NOT DESIGNATED FOR PUBLICATION

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	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	* * * * * * *	

VERSUS

DEAN MORRIS, L.L.P., BANKER'S TRUST OF CALIFORNIA, CHASE MANHATTAN MORTGAGE CORPORATION, WASHINGTON MUTUAL, INC., MORTGAGE ELECTRONICS REGISTRATION SYSTEMS INC., COUNTRYWIDE HOME LOANS, INC., BANK ONE CORPORATION, SUN FINANCE COMPANY, L.L.C., ET AL.

<u>CONSOLIDATED WITH:</u> **<u>CONSOLIDATED WITH:</u>**

MARY & LARRY PATTERSON, BRIAN BATTISTE, DEBRA ELLZEY-HERRON, THOMAS THIBODEAUX, ALEX HARTLEY, EDNA B. TAYLOR, EDWARD & HELEN CARTER, DEMETURIE SIMMONS, MELVIN FRANKLIN, RONALD SINGLETON, HELEN RATCLIFF, WILLLIE BROWN, ET AL. **NO. 2007-CA-0636**

VERSUS

DEAN MORRIS, L.L.P., PROVIDENT BANK, OPTION ONE MORTGAGE CORPORATION; THE LEADER MORTGAGE COMPANY, LLC., SAXON MORTGAGE SERVICES, INC., AURORA LOAN SERVICES, INC., FIDELITY BANK, LONG BEACH MORTGAGE COMPANY, CHASE MANHATTAN MORTGAGE CORPORATION, ET AL.

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 2005-2173 C/W 2005-2174, DIVISION "L-6"
Honorable Kern A. Reese, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Terri F. Love)

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AFFIRMED

Defendant, Ocwen Loan Servicing, L.L.C. [“Ocwen”] appeals the trial court’s judgment in favor of plaintiff, Lionel J. Coleman, denying Ocwen’s motion to compel arbitration. For the reasons which follow, we affirm.

FACTS AND PROCEEDINGS BELOW

On February 17, 2005, a group of plaintiffs including Mr. Coleman filed a petition for damages on behalf of themselves and a putative class. The petition alleged that the law firm, Dean Morris, L.L.P. [“Dean Morris”],[1] acting as attorneys for various lenders named as co-defendants, had inflated court costs, sheriffs’ fees, and other expenses associated with the institution of foreclosure proceedings against the plaintiffs. The petition alleged that the named lenders, including Ocwen, represented a putative class of lenders that were vicariously liable for the actions of their agent, Dean Morris, and also were independently liable as the beneficiaries of the foreclosure proceedings because they had received the improper payments and had “cooperated in, participated in and authorized the practice of charging, receiving and not refunding improper and excessive fees.”

[1] The individual attorneys who are partners in Dean Morris were also named as defendants.

Defendant Ocwen filed a motion to compel arbitration claiming that plaintiff Coleman had signed a binding arbitration agreement with Delta Funding Corporation ["Delta"]. Although Delta is not a party to the suit, the motion to compel arbitration was based upon the assertion that "Ocwen is the servicing agent for the investor to which Delta Funding assigned plaintiff Coleman's loan." On February 16, 2007, the trial court denied Ocwen's motion. In written reasons for judgment, the trial court found an ambiguity existed with regard to whether Ocwen was one of the lender's assignees covered by the arbitration provision contained in the plaintiff's mortgage agreement. In addition, the trial court noted that the plaintiff had made a compelling argument that the arbitration provision rendered the contract adhesionary.

On appeal, Ocwen argues that the trial court erred by finding the arbitration agreement to be ambiguous and/or adhesionary, and by refusing to enforce the provision.

STANDARD OF REVIEW

An appellate court's review of a district court's findings relative to arbitration "should proceed like review of any other district court decision finding an agreement between the parties, *e.g.*, accepting findings of fact that are not clearly erroneous, but deciding questions of law d*e novo*." *Lakeland Anesthesia, Inc. v. United Healthcare of Louisiana, Inc.*, 2003-1662 (La. App. 4 Cir. 3/17/04), 871 So.2d 380, 388, *citing Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 532 (5th Cir. 2000). The *Lakeland* court further stated that the issue of whether or not the language of a contract is ambiguous is an issue of law subject to *de novo* review on appeal, though the trial court's interpretation of the contract is a finding of fact subject to the manifest error rule. *Id.*

DISCUSSION

Ocwen argues the district court erred by holding that the arbitration agreement was ambiguous and that the purported ambiguity could be used as a justification to refuse to compel arbitration.

