex-wife, Mr. DePaula closed on a loan brokered by Allied on May 3, 2007, which he secured with another rental property situated at 41114 Pumpkin Center Road in Hammond, Louisiana ("Pumpkin Center Road property").[2] The Pumpkin Center Road property was free and clear of any prior encumbrances or mortgages. Mr. Smith, through Allied, once again assisted Mr. DePaula in applying for and securing financing from Homecomings Financial, LLC ("Homecomings"). The loan closing documents provided that premiums for homeowner's insurance would be included in Mr. DePaula's monthly mortgage payment. Thereafter, Mr. DePaula tendered monthly mortgage payments to the loan servicer, GMAC.

While Mr. DePaula received what he believed were the true proceeds from the sale of the McClellan Drive property, unbeknownst to him, a falsified set of closing documents had been submitted for recordation in the conveyance records of the Tangipahoa Parish Clerk of Court indicating that Mr. DePaula had sold the McClellan Drive property to Ms. Maleckar for $140,000.00. In September 2007, Mr. DePaula's ex-wife ruled him into court to explain why the McClellan Drive property that Mr. DePaula purportedly sold for $93,000.00 reflected a sas price of $140,000.00 in the records of the clerk of court.

[2] It appears from the record that the May 3, 2007 loan brokered by Allied was in the name of Mr. DePaula only.

Mr. and Mrs. DePaula immediately contacted Mr. Smith who referred them to Mr. Ham, who had served as Mr. DePaula's closing attorney. Mr. Ham, in turn, blamed an Allied employee, Ms. Killet, for having falsified the closing documents. Mr. Ham indicated that he would fix the problem by correcting the deed, and issuing a corrected IRS Form 1099 for tax purposes.[3] In addition, Mr. Ham referred Mr. and Mrs. DePaula to D. Patrick Daniel, Jr., an attorney, in order that they might pursue their claims regarding fraud.

ACTION OF THE TRIAL COURT

On August 29, 2008, Mr. Daniel, on behalf of Mr. and Mrs. DePaula, commenced the instant litigation through the filing in the 21st Judicial District Court, Parish of Tangipahoa, of a Petition for Damages that named Allied, Homecomings, Mr. Smith, and Ms. Killet as defendants therein.[4]

In their petition, Mr. and Mrs. DePaula alleged that Allied, represented by its branch manager, Mr. Smith, and its loan processor, Ms. Killet, provided them with sales documents reflecting the $93,000.00 purchase price while simultaneously providing the lender, Homecomings, with fraudulent documents reflecting the sales price as $140,130.29. It was also alleged that Homecomings thereafter forwarded a closing package to Allied and agreed to fund the loan at $140,130.29. Allied purportedly removed pages from the closing package and replaced them with duplicate pages reflecting the actual sales price and loan amount were $93,000.00. Funds were thereafter wired to Allied's account, and Mr. DePaula was paid the agreed upon sales price of $93,000.00 less closing costs and fees.

Mr. and Mrs. DePaula further alleged that the fraudulent documents reflecting the sales price as $140,000.00 were recorded, and that Allied retained the balance of

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[3] Mr. and Mrs. DePaula claim that Mr. Ham failed to disclose that he was serving as legal counsel for Ms. Killet in other litigation.

[4] The litigation filed in the 21st Judicial District bore the caption, **Salvador and Ashley DePaula v. Allied Home Mortgage Capital Corporation, et al.**, Docket No. 2008-2747 "G". Earlier, on the date suit was filed in the 21st JDC, Mr. and Mrs. DePaula filed a nearly identical action involving the same alleged transaction, occurrences, and parties, in the United States District Court for the Eastern District of Louisiana. Said litigation bore the caption, **Salvador and Ashley DePaula v. Allied Home Mortgage Capital Corporation, Homecomings Financial, LLC, Terri-Lynn Killett and Shane Smith**, Civil Action No. 2:08-cv-4313.

