

**ARKANSAS COURT OF APPEALS**DIVISION III  
No. CA 11-1094LORETTA MERCER and ASHLEY  
MERCER

APPELLANTS

V.

MICHAEL DEAN ENGLE and JO ANN  
ENGLE, HUSBAND and WIFE

APPELLEES

Opinion Delivered April 18, 2012

APPEAL FROM THE JACKSON  
COUNTY CIRCUIT COURT,  
[NO. CV-11-52]HONORABLE HAROLD S. ERWIN,  
JUDGE

REVERSED AND REMANDED

**WAYMOND M. BROWN, Judge**

This is an appeal from the Jackson County Circuit Court's grant of summary judgment against appellants, whose complaint alleged that a transaction between them and appellees violated Arkansas usury law. Because federal law does not apply under the facts of this case, we reverse and remand to the circuit court.

*Facts*

The facts in this case, which are not disputed, are as follows. In 1990, appellees Michael and Jo Ann Engle acquired a residence at 2200 Rink Road in Newport, Arkansas (hereafter referred to as "the property"). In May 2002, the Engles refinanced their debt on the property and executed a promissory note and mortgage with Delta Funding Corporation ("Delta"), securing an indebtedness of \$23,000, bearing interest at 12.39%, with monthly

payments of \$281.84. Effective July 1, 2002, the loan was transferred for servicing to Ocwen Federal Bank, FSB (“Ocwen”).

In August 2002, the Engles were in the process of moving to Tuckerman, Arkansas when the Mercers approached them about buying their Newport home. Ashley Mercer is the nephew of Jo Ann Engle. The Mercers did not have money for a down payment or credit sufficient to obtain a loan, so a different arrangement was made. Mrs. Engle told the Mercers that \$23,000 was still owed on the property, which under the terms of their mortgage was to be paid in monthly installments of \$281.84 over fifteen years (180 months), with an interest rate of 12.39%. Mrs. Engle prepared a contract for deed providing that the Mercers would buy the property for \$23,000, payable in 180 monthly installments of \$281.84, with an interest rate of 12.39% (the same terms as the Engles’ mortgage). The contract was signed and dated by the Engles and Mercers on August 25, 2002, and provided that the Mercers could send payments either to the Engles or to Ocwen directly. At no time did the Mercers enter into any agreement with Delta or Ocwen to assume the Engles’ mortgage or be added to it, nor did the Engles lend any money to the Mercers.

In 2008, the Mercers separated and Mr. Mercer moved out. Mrs. Mercer got behind on payments, and Mrs. Engle received delinquency notices from Ocwen. Eventually, the Mercers tendered a check for \$1600, which Mrs. Engle refused because she wanted to terminate the contract and retake possession of the home. The contract provided that upon default, any interest held by the Mercers in the property would be forfeited and the Engles would be entitled to terminate the contract and take immediate possession of the property.

The Mercers sued the Engles, claiming that the interest rate set forth in the contract violated Arkansas usury law and seeking a judgment of \$42,554.76, as well as attorney's fees. On March 24, 2011, the Engles filed an answer and a counterclaim, asserting that the contract is governed by federal law that preempts Arkansas usury law and asking for rescission of the contract, possession of the property, and attorney's fees and costs. Depositions were taken on April 25, 2011, and on April 28, 2011, and an agreed order was entered authorizing payments due under the contract to be made to the registry of the circuit court pending resolution of the case. It is not disputed that the Mercers defaulted on the payments required under the contract.

The Engles filed a motion for summary judgment on May 4, 2011, arguing that the nature of the contract was such that federal law would preempt and exempt the transaction from Arkansas usury law. By order entered on July 26, 2011, the circuit court granted summary judgment in favor of the Engles,<sup>1</sup> cancelled and rescinded the contract, granted the Engles possession of the property, and directed that all sums held by the circuit clerk pursuant to the agreed order be disbursed to the Engles. On August 10, 2011, the Mercers timely filed a notice of appeal.

#### *Standard of Review*

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<sup>1</sup>The summary-judgment order neglected to specifically dismiss the Mercers' complaint. However, the order is final and appealable because it concluded the Mercers' rights as to the subject matter in controversy. *Hernandez v. Simmons Indus.*, 25 Ark. App. 25, 752 S.W.2d 45 (1988). Ark. R. App. P.–Civ. 2.

