IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

| | | |
|---|---|---|
| WILMINGTON TRUST COMPANY, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. N10L-11-147 CEB |
| | ) | |
| RENNER'S PAVING, LLC, BRUCE R. RENNER and AMBER V. RENNER and THE UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendants. | ) | |

Date Submitted: March 14, 2013
Date Decided: March 27, 2013

**MEMORANDUM OPINION.**

Upon Consideration of
Plaintiff's Motion To Strike Jury Demand.
**GRANTED.**

Thomas C. Marconi, Esquire, LOSCO & MARCONI, Wilmington, Delaware. Attorney for Plaintiff Wilmington Trust Company.

Richard L. Abbott, Esquire, ABBOTT LAW FIRM, Hockessin, Delaware. Attorney for Defendants Renner's Paving, LLC, Bruce R. Renner and Amber V. Renner.

**BUTLER, J.**

# I. INTRODUCTION

The pending motion requires the Court to review a number of loan documents and determine the rights established or extinguished therein. Specifically, the Court must determine whether the defendants have waived their right to a jury trial. In making its decision, the Court has determined the party opposing the waiver bears the burden of showing why the waiver should be ignored. For the reasons explained below, the defendants have failed to meet their burden and the Court therefore grants the motion to strike defendant's jury demand.

# II. FACTS

Plaintiff is Wilmington Trust Company ("the Bank"), a bank that loaned money to defendant Renner's Paving, LLC ("Renner's Paving"). The guarantors on the debt were Bruce and Amber Renner ("the Renners"). The loans themselves are worthy of some illustration.

## The Loan Documents

In 2004, the Bank loaned Renner's Paving $215,000 with payment terms and a balloon payment due at the end of 2009. That loan was secured by a mortgage and personal guarantees by the Renners. When 2009 came and went without payment of the balloon, the parties executed a "Change Agreement" to the original note, calling for a balloon payment in March, 2010. Likewise, March, 2010 came and went without the balloon payment.

In 2006, two years after the first note was secured, the Bank and Renner's Paving executed a second loan document, this one for $122,000 with a balloon payment due in December, 2011. This second note was not secured by a mortgage, or the personal guarantees of payment by the Renners, but did provide that a default on the first note would be a default under the second one, and vice versa.

A third note in the amount of $50,000 was executed between the Bank and Renner's Paving in June, 2007. This note was "interest only." In March, 2009, the parties expanded this loan to $100,000 and the Renners executed personal guarantees on both the third note and the second note above.

While the math gets somewhat tedious, for our purposes it is sufficient to say some payments were made, many were not and all three loans went into default with the current indebtedness being something on the order of $400,000.

## III. PROCEDURAL BACKGROUND

The Bank filed suit in November, 2010, seeking 1) foreclosure on the mortgage securing the first promissory note and 2) "in personam" judgment against Renner's Paving on the notes and 3) personal judgments against the guarantors, the Renners.

In August, 2011 the Renners responded to the complaint with a counterclaim. In their counterclaim, they assert that they had been negotiating a "Forbearance Agreement" with the Bank when "suddenly and without warning" the Bank backed away from making any Forbearance Agreement and instead insisted on full performance of the preexisting notes and mortgage. According to defendants, they made multiple payments on the debt on the tacit agreement that doing so would induce the Bank to enter into the Forbearance Agreement. According to defendants, the Bank's ultimate refusal to do so 1) violates the "implied covenant of good faith and fair dealing," 2) estops the Bank from denying the existence of a Forbearance Agreement and 3) mandates a declaratory judgment that the unexecuted Forbearance Agreement is the operative agreement between the parties.

The initial complaint made no mention of a jury demand, the counterclaim did. But there the matter sat – along with the case – for quite some time. In late 2011, defense counsel sought leave to withdraw from representation of the

defendants for want of payment of his fees, but that motion was itself withdrawn, the client and counsel apparently having resolved their differences. But for most of 2012, the case languished. Indeed, a February, 2012 status report to the Court advising that the parties were actively discussing a settlement was the last docket entry for 10 months. In December, 2012, both parties asked that the January, 2012 trial date be rescheduled, because settlement was imminent. At about the same time, however, the Bank raised the question whether the case would be tried to a jury or to the bench. The issue was not resolved before the first scheduled trial date because a continuance was granted. Now that the "imminent" settlement appears to be not so, the Court must revisit the jury trial issue.

**Contractual Jury Waiver**

In the contract documents signed by the parties, there are multiple references to an agreement that any disputes arising under the loan documents would be tried to the court without a jury. The first promissory note signed in 2004 declares: "JURY WAIVER: Lender and Borrower hereby waive the right to any jury trial in any action, proceeding or counterclaim brought by either Lender or Borrower against the other." As recited above, the first note was followed by a "Change Agreement" that likewise contained the same language. This waiver, in the same language, is repeated again in the second promissory note signed in 2006 and the third in 2007.