$47,130.29. As a result, Mr. and Mrs. DePaula claimed to have suffered irreparable harm and embarrassment as a result of Allied and Homecomings' negligence. In addition, Mr. and Mrs. DePaula set forth itemized damages including, but not limited to, destruction of character, mental anguish, and emotional trauma.

In response to the petition filed on behalf of Mr. and Mrs. DePaula, Allied asserted both dilatory and declinatory exceptions on October 22, 2008.[5] As part of its dilatory exceptions, Allied claimed that in executing their loan application with Allied, Mr. and Mrs. DePaula purportedly agreed to submit any dispute arising out of their lending/mortgage transactions with Allied for disposition through arbitration. For this reason, Allied argued the present litigation was premature. In the alternative, Allied claimed that the allegations contained in Mr. and Mrs. DePaula's petition were vague and ambiguous. Allied argued that Mr. and Mrs. DePaula should be required to amend and clarify the allegations of their petition so as to sufficiently put defendants on notice of their alleged acts and/or omissions.

On May 28, 2009, Allied moved to reset its previously-filed dilatory exceptions that raised the objections of prematurity and vagueness. Following a hearing on August 31, 2009, the trial court, in a judgment signed September 28, 2009, maintained Allied's dilatory exception raising the objection of prematurity as to the original petition, enforced the arbitration agreement between the parties, and dismissed without prejudice the claims set forth by Mr. and Mrs. DePaula against Allied in their original petition.

On October 14, 2009, Mr. and Mrs. DePaula filed a Motion for Rehearing, New Trial and/or Reconsideration, requesting that the trial court grant a rehearing on the ground that it was error for the trial court to consider a purported arbitration agreement that was never introduced into evidence or properly authenticated. Prior to the trial court's reconsideration of its September 28, 2009 judgment that enforced the purported

[5] Allied filed a declinatory exception raising the objection of lis pendens and argued that the prior pending federal court action involved the identical parties and the identical underlying transaction. The trial court maintained the declinatory exception, thereby rendering the dilatory exceptions moot. In response, Mr. and Mrs. DePaula moved to dismiss their federal court litigation and same was dismissed without prejudice by order dated March 6, 2009. Allied thereafter re-urged its previously-filed dilatory exceptions.

arbitration agreement between the parties, and dismissed without prejudice the claims set forth by Mr. and Mrs. DePaula against Allied in their original petition, Mr. and Mrs. DePaula filed an amended petition. On August 25, 2010, Mr. and Mrs. DePaula filed their First Supplemental and Amended Petition for Compensatory, Statutory and Punitive Damages ("Amended Petition").[6] Therein, Mr. and Mrs. DePaula incorporated by reference all of the allegations set forth in their original petition and also set forth new claims of fraud, conversion of property, identity theft, federal corruption, and legal malpractice. In connection therewith, Mr. and Mrs. DePaula named sixteen new defendants.

As part of their amended petition, Mr. and Mrs. DePaula set forth additional allegations of fraud and conversion of property against individuals and firms that allegedly assisted Allied, its employees, and others with their fraudulent scheme involving the McClellan Drive property. Mr. and Mrs. DePaula also set forth new allegations related to subsequent transactions involving Allied that took place while the DePaulas remained without knowledge of the fraudulent acts involving the McClellan Drive property. Specifically, Mr. and Mrs. DePaula alleged that on May 3, 2007, Mr. DePaula entered into another transaction with Allied regarding the property owned by him at 41114 Pumpkin Center Road. The loan closing documents, including a HUD-1 Uniform Settlement Statement, provided that funds paid by Mr. and Mrs. DePaula for hazard insurance were to be held in escrow. Said premiums were to be deducted from Mr. DePaula's monthly mortgage payment and applied towards an insurance policy.