On appellate review, this court must determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material question of fact unanswered.<sup>2</sup> The facts in this case are not disputed. Where the facts are not in dispute and the issue is one of law, the appellate court simply determines whether the movant was entitled to summary judgment as a matter of law.<sup>3</sup>

*Discussion*

Article 19, section 13 of the Arkansas Constitution provides that “the maximum lawful rate of interest on any contract entered into after the effective date hereof shall not exceed five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract.”<sup>4</sup> This was repealed by amendment 89, § 14, but the amendment became effective on January 1, 2011, and only applies to bonds issued and loans made after the effective date.<sup>5</sup>

Pursuant to the Depository Institutions Deregulation and Monetary Control Act of 1980 (the Act), provisions of the constitution or laws of any State expressly limiting the rate or amount of interest which may be charged shall not apply to any loan, mortgage, credit sale, or advance which is

(A) secured by a first lien on residential real property, by a first lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation, or by a first lien on a residential manufactured home;

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<sup>2</sup>*Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997).

<sup>3</sup>*Dachs v. Hendrix*, 103 Ark. App. 184, 287 S.W.3d 627 (2008).

<sup>4</sup>Ark. Const. art. 19, § 13(a)(i).

<sup>5</sup>Ark. Const. amend. 89, § 12.

(B) made after March 31, 1980; and

(C) described [as a federally related mortgage loan] in section 527(b) of the National Housing Act.<sup>6</sup>

By the plain language of the Act, a transaction must meet all three of those requirements in order to be exempt from Arkansas usury law. The transaction between the Mercers and the Engles in this case fails to meet two of the three requirements.

First, even if the contract for deed signed by the parties could be considered a “loan, mortgage, credit sale, or advance,” it was not secured by a first lien on residential real property. Delta held the first lien on the property, not the Engles, and Delta also held legal title to the property.<sup>7</sup> In fact, the Engles’ mortgage with Delta prohibited the Engles from perfecting any inferior lien against the property without Delta’s prior written permission.

Second, the transaction between the Mercers and the Engles does not qualify as a “federally related mortgage loan,” which the Act defines as any loan which

(1) is secured by residential real property and

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<sup>6</sup>Codified at 12 U.S.C. § 1735f-5(b).

<sup>7</sup>The deed of trust executed by the Engles and Delta in 2002 conveyed legal title to the trustee for the beneficiary, Delta Funding Corporation, as security until the Engles repaid the \$23,000 they owed. See *Mortg. Elec. Registration Sys., Inc. v. Sw. Homes of Ark.*, 2009 Ark. 152, 301 S.W.3d 1.

(2)(A) is made in whole or in part by any lender<sup>8</sup> the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is itself regulated by any agency of the Federal Government; or

(B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary of Housing and Urban Development or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency; or

(C) is eligible for purchase by the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation, or from any financial institution from which it could be purchased by the Federal Home Loan Mortgage Corporation; or

(D) is made in whole or in part by any “creditor,” as defined in section 1602(f) of Title 15, who makes or invests in residential real estate loans aggregating more than \$1,000,000 per year.<sup>9</sup>

By the plain language of the Act, a transaction must not only be secured by residential real property but must also meet the requirements of (2)(A), (B), (C), or (D) in order to be considered a federally related mortgage loan. The contract for deed in this case does not meet any of the elements of the definition, and the Engles do not qualify as a lender covered under

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<sup>8</sup>Under 12 U.S.C. § 1735f-7a(1)(C)(vi), “lenders” include any individual who finances the sale or exchange of residential real property or a residential manufactured home which he owns and occupies or has occupied as his principal residence (presuming such individual meets the rest of the definition and has federally-insured deposits or accounts, or is regulated by a federal agency).

<sup>9</sup>12 U.S.C.A. § 1735f-5(b). 12 U.S.C.A § 1735f-7a(1)(C)(i)-(v) makes changes to the definition of “federally related mortgage loan” for the purposes of the provision to exclude certain requirements and to include credit sales or loans secured by a first lien on a residential manufactured home (mobile home). None of the changes made apply to this case.

the Act. In Arkansas cases holding that federal law preempts Arkansas usury law, both the lender and the type of transaction clearly fit within the Act's requirements.<sup>10</sup>

Because federal law does not exempt the contract between the Mercers and the Engles from Arkansas usury law, the Engles were not entitled to summary judgment as a matter of law. We make no holding as to whether the parties' transaction in fact violated Arkansas law; rather, we reverse the circuit court's order granting summary judgment and remand only on the ground that federal law is not applicable.

Reversed and remanded.

PITTMAN and ABRAMSON, JJ., agree.

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<sup>10</sup>See, e.g., *Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998) (loan obtained from appellee bank for purchase of home); *Troutt v. First Fed. Sav. & Loan Ass'n of Hot Springs*, 280 Ark. 505, 659 S.W.2d 183 (1983) (note secured by mortgage given to federal savings-and-loan association for purchase of home); See also *In re Lawson Square, Inc.*, 816 F.2d 1236 (8th Cir. 1987) (loan obtained from federally insured savings-and-loan association for purchase of apartment complex).