IN THE SUPREME COURT FLORIDA

CASE

No.: SC 06-999
ANDRZEJ MADURA, L. T. No.: 2D- 06-915
Petitioner
vs.
FULL SPECTRUM LENDING, INC., and
COUNTRYWIDE HOME LOANS, INC.
Respondents

PETITIONER'S REPLY BRIEF ON THE MERITS

On the Review from the District Court of Appeal Second District
State of Florida

Respectfully submitted :

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PRELIMINARY STATEMENT

References in this brief will be consistent with those made in the Petitioner's brief on merits with the following additions: " PB at___." Petitioner's Initial Brief on Merits; "RA at___" Respondents Appendix, " RB at__." Respondents brief on merits.

SUMMARY OF ARGUMENTS IN REPLY

Argument I: On Feb.27, 2007, this Court considered Respondents' July 31, 2006 jurisdictional brief including the same arguments filed now in their May 18, 2007 brief on merits, and accepted *Discretionally Jurisdiction*. To reverse this Order, Respondents should prove that this Court abused its discretion by accepting *Discretionally* review. They did not prove it. Respondents' attempt to reverse is defective inasmuch as they cited distinguishable cases only and did not cite any relevant case in which the district court dismissed certiorari from the trial court's order denying the motion to file amended complaint which was filed in order to avoid arbitration, as in the present case. The 2nd District decision indicated that *petition for writ of certiorari was dismissed because the order denying petitioner's motion for leave to file an amended complaint is not reviewable by certiorari.* It directly and expressly conflicts with *Hall v. Wojciechowski,* 312 So.2d 204 (Fla.4th DCA 1975) where the 4th District *issued writ of certiorari from such trial court's order denying a motion for leave to file an amended complaint* .

Argument II : The district Court erred in declining to exercise certiorari jurisdiction by indicating that the petitioner would have adequate remedy on direct appeal from final judgment. Petitioner raised his material injury issue before trial and the district Courts. The trial court departed from the essential requirements of law in denying without a hearing petitioner's motion for leave to file the first amended complaint.

ARGUMENT I : THE EXPRESS CONFLICT BETWEEN THE 2nd DISTRICT'S DECISION IN THE PRESENT CASE AND THE 4th DISTRICT'S DECISION IN *HALL,* SUPPORTS DISCRETIONARY REVIEW BY THIS COURT

Respondents' May 18, 2007 attempt to overturn this Court's February 27, 2007 Order accepting jurisdiction is defective. For almost one year, this Court considered similar arguments. An attempt to overturn this Court's acceptance of jurisdiction is futile inasmuch as this Court has *Discretionary Jurisdiction* to review the 2nd District order at issue. Therefore, in order to reverse this Court's Order accepting *Discretionary Jurisdiction*, Respondents should prove that this Court abused its discretion in accepting this *discretionary review*. They did not prove it. Respondents argument that unpublished District Court's *per curiam* opinions citing controlling authorities do not constitute precedent is erroneous and they misplaced *Ullah v. State,* 679 So.2d 1242(Fla.1stDCA1996)(RB 9). In *Ullah,* the Court struck an answer brief referring to matters outside the appellate record and never decided whether this Court lacks jurisdiction over " unpublished " decisions citing short opinion and controlling authorities. The Court, in *Ullah,* only held that docketing statements was due no later than the answer brief and struck answer brief. *Id at 1244.* Next, the

Respondents cite *Dep''t of Law Enforcement* (RB footnote 2) where this Court accepted jurisdiction under Rule 9.030(a)(2)(vi) to review certified conflict. In the instant case, this Court accepted jurisdiction under R. 9.030(a)(2)(iv). Next, Respondents suggested that this Court has no jurisdiction because *Harry Pepper* is not pending review nor has been reversed by this Court and cited *Jolie v. State*, 405 So.2d 417 (Fla.1981)(RB 9), which is distinguishable, to wit:

a) This Court in *Jolie* granted review of the 5th District *per curiam* affirmance . The 5th District disposition read: " *Affirmed, see Murray v State, [quotation]* . "