Mr. and Mrs. DePaula claimed that unbeknownst to them, the escrow funds they paid each month for hazard coverage, as dictated by the HUD-1 Uniform Settlement Statement, were never sent to the insurer to bind coverage. Said funds were allegedly

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[6] Mr. and Mrs. DePaula named Homecomings as a defendant in their original petition filed August 29, 2008. Homecomings subsequently obtained a dismissal with prejudice through the grant of its motion for summary judgment on February 12, 2010. Mr. and Mrs. DePaula did not appeal this judgment. Mr. and Mrs. DePaula named Homecomings as a defendant again as part of their First Supplemental and Amended Petition filed August 25, 2010. Homecomings filed numerous exceptions, including peremptory exceptions raising the objections of res judicata, no right of action, and no cause of action. Following a hearing, the trial court sustained the objections of res judicata and no cause of action, and Homecomings was dismissed with prejudice through a judgment signed by the court on May 3, 2011.

misappropriated and funneled into the accounts of Allied employees and others and converted to their own use. Mr. and Mrs. DePaula did not learn that their Pumpkin Center Road property was uninsured until a tornado struck the rental property in May 2008 and caused extensive damage. When Mr. and Mrs. DePaula attempted to make a claim, they learned the property was uninsured. As a result, Mr. and Mrs. DePaula claimed they lost thousands of dollars in repairs and continue to lose money based upon depreciation in the value of the home and its devaluation as a rental property.

Mr. and Mrs. DePaula also alleged that Allied, its employees, and others obtained, stole, and used Mr. DePaula's identity via his retirement account information for documentation to support additional mortgage fraud in the names of other unknown applicants. Mr. and Mrs. DePaula claimed that the actions of Allied employees and others have placed their creditworthiness at risk and forced them to incur thousands of dollars in costs to restore and clear their credit and establish clear titles to the properties they own. Mr. and Mrs. DePaula also claimed that Allied employees and others participated in fraudulent acts in violation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO")(18 U.S.C. § 1962).

In addition to the foregoing allegations involving Allied and its employees, Mr. and Mrs. DePaula, as part of their amended petition, also set forth claims against their former legal counsel, various title examiners, title attorneys, title companies, and others. Said allegations are not directly related to the present appeal.[7]

Despite the interim filing by Mr. and Mrs. DePaula of a First Supplemental and Amended Petition, the trial court, on August 30, 2010, nevertheless proceeded to hear arguments on Mr. and Mrs. DePaula's Motion for Rehearing, New Trial and/or Reconsideration of its September 28, 2009 judgment that enforced the purported arbitration agreement between the parties, and dismissed without prejudice the claims set

[7] In the instant appeal, Mr. and Mrs. DePaula claim the trial court erred in denying their request for a rehearing of its prior judgment maintaining dilatory exceptions put forth by Allied and its former employee, Mr. Smith, raising the objection of prematurity as to Mr. and Mrs. DePaula's amended petition, enforcing the alleged arbitration agreement between the parties, and dismissing without prejudice Mr. and Mrs. DePaula's claims against Allied and Mr. Smith.

forth by Mr. and Mrs. DePaula against Allied in their original petition. Also, on that date, the trial court maintained a dilatory exception raising the objection of prematurity filed on behalf of Allied's former employee, Mr. Smith, and referred Mr. and Mrs. DePaula's claims against Mr. Smith in their original petition to arbitration.

On October 8, 2010, Allied filed dilatory exceptions again, raising the objections of prematurity and vagueness, this time in response to the claims set forth by Mr. and Mrs. DePaula in their amended petition. On that same date, similar exceptions were filed on behalf of Allied's former employee, Mr. Smith, in response to the claims put forth by Mr. and Mrs. DePaula in their amended petition. Following a hearing on April 18, 2011, the trial court, in a judgment signed May 9, 2011, maintained Allied and Mr. Smith's dilatory exceptions raising the objection of prematurity as to the amended petition, enforced the arbitration agreement between the parties, and dismissed without prejudice the claims set forth by Mr. and Mrs. DePaula against Allied and Mr. Smith in their amended petition.

Mr. and Mrs. DePaula thereafter applied for supervisory writs from this court seeking review of the trial court's April 18, 2011 ruling. This court subsequently granted Mr. and Mrs. DePaula's writ application for the limited purpose of remanding this matter back to the trial court with instructions to grant Mr. and Mrs. DePaula an appeal.[8] From the trial court's May 9, 2011 judgment, Mr. and Mrs. DePaula now appeal.