In ruling on a motion to compel arbitration, the threshold question for the court to answer is whether the parties have agreed to arbitrate their dispute. This inquiry is two-fold; to-wit: (1) whether there is a valid arbitration agreement and (2) whether the dispute in question falls within the scope of that agreement. *Lakeland*, p.9, 871 So.2d at 388.

In the instant case, Mr. Coleman signed the arbitration agreement prepared by his lender, Delta, as did a representative of Delta. However, the parties to this dispute are Mr. Coleman and Ocwen. Therefore, assuming the agreement to arbitrate is valid between the parties signatory,[3] we must determine whether Mr. Coleman's dispute with Ocwen falls within the scope of the agreement.

The arbitration provision provides that the parties agree to submit to arbitration any claim "between you and us" that arises from or relates to the "Credit Transaction." The arbitration agreement defines "We" or "Us" to mean Delta,

> and any Covered Third Party; all of their parents, wholly or majority owned subsidiaries, affiliates, predecessors, successors, and assigns; and all of the agents, employees, directors and representatives of such entities. "Covered Third Party" means any third party providing product or service in connection with the Credit Transaction (including but not limited to mortgage and real estate brokers, credit bureaus, appraisers, mortgage life insurance companies, private mortgage insurance companies, closing agents, attorneys, escrow agents, trustees, title insurance companies, loan originators, rating agencies, loan services and debt collectors) or any assignee of or participant in the Credit Transaction (including but not limited to investors, trusts and potential investors) if and only if such third party is named as a co-defendant with us in a Claim asserted by you.

[3] We note that despite the trial court's observation in its Reasons for Judgment that the plaintiff had made a compelling argument that the arbitration agreement rendered the mortgage contract adhesionary, the court did not actually hold that either the arbitration agreement or the mortgage contract was adhesionary or otherwise invalid. Therefore, the issue of the validity of the agreement is not before us.

In support of its motion to compel, Ocwen submitted the affidavit of Mr. Chromie Neil, who is employed by Ocwen as a "senior research specialist." Mr. Neil avers that the loan file of Mr. Coleman "is maintained by Ocwen in the regular course of business and includes documents reflecting a mortgage loan that was originated by Delta Funding Corp., serviced by Ocwen, and referred to the law firm of Dean Morris." On appeal, Ocwen argues that it is, at the very least, the "agent" of an assignee of Delta, and is therefore entitled to enforce the arbitration agreement.

However, besides Mr. Chromie's affidavit, which merely asserts that Ocwen "serviced" the loan, Ocwen provided no documentary or other evidence showing that it was an "agent, employee, director or representative" of Delta or of any particular assignee of Delta, or of any "Covered Third Party" under the terms of the agreement. Nor does Ocwen itself qualify as a "Covered Third Party" under the language of the arbitration agreement. As stated therein, "Covered Third Party" includes any third party as described in the provision "if and only if" such third party is "named as a co-defendant with Us in a Claim asserted by you." Because Delta (designated as "Us" in the agreement) is not a named defendant in the instant lawsuit, Ocwen cannot be considered a "Covered Third Party."

Based on the evidence, we cannot say the trial court erred by denying the motion to compel on the grounds that an ambiguity exists as to whether Ocwen is covered by the arbitration agreement. Reviewing the record, we agree that Ocwen, as mover, failed to submit evidence sufficient to prove that it qualifies as a covered party under the agreement.

Ocwen also contends that a dispute as to whether or not the agreement is ambiguous should be decided by the arbitrator rather than by the court. We disagree. In the instant case, the trial court determined that Mr. Coleman failed to

prove that his claim against Ocwen falls within the scope of the arbitration agreement signed by Mr. Coleman and Delta. Questions regarding the scope of an arbitration provision are questions of substantive arbitrability for the court to decide. *Lakeland*, p.12, 871 So.2d at 389; see also *Collins v. Prudential Ins. Co. of America*, 99-1423, pp.9-10 (La. 1/19/00), 752 So.2d 825, 831. Although law and policy both favor arbitration, neither can supply an agreement to arbitrate when there is none. *Hansford v. Cappaert Manufactured Housing*, 40,160, p.7 (La. App. 2d Cir. 9/21/05), 911 So.2d 901, 906. An agreement to arbitrate a dispute with one party cannot encompass disputes against another party when the second party is not mentioned in the agreement. *Id*., p. 8, 911 So.2d at 906. Accordingly, we find no error in the trial court's judgment refusing to compel arbitration between the parties herein.

CONCLUSION

For the reasons stated, the judgment of the trial court denying the motion to compel arbitration is affirmed.

AFFIRMED