In the guarantees signed by the Renners personally, there is a separate paragraph entitled "WAIVER OF RIGHT TO TRIAL BY JURY" by which the parties agree to waive a jury as to any dispute:

> [I]n any way connected with or related or incidental to the dealings of the parties hereto with respect hereto or any other instrument, document or agreement executed or delivered in connection herewith,

> in each case whether now existing or hereafter existing and whether sounding in contract or tort or otherwise…

This jury trial waiver appears in 3 different commercial guarantees signed by the Renners.

Finally, there is the mortgage executed by the Renners that secured the first promissory note.[1] The following is set forth in bold type:

> **Waive Jury: All parties to this Mortgage hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.**

It seems safe to say that the Bank did not want a jury trial to impede its efforts to get payment under the loans and it made that point repeatedly in its documents – in fact, every document executed with the defendants contained jury waiver language. The defendants signed the documents and took the money.

## IV. ANALYSIS

Defendants first attack the Bank's effort to enforce the jury waiver provisions by arguing that the Bank should have moved more expeditiously to enforce the jury waiver, since the Renners demanded a jury in their counterclaim complaint, which they filed long ago. In effect, they argue that the Bank "waived the waiver."

This argument had more appeal in December, 2012 when it was first raised. Trial was scheduled for January 7, 2013. While the defendants were unable to articulate any specific prejudice occasioned by the late pleading, the Bank's

---

[1] The Court questions whether there is a right to a jury trial in a mortgage foreclosure proceeding at all. *Compare The Money Store, Inc. v. Kamara*, 704 A.2d 282 (Del. Super. 1997), *with Lee v. K-Ro, Ltd.*, 1981 WL 376977 (Del. Super. July 10, 1981). Here, the plaintiff proceeds under two causes of action, one of which (the debt action) it concedes carries with it a right to a jury trial. I therefore need not reach the thorny questions raised by conflicting precedent or defendant's counterclaims. *See generally, Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893 (Del. Super. 1973).

motion, coming as it did just weeks before trial, seemed, well, late. But that was before the parties announced an imminent settlement and jointly requested a new trial date, so it would seem any prejudice to the defendants is substantially vitiated, albeit by coincidence.

Because the trial date was rescheduled, the jury trial question lost much of its urgency and, with it, the defense lost all claim of prejudice. This question is at least interesting because we know that some courts consider the litigation behavior of the parties in deciding whether to enforce a jury trial waiver in contract documents.[2] This does not appear to be a case in which the litigation behavior of either party was predicated on an assumed right to a jury trial. Indeed, there has been so little discovery taken it is difficult to see any prejudice to consideration of the motion whatsoever.

The second argument raised by defendants is the "four part test" employed by the Superior Court in *CIT Communications Finance Corp. v. Level 3 Communications, LLC.*[3] In *CIT Communications*, Judge Slights followed the lead of the District Court of Delaware in considering 1) the negotiability of the contract terms, 2) any disparity in bargaining power between the parties, 3) the business acumen of the party opposing the waiver and 4) the conspicuousness of the jury waiver provision.[4] Defendants then whittle away at each of the four factors,

---

[2] *See, e.g., Miller Brewing Co. v. Fort Worth Distrib. Co., Inc.*, 781 F.2d 494 (5th Cir. 1986) (where a party engages in substantial pretrial discovery, it may not later seek enforcement of an arbitration agreement as opposing party has been prejudiced).

[3] 2008 WL 2586694 at *5, (Del. Super. June 6, 2008).

[4] *See, In Re Daimler Chrysler AG Sec. Litig.*, 2003 WL 22769051 at *1, (D. Del. Nov. 19, 2003). It should be noted that these factors, while relevant, were by no means intended to announce a "test" at all: the District Court merely noted that in deciding the issue, "courts consider such factors as…" While courts do indeed, no court has held that these factors are exclusive or what weight to assign to each factor.

claiming that the plaintiff cannot "satisfy any of the 4 elements necessary" to enforce a jury waiver.

The Court believes defendants have over-read *CIT Communications*. The four factors are neither "elements" nor are they "necessary." But while a discussion of each of the issues cited in that case is certainly worthwhile, the more basic question is: who bears the burden with respect to the alleged waiver? Who must show that there was a disparity in bargaining power between the parties? Who bears the burden of proving the "business acumen" of the party opposing the waiver? This issue assumes some importance here, because the parties have engaged in very little discovery: there were no depositions taken of any witnesses and no affidavits submitted in support (or in opposition) to this motion. The parties thus ask the Court to rule on the issue on a virtually barren record.

The Court has found no Delaware precedent addressing the question of who has the burden of showing a valid waiver of the right to a jury trial and the federal circuits are apparently split on the issue.[5]

In this case, the Bank has produced its documents that purport to waive a jury. The documents themselves do allow the Court to consider "the conspicuousness of the waiver provision" but none of the other considerations cited by the Court in *CIT Communications*. It seems entirely appropriate that the party seeking to enforce the jury trial waiver be saddled with the burden of showing that a waiver was agreed to and that its terms were clearly spelled out in an agreement. As to the conspicuousness, the Court notes that the waiver appears in its own paragraph in all of the documents and states in all capitalizations "JURY

---

[5] *Compare Leasing Serv. Corp. v. Crane,* 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."), *with K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir.1985) ("We agree that in the context of an express contractual waiver the objecting party should have the burden of demonstrating that its consent to the provisions was not knowing and voluntary." ).