ISSUES PRESENTED ON APPEAL

In connection with their appeal in this matter, Mr. and Mrs. DePaula set forth the following issues for review and consideration by this court:

[8] The grant by this court of Mr. and Mrs. DePaula's writ application erroneously referenced the wrong judgment of the trial court. Pursuant to **Salvador and Ashley DePaula v. Allied Home Mortgage Capital Corporation, Homecoming Financial, LLC, Terri-Lynn Killett and Shane Smith, 2011-CW-0912**, this court incorrectly stated that the trial court's May 3, 2011 judgment dismissed without prejudice all claims raised by Mr. and Mrs. DePaula in their First Supplemental and Amended Petition against Allied and Mr. Smith. It was actually the trial court's May 9, 2011 judgment that dismissed without prejudice all claims raised by Mr. and Mrs. DePaula in their First Supplemental and Amended Petition against Allied and Mr. Smith.

1. Whether arbitration can be held in a mortgage fraud case when the defendants did not follow the proper procedure directing the parties to arbitration.

2. Whether arbitration can be held in a mortgage fraud case when the defendant's failure to follow procedure denied the DePaulas their right to test the validity and authenticity of the arbitration agreement.

3. Whether the DePaulas alleged consent to arbitrate was vitiated by error.

4. Whether the arbitration agreement encompasses the underlying factual disputes involving fraud, forgery, conversion, identity theft, and related cover up.

5. Whether it is reasonable to expect the DePaulas to pay tens of thousands of dollars in arbitration filing fees in an effort to recover money that was stolen from them which has resulted in their financial ruination.

STANDARD OF REVIEW

The Louisiana Constitution of 1974 provides that the appellate jurisdiction of the courts of appeal extends to both law and facts. La. Const., art. V, § 10(B). A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is not manifestly erroneous or clearly wrong. See **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882, n. 2 (La. 1993). When the court of appeal finds that a reversible error of law or manifest error of material fact was made in the trial court, it is required to redetermine the facts *de novo* from the entire record and enter a judgment on the merits. **Rosell v. ESCO**, 549 So.2d 840, 844 n. 2 (La. 1989).

LAW AND ANALYSIS

Louisiana Code of Civil Procedure article 926(A)(1) provides for the dilatory exception raising the objection of prematurity. Such an objection is intended to retard the progress of the action rather than defeat it. La. Code Civ. P. arts. 923 and 926. A suit is premature if it is brought before the right to enforce the claim sued on has accrued. La. Code Civ. P. art. 423. Prematurity is determined by the facts existing at the time suit is filed. **Houghton v. Our Lady of the Lake Hosp. Inc.**, 2003-0135, p. 5 (La. App. 1 Cir. 7/16/03), 859 So.2d 103, 106. Evidence may be introduced to support or controvert the

exception, when the grounds do not appear from the petition. La. Code Civ. P. art. 930. The objection of prematurity raises the issue of whether the juridical cause of action has yet come into existence because some prerequisite condition has not been fulfilled. **Bridges v. Smith**, 2001-2166, p. 4 (La. App. 1 Cir. 9/27/02), 832 So.2d 307, 310, writ denied, 2002-2951 (La. 2/14/03), 836 So.2d 121. The objection contemplates that the action was brought prior to some procedure or assigned time, and it is usually utilized in cases where the applicable law or contract has provided a procedure for one aggrieved of a decision to seek relief before resorting to judicial action. **Plaisance v. Davis**, 2003-0767, p. 6 (La. App. 1 Cir. 11/7/03), 868 So.2d 711, 716, writ denied, 2003-3362 (La. 2/13/04), 867 So.2d 699.

In the instant case, Allied and its former employee, Mr. Smith, claim that Mr. and Mrs. DePaula "voluntarily utilized Allied in the preparation of the closing documents for the sale of their [McClellan Drive] property.... Then in April and May 2007, [Mr. and Mrs. DePaula] voluntarily obtained three (3) additional loans through Allied, which were secured with certain property owned by [Mr. and Mrs. DePaula] in Hammond, Louisiana." These alleged facts were originally set forth by Mr. Smith in connection with his April 11, 2011 affidavit.

