

# RECENT DEVELOPMENTS

favoring arbitration. The court, therefore, concluded that the 2002/2003 arbitration agreements, like their 2001 predecessor, do have retroactive effect.

## NEW JERSEY SUPREME COURT STRIKES DOWN CONSUMER CLASS ACTION BAN AS UNENFORCEABLE

Muhammad v. County Bank of Rehoboth Beach, \_\_\_A.2d\_\_\_ (N.J. 2006).

**FACTS:** Plaintiff Jaliyah Muhammad received a short-term, single-advance, unsecured loan of \$200. The principal plus a \$60 finance charge was due, with an annual percentage rate of 608.33%. Muhammad extended the loan twice, resulting in a total of \$180 in finance charges.

To receive a loan, Muhammad had to complete and sign three pages of standard form contracts, that contained an arbitration agreement calling for binding individual arbitration, and prohibiting class arbitration. Furthermore, the contract contained additional statements directly above the signature line specifically excluding customer participation in class actions.

Muhammad brought a putative class-action lawsuit against County Bank, Main Street Service Corp., Easy Cash, and Telecash, alleging violations of the Consumer Fraud Act, the civil usury statute, and the New Jersey RICO statute alleging that defendants charged and conspired to charge illegal rates of interest. Muhammad argued that the arbitration agreement was unconscionable based on the class-action waiver and other provisions. The trial court disagreed and granted defendants' motion to compel arbitration. The appellate division affirmed. The New Jersey Supreme Court granted Muhammad leave to appeal.

**HOLDING:** Reversed and remanded.

**REASONING:** The Court held that the presence of the class-arbitration waiver in Muhammad's consumer arbitration agreement rendered that agreement unconscionable. The court reasoned as a matter of generally applicable state contract law, it was unconscionable for defendants to deprive Muhammad of the mechanism of a class-wide action, whether in arbitration or in court. The court noted the public interest at stake in the ability to effectively pursue statutory rights under the State's consumer protection laws overrides the defendants' right to seek enforcement of the class-arbitration bar in their agreement.

## LANDLORD TENANT

### TENANT HAS BURDEN TO PLEAD AND PROVE FAILURE TO MITIGATE, AND BREACH OF WARRANTY OF SUITABILITY AS AFFIRMATIVE DEFENSES

McGraw v. Brown Realty Co., 195 S.W.3d 271 (Tex. App.—Dallas 2006).

**FACTS:** In late December 2003, Donnie McGraw ("McGraw") signed a lease with Brown Realty for a building in Dallas, Texas, to be used as a restaurant. The lease was to begin on February 15, 2004 and to end on February 14, 2009. The rent was to be paid in monthly installments of \$3,450, totaling \$207,000. On March 3, 2004, McGraw sent a letter to Gary Brown, the president of Brown Realty ("Brown"), in regards to some equipment that needed repair or replacement. McGraw also sent a second letter complaining of a leak in the building's roof. Brown Realty never responded to the letters. McGraw paid his rent payments from March through October of 2004 on time. One check in November 2004 was returned for insufficient funds, and McGraw later abandoned the premises in early December.

Brown sued McGraw for breach of contract in early February 2005. In late March, McGraw filed his original answer and affirmative defenses. In June, Brown moved for traditional summary judgment where they claimed they had mitigated damages by securing a new tenant for the premises. McGraw responded by filing his own traditional summary judgment motion on his affirmative defenses. The trial court entered summary judgment in favor of Brown on its breach of contract claim for \$114,714.

**HOLDING:** Affirmed in part; reversed in part; remanded.

**REASONING:** The court dealt separately with the two arguments McGraw made on appeal. First, the court examined the issue of breach of an implied warranty of suitability. This question was raised for the first time on appeal. When dealing with a breach

of implied warranty of suitability, the court must recognize the matter has to be pleaded by a cause of action, counter-claim, or as an affirmative defense. The court reasoned that although McGraw did not specifically assert breach of the implied warranty of suitability as an affirmative defense, it was evident from the original answer that it was part of the basis of his defense to the suit.

The court, however, pointed out that the lease explicitly stated that McGraw waived his right to terminate the lease because of any condition on the premises. Accordingly, McGraw waived his remedy or defenses to the nonpayment of rent, by failing to raise an issue of material fact in order to establish his affirmative defense as a matter of law. The court held that the trial court's grant of summary judgment for Brown was correct.

The court also discussed the issue of whether the landlord failed to mitigate damages. Brown argued it mitigated damages when it found a new tenant. McGraw responded by claiming there was an issue of material fact regarding the amount of damages Brown had mitigated. The court examined McGraw's exhibits. These demonstrated Brown's claim of having secured a new tenant for the lease term of August 1, 2005 though July 21, 2007 was untrue. The court held that the lower court erred when it granted summary judgment on damages in favor of Brown. The court reversed with respect to damages and remanded for further proceedings on damages.

**McGraw waived his remedy or defenses to the nonpayment of rent, by failing to raise an issue of material fact in order to establish his affirmative defense as a matter of law.**