This Court granted review this *per curiam* disposition rendered *without opinion*, because the decision in *Murray* was that time pending this Court's review.

b) In the present case, the 2nd District's disposition read differently :

"Petition for writ of certiorari was dismissed because the order denying petitioner's motion for leave to file an amended complaint is not reviewable by certiorari, See Harry Pepper & Assoc., Inc. v. City of Cape Coral [quotation] "

This 2nd District's short opinion expressly conflicts with *Hall* where the 4th District *issued a writ of certiorari from the trial court's order denying a motion for leave to file amended complaint.* Therefore, the Respondents' theory is erroneous inasmuch as the issue in the instant case is that the 2nd District opinion conflicts with *Hall,* not whether *Harry Pepper* conflicts with *Hall.* Next, Respondents cite *Jaye v. Royal Saxon,* 720 So.2d 214(Fla.1998) (RB12), which is distinguishable. This Court held:

"certiorari review is inappropriate to review non-final order striking party's demand for jury trial because a trial court's order denying a demand for a jury trial does not cause an irreparable injury that cannot be remedied on direct appeal. " *Id at 214.*

This Court, in *Jay*, held that Jaye did not state how the alleged denial of jury trial

causes an irreparable injury. Here, the Petitioner, was deprived of his rights to argue his motion at hearing and of his rights to file motion for rehearing. However, Petitioner argued that the amendment would warrant avoidances of the statute of limitation of his Count III claims, rescission of the contract for forgery (5 years in action on a contract) See pg 2-3 of Am. Com (A-23) and pgs. 5, 7-8 in petition for writ of certiorari (A-29). Petitioner also raised the issue of his entitlement to amend the complaint for the purpose of avoiding the arbitration and cited *Blakeslee v. Morse Operation Inc.,* 720 So.2d 1166 (Fla.4th DCA 1998).(A-29 pg.5)(A-33) and (PB19). Therefore the trial court's order denying the motion to amend the complaint with rescission claims would cause irreparable harm . *Plenary appeal would not provide an adequate remedy for having to endure a costly arbitration process which the amendment sought to avoid.* This Court, in *Jaye,* held that any error in failing to provide a jury trial is an error which can be corrected at a direct appeal. Petitioner would not adequately correct the trial court error because he is without the right of a trial de novo. See this Court holding in *Nationwide* on pg. 7 of this Reply Brief. Therefore, this Court correctly accepted jurisdiction inasmuch as the 2nd District holding directly and expressly conflicts with *Hall.* Further, the 2nd District's Order conflicts with *Hohl v. Croom Motorcross, Inc.,* 358 So.2d 241(Fla. 2ndDCA 1978), wherein the 2nd District issued writ of certiorari from the trial court's order denying motion for leave to amend complaint. This Court correctly accepted discretionary jurisdiction to review the 2nd District decision because the 2nd District's decision

would require a law that *all petitions for certiorari from non-final orders denying motion to file amended complaint must be dismissed for lack of jurisdiction.*

Furthermore, this Court correctly accepted jurisdiction because the 2nd District failed to conduct the jurisdictional analysis to determine whether the trial court's order denying petitioner's first motion to amend the complaint could result in material injury that cannot be corrected in plenary appeal. See *Barker v. Barker* 909 So.2d 333 (Fla.2nd DCA 2005) *Id at 334, 336,* wherein the 2nd District correctly conducted such analysis. Next, Respondents mislead that the trial court already made the *specific finding*: that the claims of amended complaint (rescission of cancelled in May 2001 2001 contract) were subject to arbitration (RB12). The record does not show such a ruling. The amended complaint should not be subject to arbitration because the forged contract was undisclosed to, and unsigned by Petitioner. See Justice Cantero and Scalia's holdings supported by cases similar to the instant case (PB 20-28). Respondents' Argument I is defective inasmuch as it is not supported by any case in which any district court dismissed certiorari from the trial court's order denying a motion to amend complaint, which was filed in order to avoid arbitration, as in the present case. Instead, they cited distinguishable cases only.