As part of his affidavit, Mr. Smith further attests to the allegation that in connection with these transactions, Mr. DePaula entered into an Agreement For The Arbitration Of Disputes ("arbitration agreement"). Mr. Smith further claimed that it was Allied's customary practice to have arbitration agreements signed prior to the closing of contemplated real estate transactions. The arbitration agreement purportedly signed by Mr. DePaula provides, in pertinent part:

> This Agreement is made in consideration of our processing of your inquiry or application for a loan secured by the property identified below ("loan") and is also made in further consideration of our funding of the loan at the interest rate(s) and terms referenced in the loan documents. This Agreement is effective and binding on you and your heirs, successors and assigns and us when it is signed by both parties. This Agreement shall also apply to any dispute with us or our corporate parents, affiliates, subsidiaries, agents, employees, officers, directors, successors, and assigns. *If you have any questions, you should consult your own lawyer before you sign this Agreement.* [Italics in original; underscoring supplied.]

Allied and its former employee, Mr. Smith, also cite **Aguillard v. Auction Management Corp.**, 2004-2804, 2004-2857 (La. 6/29/05), 908 So.2d 1, for the proposition that in Louisiana, there is a presumption of arbitrability. In furtherance of this proposition, Allied and Mr. Smith rely on the following language from the supreme court's holding in **Aguillard**:

> Accordingly, even when the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration. The weight of this presumption is heavy and arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue.

Aguillard, 2004-2804, 2004-2857, p. 25; 908 So.2d at 18. Considering this presumption of arbitrability, Allied and Mr. Smith claim the trial court correctly resolved the issue of arbitrability in favor of enforcing the arbitration agreement and sustaining Allied and Mr. Smith's exceptions raising objections as to prematurity.

After a thorough review of the record in this matter, we note that despite the claims made by Mr. Smith in his affidavit, namely that Mr. and Mrs. DePaula "voluntarily obtained three (3) additional loans through Allied" in addition to "the sale of their [McClellan Drive] property," the record before this court discloses only one loan by Mr. DePaula through Allied. Said loan was closed following Mr. DePaula's sale of his McClellan Drive property. The loan in question was a loan dated May 3, 2007 through Allied secured by Mr. DePaula's rental property situated at 41114 Pumpkin Center Road in Hammond, Louisiana.

Close examination of the terms of the arbitration agreement reveals that "[t]his Agreement is made in consideration of our processing of your inquiry or application for a loan secured by the property identified below ('loan')." The property identified at the bottom of the arbitration agreement was "42482 Pumpkin Center Rd., Hammond, LA. 70403." This is different from the property in the sale dated December 4, 2006, and the property in the loan of May 3, 2007. The terms of the arbitration agreement also provided that it "shall also apply to any dispute with us or our corporate parents, affiliates,

subsidiaries, agents, employees, officers, directors, successors, and assigns." With respect to "disputes," the arbitration agreement provided as follows:

> **Disputes:** For purposes of this Agreement, a "dispute" is any claim or controversy of any nature whatsoever arising out of or in any way related to the loan; the arranging of the loan, any application or attempt to obtain the loan; the funding of the loan; the terms of the loan; any loan documents; the servicing of the loan; or any other aspect of the loan transaction. It includes, but is not limited to, federal or state contract, tort, statutory, regulatory, common law and equitable claims. A "dispute" does not include those items described in the paragraph labeled "Exceptions," below.[9]

The arbitration agreement was allegedly signed by Mr. DePaula and initialed by or on behalf of Mr. Smith on December 13, 2006, the day prior to Mr. DePaula's sale of his McClellan Drive property.[10] The arbitration agreement specifically references and limits itself to a subsequent loan by Mr. DePaula on property located oat 42482 Pumpkin Center Road, Hammond, Louisiana.