WAIVER." The language employed is not overly legalistic and expresses quite clearly that all disputes are to be resolved without a jury. So on the bare documents produced, the waiver is stated clearly and unambiguously and in sufficiently large print that one engaging in an even casual read of the document would see it.

As to the remaining factors the Court is directed to consider, there is simply no evidence at all. One would think that defendants themselves are most likely to be in possession of this evidence: it is doubtful the Bank would keep record of the defendants' relative sophistication or business acumen. It is thus appropriate to assign to defendants the burden of proving these factors. Defendants' problem is that, other than the arguments of counsel, there is nothing in the record upon which to ground such findings.

Defendants say the loan notes were "standard bank notes which the Renners had no ability or opportunity to negotiate; they were imposed upon the Renners on a "take it or leave it" basis."[6] If these allegations by counsel were supported by affidavit or record testimony, they might form the basis of further inquiry. It is not clear, for example, whether the defendants were for some reason forced to borrow from this bank to the exclusion of all other banks that do not have a jury waiver in their contracts, or whether such clauses are in all bank contracts, or indeed whether the Renners did in fact negotiate with the Bank over inclusion of the clause. The absence of evidence is not evidence – particularly for a party bearing the burden of proof.

Defendants say the Bank "dangled the carrot of a loan in front of the Renners conditioned upon their agreement to terms which are obviously so one

[6] Defense Brief at page 2.

sided as to border on the unconscionable."[7] Whatever is so "obvious" to the defendants is not so obvious to the Court. Jury waiver provisions have been held to be neither unconscionable nor against public policy.[8] Indeed, one could well imagine the desirability of such a term for both sides insofar as a nonjury trial would presumably take less time and therefore cost less in legal fees for both sides. Defendants have pointed to no other provisions of the loan documents that would support an argument of unconscionability here.

Finally, defendants say the Bank is big and sophisticated while theirs is a "simply run" site contracting business operated by a sole proprietor and a housewife. Again, there is no record evidence in support of this argument and even if there were, the mere fact that he is a sole proprietor and she is a housewife would add little to clarify the matter. The Court is disinclined to presume that simply because someone is a sole proprietor he is incapable of shopping for a loan or hiring a lawyer or reading a contract before signing it.

The Court holds that a party seeking to preclude his opponent from a jury trial in a case in which it is otherwise available must present evidence sufficient to show that the parties agreed to waive a jury trial and that the terms of that agreement are sufficiently "conspicuous" as to demonstrate that a party signing such an agreement would have been on notice of the term upon a simple reading thereof. A party resisting such a motion must then produce record evidence that demonstrates that there are countervailing circumstances that make enforcement of such a waiver inappropriate. What that evidence must be we need not divine here, as defendants produced nothing but argument by counsel.

---

[7] *Id.*

[8] *See, e.g., Graham v. State Farm Mut. Auto. Ins.* 565 A.2d 908 (Del. 1989) (even "contracts of adhesion" that contain arbitration clauses waiving a jury are not unconscionable).

**Defendants' Counterclaims**

Having determined that defendants' jury demand must be stricken, we come to the matter of their counterclaims for which they assert an independent right to a jury trial. Defendants' counterclaims seek enforcement of the "Forbearance Agreement." The Forbearance Agreement represented an effort by the parties to consolidate the notes and otherwise alter the terms of repayment of the outstanding indebtedness. The promissory notes, the guarantees and the mortgage all made clear that the jury waiver would apply not only to the documents, but to any dispute arising between the parties as a result of the loans. It is clear enough to the Court that the Forbearance Agreement is just such a dispute and the waiver provision should apply to that dispute as well.

There is a second reason to apply the jury waiver to the counterclaim. The promissory notes then in effect were incorporated by reference into the Forbearance Agreement, which defendants concede was never signed or formally agreed to by the parties. Defendants are thus in the somewhat awkward position of seeking a declaration that the Forbearance Agreement is the agreement that binds the parties even as they concede it was never signed or agreed to.

Adding to defendants' difficulty is the fact that the Forbearance Agreement does not call for any alteration or amendment of the jury trial waiver already contained in the numerous documents signed by the parties. So the defense asks the Court not only to enforce those provisions of the non-agreement to forbear, but also to ignore the provisions that declare the jury waiver in the original documents that are incorporated into the non-agreement. Unsure whether the defendants are trying to have it two ways, or perhaps three or four, the Court declines to engage further. Since the original loan documents waived a jury trial for any dispute arising between the parties and the Forbearance Agreement incorporated the jury

trial waiver provisions of previous documents, the counterclaims based on the Forbearance Agreement are also triable to the bench and not a jury.

## V. CONCLUSION

As a result of their contractual waiver of their right to a jury trial, the Court finds that the defendants are not entitled to a trial by jury on the original complaint or on their counterclaims. Plaintiff's Motion to Strike the Jury Demand is hereby **GRANTED**.

**IT IS SO ORDERED.**

Judge Charles E. Butler