ARGUMENT II : THE DISTRICT COURT ERRED BY DISMISSING CERTIORARI FOR LACK OF JURISDICTION

In light of Fla Statute and case law, the petitioner would have no adequate remedy on direct appeal from an Arbitrator's final decision. Respondents cited *Jaye, Kilgore, Reeves, Martin-Johnson, Allstate, Combs* and *Parkway* which are distinguishable

(RB:14). They argue that the 2nd District correctly made the jurisdictional analysis in the present case to determine whether the trial court's order result in petitioner's material injury for the remainder proceeding which cannot be corrected in plenary appeal, *because the Judge, who sat on the panel in this case made correct analysis in Parkway . See* (RB15, footnote 3). Such a theory is an improper legal argument.

The 2nd District, in *Parkway,* dismissed certiorari challenging non-final order denying motion to strike jury demand and held that such order would not necessary cause material injury to invoke appellate court's certiorari jurisdiction, *Id 647.*

Thus, the 2nd District correct jurisdictional analysis in *Parkway Bank* does not bar the argument that the 2nd District failed to make a correct analysis in this case. In the instant case, the Petitioner was deprived of his rights to argue his motion at a hearing and to file a motion for rehearing. However, on the contrary to Respondents' theory,

Petitioner raised, at least *prima facie,* issue that he cannot appeal his claim for rescission in plenary appeal because the issue of the rescission of the contract has never been before the trial court and the trial court never decided Petitioner's rescission claims (pg.5 of A-29).

Petitioner argues that if he pursues rescission claim and if the trial court decides in his favor, there would not be a need for arbitration with resulting waste of time and money and cited *Blakeslee.* See A-3, pg 5 of A-29, and pg.19 in Pet. brief on merits

A. THE 2nd DISTRICT ERRED BY INDICATING THAT PETITIONER WOULD HAVE AN ADEQUATE REMEDY ON APPEAL FROM FINAL JUDGMENT

The 4thDistrict in *Blakeslee* held that a plaintiff was entitled to amend a complaint for

purpose of avoiding arbitration. Thus, the trial court order denying petitioner motion to amend complaint with claims of rescission of the forged contract, *if upheld*, would cause irreparable harm of costly arbitration, *and is no remedy to avoid arbitration on plenary appeal from arbitration* (A-33) (A-29, pg. 5) (PB 19). Had the trial Court allowed to pursue the rescission claims and such claims were granted *there would be no need for arbitration inasmuch as no arbitration agreement would exist.*

Next, the Respondents cited distinguishable *Jaye*, *Reeves* and *Parkway Bank.* which are distinguishable. Petitioner would have no adequate remedy on appeal from the arbitrator final decision to wit:

a.) This Court, in *Nationwide Mutual Fire Insurance Company v. Pinnacle Medical Inc.*, 753 So.2d 55 (Fla.2000), held that the limited review and the conclusiveness attached to the arbitration award without the right of a trial de novo diminishes the right to have ultimate decision in a case made by a court. *Id 58.*

b) The Court in *Prudential-Bache v Schuman,*483,So.2d 889(Fla.3rd DCA1986) held

" The standard of judicial review of arbitration panel's decision is extremely limited. The panel is the sole and final judge of the evidence and the weight to given it. Fact that relief granted by arbitration panel is such that it could not or would not be granted by court of law or equity is not ground for vacating or modifying a award."