Based upon our examination of the arbitration agreement at issue, it is clearly evident that the purported agreement has no application to Mr. DePaula's initial sale of his McClellan Drive property or the property located at 41114 Pumpkin Center Road in the loan of May 3, 2007. Mr. DePaula was merely the seller in the transaction involving the McClellan Drive property, and he neither inquired, nor applied for a loan with Allied secured by the McClellan Drive property. Thus, all allegations set forth by Mr. and Mrs. DePaula in their amended petition against Allied and its former employee, Mr. Smith, which relate to the December 14, 2006 sale of Mr. DePaula's McClellan Drive property, are clearly not subject to arbitration. These claims include, but are not limited to, mortgage fraud and conversion of the true proceeds derived from the sale of the McClellan Drive property. In addition, all allegations set forth by Mr. and Mrs. DePaula in their amended petition against Allied and its former employee, Mr. Smith, that relate to harm occasioned

[9] In the subsequent paragraph labeled "Exceptions," the arbitration agreement set forth items not considered "disputes" and not subject to arbitration under the arbitration agreement. Said items included (1) any judicial or non-judicial foreclosure proceeding against any property serving as collateral for the loan; (2) the exercise of any self-help remedies; and (3) provisional or ancillary remedies with respect to the loan or any collateral for the loan.

[10] As part of this appeal, Mr. and Mrs. DePaula have challenged the validity of the arbitration agreement by questioning the veracity of Mr. DePaula's signature. Mr. DePaula maintains that he has no recollection of signing an arbitration agreement. Additionally, the arbitration agreement provides that it is effective and binding when it is "signed by both parties." Although Mr. Smith's initials appear in place of his signature, said initials are distinctly different from Mr. Smith's signature on his affidavit.

to Mrs. DePaula are not subject to arbitration, inasmuch as it appears Mrs. DePaula did not own an interest in her husband's separate Pumpkin Center Road property. Mrs. DePaula neither inquired, nor applied for a loan with Allied, secured by the Pumpkin Center Road property, and most importantly, Mrs. DePaula was not a party to the purported arbitration agreement. The arbitration agreement at issue is indeed very broad, but it cannot be extended to encompass disputes between the parties other than those that arise out of the underlying loan and property specifically referenced in the arbitration agreement. The trial court clearly erred in referring these unrelated claims to arbitration.

The remaining claims put forth by Mr. and Mrs. DePaula in their amended petition, namely, the conversion of their escrow payments for hazard insurance, involve disputes or controversies arising out of, or related to, Mr. DePaula's request for a loan through Allied secured by his property at 41114 Pumpkin Center Road. It was this loan by Mr. DePaula that was brokered and closed by Allied on May 3, 2007. The arbitration agreement limits itself to and refers only to property located at 42482 Pumpkin Center Road.

Louisiana public policy favors the resolution of disputes through the arbitration process. See La. R.S. § 9:4201. As our supreme court stated in its opinion in **Aguillard**, La. R.S. 9:4201 specifically provides:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Aguillard, 2004-2804, 2004-2857, p. 6; 908 So.2d at 7. The supreme court in **Aguillard**, also stated that Louisiana's policy favoring arbitration echoes the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq. The court further noted that Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to

> perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The United States Supreme Court has made it clear that the substantive provisions of the FAA preempt state law and govern all written arbitration agreements in contracts connected to transactions involving interstate commerce. **Aguillard**, 2004-2804, 2004-2857, p. 8; 908 So.2d at 8, citing **Collins v. Prudential Ins. Co. of America**, 1999-1423, p. 2 (La. 1/19/00), 752 So.2d 825, 827.

Although the FAA clearly preempts state law in cases involving transactions which affect commerce, see **Allied-Bruce Terminix Cos., Inc. v. Dobson**, 513 U.S. 265, 273, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), the states do retain the ability to regulate contracts involving arbitration agreements and may do so under general contract law as is referenced in the final section of 9 U.S.C. § 2. **Aguillard**, 2004-2804, 2004-2857, p. 8; 908 So.2d at 8, citing **Allied-Bruce**, 513 U.S. at 281, 115 S.Ct. 834. Thus, states may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." **Aguillard**, 2004-2804, 2004-2857, p. 9; 908 So.2d at 8, quoting **Allied-Bruce**, 513 U.S. at 281, 115 S.Ct. 834.