c) Arbitration award based on arbitrator's erroneous interpretation of statute could not be vacated because error of law was not one of five specific statutory grounds for awards. See *Schumacher Holding v. Noriega,*542 So.2d 1327(Fla.1989) *Id at 1327* Section 682.13(1) sets forth the only grounds upon which award of an arbitrator may

be vacated: (a) the award is procured by corruption, fraud or other undue means; (b) there is partiality by an arbitrator or other misconduct prejudicing the rights of any party; (c) the arbitrator exceeded his powers; (d) the arbitrator refused to hear evidence material to the controversy or to postpone a hearing when sufficient cause is demonstrated; (e) there is no agreement or provision for arbitration. *Id at 1328* This Court's above holdings that the limited review and the conclusiveness attached to the arbitration award without the right of a trial de novo diminishes the Petitioner right to have ultimate decision in a case made by a court, show, that Petitioner would have no adequate remedy on appeal from the Arbitrator final judgment. Respondents cited *Hallmark,* which only supports that based on the particular facts of this case the 2nd District should issue a writ of certiorari .(RB19). Next, the Respondents cited *Hawaiian Inn* which is distinguishable from the circumstances of the present case.

B. PETITIONER RAISED ISSUE OF HIS MATERIAL INJURY THOROUGH THE REMAINDER OF THE PROCEEDING

Respondents argue that petitioner did not raise issue of his material injury. (RB 21). Petitioner, in petition (A-29, pg 5) did raise the issue that denying a motion to amend complaint would cause irreparable harm by forcing him to file a new lawsuit asserting Count III rescission claim (not under the TILA but under validity of forged contract). Sec. 95.11, F.S. provides that a legal or equitable action on a contract shall be commenced within five years, which expired here on November 25, 2006. Petitioner correctly raised the issue that the trial court's order denying the amendment, if uphold, would cause irreparable harm and no remedy on appeal from

final judgment would exist. On January 25, 2006, the trial court received the Petitioner's request for a hearing on his motion for leave to file first amended complaint (A-27). On February 1, 2006 , the trial Court denied it without a hearing and deprived the petitioner from seeking a rehearing.(A-28). Petitioner, in a motion for leave, submitted that the amendment warrants avoidances of statute of limitation of his claims in Count III of rescission of the contract upon its forgery. See pgs.2-3 of (A-23) and repeated this issue in his petition for certiorari (pgs.5, 7-8 A-29). The unreasonable court's action deprived Petitioner from raising this and other injury issues before the trial court. However, in Counts I-IV, X, XI of proposed amended complaint, the Petitioner shows, a continuous material injury from the Respondents fraud and failure to honor his two demands for loan's rescission. He pays interest in the amount more than $1,000.00 monthly which should be void since he rescinded his loan on May 23, 2001. Respondents, on pg. 21 of brief, *argued that the trial order did not prejudice petitioner,* while even if the trial court wrongly denied amendment, and the decision were reversed on plenary appeal, petitioner's amended claims would relate back to a date of his motion for leave (*June 17, 2005*) (A-23). *The date of June 17, 2005 would prejudice the petitioner, because one year statute of statutory TILA limitations expired on Nov. 25, 2006* (petitioner was aware of forgery since *Nov. 25, 2001 date of* Forensic Report. In case, the trial court grants motion for leave to amend, the petitioner's claims of rescission and statutory TILA violations would relate back to *May1, 2002* original complaint and *would be within*

one year of statute limitations. and *would not prejudice the petitioner.* Rule 1.190(c) Fla. R.C.P. and Fed. Rule 15(c) governing TILA Act state in pertinent part that an amendment of a pleading relates back to the date of the original pleading if the claim asserted in the amended complaint arose out of the conduct transaction or occurrence set forth in the original pleading. See 2nd District holding in *Keel v. Brown*, 162 So. 2d 321(Fla. 2ndDCA 1964)(A-23). Without question, the TILA purported violations, as set forth in the proposed amended complaint, occurred as a part of the same transaction that formed the basis of the petitioner's original complaint. As such " relation back" effect of Rules 1.190(c) and 15(c) is specifically applicable to this matter. Federal courts has spoken to this TILA issue on numerous occasions. See *Johansen v. E.I Du Pont de Nenours,* 810 F.2d 1377(5thCir), *cert. denied*, 484 U.S. 849, 108 S.Ct.148, 98 L.Ed.2d 104(1987), *In Re Spence,* B.R. 149(Bkrtcy N.D. Miss. 2001); *Cunningham v. H.A.S. Inc.*, 74 F. Supp.2d 1157(M.D.Ala.1999) *Id1166-67; Money v. Willings Detroit Diesel,Inc,*551 So.2d 926, 928-929 (Al.1989); *Federal Deposit Ins. Corp. v. Conner*, 20 F.3d 1376 (5thCir.1994) and *In Re Brothers,* 345 B.R. (Bkrtcy, S.D. Fla.2006). Respondents argued that the trial court *did not prejudice* Petitioner. The true is that the trial court, by denying amendment, deprived the Petitioner of his day in court and caused that Petitioner's amended claims of rescission are barred by statute of limitation.

Next, the Respondents attempt to mislead this Honorable Court that the Petitioner's claims for statutory TILA damages and for rescission were " **already** time-barred as a

matter of law"(RB22). Statute of limitations in TILA is a subject of equitable tolling. See *Ellis v. General Motors Acc.Corp*,C.A.11(Ala.) 1998 160F 3d 703 and *Ramadan v. Chase Manhattan Corp*,156F.3d499 (3rdCir.1998) *at 499.* Mortgagors' allegations that mortgages engaged in fraudulent, misleading, and deceptive efforts to conceal their TILA violation …were sufficient to allege an equitable tolling of the applicable statute of limitations. See *Mc.Ananey v. Astoria Financial Corp*., E.D.N.Y. 2005, 357 F.Supp.2d 578. On May 1, 2002 the Petitioner claimed the Respondents' failure to disclose the forged TILA document, and its forgery of the TILA document. Petitioner TILA claim was filed within one year of his knowledge of forgery, to wit:

a) On May 10, 2001, the Respondents, for the first time, disclosed Promissory Note, improperly, by fax , See 12CFR s. 226(a)(1). See (A-10) and (RA1:50-52).

b). Petitioner was not aware of TILA documents' forgery until receiving the November 25, 2001, Forensic Document Report of forgery of the TILA document and the Promissory Note (PB-4, A-19 and Respondents Appendix A1: 53-54).

15 U.S.C. 1639(a)(b)(1), which applies to this loan transaction, provides that the disclosures shall be given not less than 3 business days prior to consummation of the transaction. Respondents disclosed, at consummation (at closing) only some documents. Next, they destroyed or hid the TILA and the Promissory Note obtained at closing(A-4) and (A-2) and uttered in Title Agency another documents with new loan disclosures and signed it with forged signatures of the borrowers (A-6) &(A-7) (PB2-3). They never provided to the petitioner a new forged Truth in Lending disclosure. (PB 2-5). They violated 15USC.1639(b)(2), titled " *new disclosures*

required " which expressly provides that any changes make disclosure inaccurate unless new disclosures are provided. Notice to Cancel (attached) provided at closing, shows that petitioner have a legal right under federal law to cancel transaction, within 3 three business days from whichever of the following events occurs last:

(1) The date of the transaction, which is 07/26/2000;

(2) The date you received *your Truth In Lending disclosure*, or:

(3) The date you received this notice of your right to cancel. See App. to this brief

Respondents never delivered forged by them *"his Truth In Lending disclosure"*(PB5) Petitioner, **on May 23, 2001,** rescinded loan(A-11). Respondents violated 12 C.F.R. 226.23(d)(2), by not responding within 20 days and, later, mislead that all disclosures were given and that documents do not appear forgeries (A-12). **On May 1, 2002**, six six months after receiving the Forensic Report, to vindicate his rights for rescission,

Petitioner filed a lawsuit claiming Respondents' failure to disclose a new Truth In Lending disclosure and forgery of it and of the Promissory Note. The trial court's order denying petitioner's motion deprived the Petitioner from amending complaint with claims of voiding mortgage upon the forged contract. Respondents, cited distinguishable cases.(RB-23). They omitted *In re Bkrtcy. Minn.*,1995,189 B.R.752:

> " In case where borrowers have not received disclosure mandated under TILA they retain right of rescission for period three years after date of closing. Is *any lawsuit* brought to vindicate that right is not time-barred so long as it is filed before three years have run from consummation of loan."