The validity and enforceability of arbitration agreements are favored except upon such grounds as exist at law or in equity for the revocation of any contract. See La. R.S. 9:4201; see also La. Civ. Code arts. 2029 et seq. (providing for nullity actions) and 2036 et seq. (providing for recovery actions).

Louisiana Civil Code article 1927 provides that a contract is formed by the consent of the parties established through offer and acceptance. Louisiana Civil Code article 1948 provides that said consent may be vitiated by error, fraud, or duress. Article 1949 of the Civil Code provides, "[e]rror vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party."

As part of this appeal, Mr. and Mrs. DePaula have challenged the validity of the arbitration agreement by questioning the veracity of Mr. DePaula's signature.

Mr. DePaula maintains that he has no recollection of signing an arbitration agreement in connection with the closing of his loan through Allied.

A review of the record reveals the arbitration agreement relating to Mr. DePaula's loan on his 42482 Pumpkin Center Road property was allegedly signed by Mr. DePaula on December 13, 2006, the day prior to Mr. DePaula's sale of his McClellan Drive property. The loan by Mr. DePaula on his 41114 Pumpkin Center Road property was brokered by Allied, but did not close until May 3, 2007.

In **Quebedeaux v. Sunshine Homes, Inc.**, 2006-349 (La. App. 3 Cir. 10/11/06), 941 So.2d 162, the third circuit, while recognizing that Louisiana public policy favors the resolution of disputes through the arbitration process, noted that one of the conditions for a valid contract is the consent of both parties and that such consent may be vitiated by error. In **Quebedeaux**, the third circuit found that when the plaintiffs signed an agreement to purchase a mobile home and tendered $15,000.00 in earnest money, there was no discussion about, nor did plaintiffs agree to, the inclusion of an arbitration clause.

The third circuit in **Quebedeaux** affirmed the trial court and refused to order arbitration based upon its finding that defendant had unilaterally added an arbitration clause to the final contract of sale. The court noted that had the plaintiffs refused to sign the document containing the arbitration clause, they would have forfeited their $15,000.00 deposit together with the $7,000.00 already expended to prepare the site for the home. Thus, the court held that the Quebedeaux's consent to arbitration was vitiated by error.

The facts presented in **Quebedeaux** are similar to those found in an earlier third circuit case, **Rodriguez v. Ed's Mobile Homes of Bossier City, Louisiana**, 2004-1082 (La. App. 3 Cir. 12/8/04), 889 So.2d 461, writ denied, 2005-0083 (La. 3/18/05), 896 So.2d 1010. In **Rodriguez**, plaintiffs signed a purchase agreement in May 2000 for the purchase of a mobile home and made a down payment of $7,000.00. A month later, the plaintiffs signed several act of sale forms for the mobile home together with a Dispute Resolution and Disclosure Agreement that provided for binding arbitration. Plaintiffs later

testified that when they signed the arbitration agreement at the closing, they thought they "had" to sign in order to obtain delivery of their mobile home.

The third circuit affirmed the trial court's judgment on other grounds and held that the purchasers' understanding was error that vitiated the consent given. The third circuit concluded that the parties had already agreed upon the terms of the contract of sale prior to the closing, and the arbitration agreement could not be part of the consideration of the original contract. **Rodriguez**, 2004-1082, p. 4, 889 So.2d at 464.

More recently, in **Coleman v. Jim Walter Homes, Inc.**, 2008-1221 (La. 3/7/09), 6 So.3d 179, the supreme court upheld the validity of a written arbitration agreement that plaintiff claimed was unenforceable. Plaintiff claimed the arbitration agreement was allegedly inserted unilaterally and mistakenly signed by him after the parties had confected an oral agreement regarding the design and price of plaintiff's home.