Therefore, the Respondents' "theory" that pursuant to USC 1635(f), the petitioner's right of rescission was extinguished in July 2003 is without merit.

C. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY DENYING PETITIONER FIRST MOTION FOR LEAVE TO AMEND

Respondents argue that all plaintiff's claims are subject of the arbitration. (RB:24). Respondents did not rebut the Justice Cantero's holdings in *Cardegna v. Buckeye Check Cashing,*894 So.2d 860(Fla.2005) and the Justice Scalia's holdings in *Buckey Check Cashing Inc. v. Cardegna,* 126S.Ct.1204(2006), that claims, in cases similar to this case, shall not be compelled to the arbitration (PB19-28). Both Justices analyzed similar cases and bar Respondents' theory that Petitioner's amendment would have fallen within arbitrating agreement. Respondents, in their brief, did not support their " theory" that the amendment is futile. They did not rebut the Justices' holdings and the cited cases on pgs 17-20 of Petitioner brief. Further, the Petitioner relies also on *Lee v. All Florida Construction Co* , 662 So.2d 365 (Fla. 3rdDCA 1995) (holding that a party cannot be forced to arbitrate a dispute arising from one contract (*which was forged*) based on an arbitration clause in another contract (*which was signed*).

Next, the Respondents cited *Haines* and *Combs* which are distinguishable (RB 24). *Combs* is a criminal case and is not applicable. This Court held in *Haines*: " The trial court order did nothing more then reversal a county court eviction judgment based on a peculiar set of facts. It didn't deprive the petitioner of its day in court. " *(Id at 531)*. In the present case, the trial court's order deprived the petitioner of its day in court. Count III of amended complaint (rescission and cancellation of the mortgage upon forgery) bars the arbitration. Counts IV, IX-XI are distinguishable from the counts raised in original complaint. These claims raise issue that the Respondents by signing

" their" contract with borrowers' names lacked the authority to bind it to the contract containing arbitration clause, the very existence of the agreement was disputed and the court must resolve the treshold question of whether an arbitration agreement pertaining to the forged and never disclosed contract exist. Respondents did not rebut the argument that the arbitration did not pertain to forged contract (PB 22-23). Petitioner was never provided with this contract, never signed it or assented to it. Respondents uttered it in Title Agency as the true documents. The mortgage incorporates on pg 1 forged Note and as such is void (A-1). The trial court order conflicts with cited by petitioner cases (PB 17-20). If a *prima facia* case is made to support a claim for rescission, arbitration provided for in the contract is abated pending trial of the rescission issue. See *Borck v. Holewinski,* 459 So.2d 405 (Fla.4th DCA 1984). The US Supreme Court in *Southland* held: The agreement to arbitrate resulted from the sort of fraud… would provide *grounds for the revocation of any contract*, 465 US, at 16, n 11, 79 L. Ed 1,104 S Ct 852.

CONCLUSION

The petition for certiorari should be granted and the trial order should be reversed

Respectfully submitted :

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Andrzej Madura, Pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been served by U.S.Mail to Respondents' counsels William Heller, Esq. , Kimberly Learly, Esq., 350 E. Las Olas Blvd., Fort Lauderdale, Fla. 33301 by U.S. Mail on July 2, 2007.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I HEREBY CERTIFY, that this Reply Brief complies with the font standards as required by Florida Rule of Appellate Procedure 9.210(a)(2) in that this Reply Brief is submitted in Times New Roman 14-point font type face.

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