The supreme court found little support for plaintiff's contention that a complete oral agreement regarding the building of a house had been reached by the parties before closing documents were signed. The court opined that it was "obvious that the parties contemplated additional documents, such as a mortgage and promissory note, which the law requires to be reduced to writing in order to be effective." **Coleman**, 2008-1221, p. 6; 6 So.3d at 183. The court further opined that "[w]here the parties intend to reduce their negotiations to writing, they are not bound until the contract is reduced to writing and signed by them. **Coleman**, 2008-1221, p. 6; 6 So.3d at 183; quoting **Breaux v. Boh Brothers Construction Co. v. Associated Contractors, Inc.**, 226 La. 720, 77 So.2d 17, 20 (1954). The court further quoted from its opinion in **Aguillard** for the proposition that a party who signs a written agreement is presumed to know its contents. **Coleman**, 2008-1221, p. 7; 6 So.3d at 183; quoting **Aguillard**, 2004-2804, 2004-2857, pp. 22-23; 908 So.2d at 17. "The presumption is that parties are aware of the contents of writings to which they have affixed their signatures .... The burden of proof is upon them to establish with reasonable certainty that they have been deceived." **Aguillard**, 2004-2804, 2004-2857, p. 23; 908 So.2d at 17; quoting **Tweedel v. Brasseaux**, 433 So.2d 133, 137 (La. 1983).

In the instant case, Mr. and Mrs. DePaula have challenged the veracity of Mr. DePaula's signature on the arbitration agreement as Mr. DePaula claims to have no recollection of signing an arbitration agreement in connection with the closing of his loan through Allied. The arbitration agreement related to Mr. DePaula's loan on his 42482 Pumpkin Center Road property and was allegedly signed by Mr. DePaula on December 13, 2006, the day prior to Mr. DePaula's sale of his McClellan Drive property. It is conceivable that the arbitration agreement was inserted unilaterally, and mistakenly signed by Mr. DePaula under the belief that his signature on said document was necessary in order to complete the sale of the McClellan Drive property.

We further note that despite his attestations to the contrary, Mr. Smith did not actually sign the arbitration agreement, and his purported initials on the arbitration agreement bear no resemblance to Mr. Smith's signature on his affidavit. Louisiana Revised Statutes 9:4201 provide that if the agreement to arbitrate is in writing, it shall be valid, irrevocable and enforceable. The fourth circuit has held that:

> A writing requirement does not necessarily imply a signing requirement. Signing is an additional requirement beyond writing. When the law requires both, it expressly states both requirements . . .
>
> La. R.S. 9:4201 provides that if the agreement to arbitrate is in writing, it shall be valid, irrevocable and enforceable. The law does not provide that the agreement must be signed. We conclude, therefore, that if the agreement between the parties is written, the provisions of the statute are satisfied even though the writing is not signed by the parties.

Hurley v. Fox, 520 So.2d 467, 469 (La. App. 4 Cir. 1988).

Nevertheless, the arbitration agreement at issue in this case specifically states, "This Agreement is effective and binding on you and your heirs, successors and assigns and us when it is signed by both parties." (Underscoring supplied.) Although La. R.S. 9:4201 does not require that an agreement must be signed, the terms of the arbitration agreement mandate that it shall not be effective until it is signed by both parties. Clearly, Mr. Smith knew or should have known that the arbitration agreement would not be binding without his signature on behalf of Allied.

Thus, the elements required for invalidation of the contract by error are present.

CONCLUSION

For the above and foregoing reasons, we reverse the judgment of the trial court that maintained Allied and Mr. Smith's dilatory exceptions raising the objection of prematurity as to the amended petition, enforced the arbitration agreement between the parties, and dismissed without prejudice the claims set forth by Mr. and Mrs. DePaula against Allied and Mr. Smith in their amended petition. We remand this matter to the trial court for further proceedings consistent with this opinion. All costs associated with this appeal shall be assessed equally against defendants, Allied Home Mortgage Capital Corporation and Shane Smith.

REVERSED AND REMANDED.