

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY L. BARCLAE, CYNBA
INTERNATIONAL, INC., and ROBOT
DEFINED L.L.C.,

UNPUBLISHED
January 18, 2011

Plaintiffs-Appellants,

v

ERNEST M. ZARB,

Defendant-Appellee.

No. 289878
Wayne Circuit Court
LC No. 08-124168-CZ

Before: CAVANAGH, P.J., AND O'CONNELL AND WILDER, JJ.

PER CURIAM.

Plaintiffs Anthony Barclae, Cynba International, Inc. ("Cynba"), and Robot Defined, L.L.C. ("Robot Defined") appeal by leave granted an order granting defendant Ernest M. Zarb's motion to strike plaintiffs' jury demand in their action for fraud. We reverse.

I.

According to plaintiffs, Robot Printing, Inc., and Robot Properties, L.L.C., were businesses that needed working capital in 2007, but their assets were collateral for Comerica Bank loans. Further according to plaintiffs, Zarb (a senior vice president for Comerica Bank) made fraudulent misrepresentations to plaintiffs in April 2007 to induce them "to advance hundreds of thousands of dollars" for these assets to, and for the benefit of, Robot Printing, Inc., Robot Properties, L.L.C., and Comerica Bank. In return for the advance, plaintiffs expected to collect Robot Printing, Inc.'s receivables after April 17, 2007.

After the allegedly fraudulent misrepresentations by Zarb were made, on May 4, 2007, Robot Defined and Comerica Bank entered into a debt purchase agreement. According to the agreement, Robot Defined agreed to purchase outstanding loans made by Comerica Bank to Robot Printing Inc. and Robot Properties, L.L.C. The outstanding principal on the loan notes exceeded \$7,000,000.00. The purchase price was the amount outstanding on the notes, less \$800,000 (and certain fees). On the same day, a forbearance agreement was executed. In that agreement, Comerica Bank agreed to "forbear from taking action" in regard to defaults on the loans at issue in the debt purchase agreement. Both the debt purchase agreement and the forbearance agreement included a jury trial waiver.

Plaintiffs subsequently filed a complaint against Zarb alleging:

4[.] In and about April, 2007, Defendant Zarb made statements to Plaintiffs in Wayne County, Michigan that, inter alia, if Plaintiffs advanced money to and for the benefit of Robot Printing, Inc. and Defendant Bank,[] Zarb had the intent and ability to cause Comerica Bank to allow Plaintiffs to be paid Robot Printing Inc.'s receivables from and after April 17, 2007.

5. Defendant Zarb made those statements to, inter alia, induce Plaintiffs to advance money.

6. Plaintiffs reasonably and detrimentally relied upon Defendant Zarb's statements by, inter alia, advancing money.

7. Defendant Zarb's statements were knowingly false or were made with reckless disregard as to their falsity.

8. Plaintiffs were damaged by Defendant Zarb's fraudulent misrepresentations, including without limitation loss of the amounts that Plaintiffs advanced.

Zarb answered, denying the false statements and denying that Barclae, Cynba, or Zarb were parties to the debt purchase agreement or forbearance agreement.

Plaintiffs thereafter filed a jury demand, which Zarb moved to strike. In opposition to the motion to strike, plaintiffs argued that: 1) the suit was not "related to" the agreements, notes or loan documents as contemplated by the jury trial waiver, 2) Zarb could not invoke the jury trial waiver because Zarb was an individual and was not defending the action as an agent of Comerica Bank, and 3) Barclae and Cynba could avoid the jury trial waiver because they were agents of Robot Defined.

The trial court found that Zarb was acting as an agent for Comerica Bank when he allegedly made the fraudulent misrepresentations. It also found, with respect to plaintiffs, "they're all intertwined", "[a]ll alter ego's of each other" and that their claims are "derivative." Consequently, the trial court found that plaintiffs waived their rights to a jury trial and granted Zarb's motion to strike plaintiffs' jury trial demand. Plaintiffs' application for leave to appeal followed from this order. *Barclae v Zarb*, unpublished order of the Court of Appeals, issued April 29, 2009 (Docket No. 289878).

II.

Although plaintiffs in civil suits are guaranteed the right to trial by jury, this right is permissive, and therefore, may be waived. *Zdrojewski v Murphy*, 254 Mich App 50, 75; 657 NW2d 721 (2002), citing Const 1963, art 1, § 14; see also MCR 2.508. "'Waiver' is an intentional and voluntary relinquishment of a known right." *Walters v Nadell*, 481 Mich. 377, 384 n 14; 751 NW2d 431 (2008). In this case, the debt purchase agreement and the forbearance agreement signed on May 4, 2007 each contained the following provision: **"EACH PARTY . . . KNOWINGLY AND VOLUNTARILY, AND FOR THEIR MUTUAL BENEFIT WAIVES**

ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING THE PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO” the agreements, the notes, or other loan documents.

On appeal, plaintiffs challenge the waiver provisions, arguing both that the phrase “in any way related” is too vague and ambiguous to be enforceable, and that plaintiffs’ complaint is not in any way related to the agreements, notes, or other loan documents. The interpretation of a contract and whether a party has waived the right to a jury trial in a contract present questions of law, reviewed de novo. See *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999); *DaimlerChrysler Corp v G Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

Plaintiffs have abandoned their vagueness claim by failing to raise it in their statement of questions presented, and by failing to rationalize their argument and support it with legal theory. MCR 7.212(C)(5); *State Treasurer v Sprague*, 284 Mich App 235, 243; 772 NW2d 452 (2009) (“Failure to brief a question on appeal is tantamount to abandoning it.”); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008) (an argument that is not contained in the statement of questions presented is deemed abandoned). In any event, there is only one reasonable interpretation of “in any way related” when the terms are considered in accordance with their commonly used meanings. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 504; 741 NW2d 539 (2007) (“Courts may consult dictionary definitions to ascertain the plain and ordinary meaning of terms undefined in an agreement.”). The word “in” is “used to indicate inclusion within space, a place, or limits,” Random House Webster’s College Dictionary (2001), and the word “any” is defined as “every; all.” *Dep’t of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 9; 779 NW2d 237 (2010), citing Random House Webster’s College Dictionary (1997). The term “related” is defined as “‘associated’ or ‘connected.’” *McClellan v Collar*, 240 Mich App 403, 410; 613 NW2d 729 (2000). “Connect” means “to have an accompanying or associated feature.” Random House Webster’s College Dictionary (2001). According to the plain and ordinary meaning of the provisions, the parties intended the jury trial waiver to apply to all litigation sharing an associated feature with the agreements, the notes, or other loan documents.

Plaintiffs’ claim that the instant litigation is not in any way related to the agreements, notes, or other loan documents fails. Plaintiffs’ initial complaint was based on statements allegedly made by Zarb to induce plaintiffs to advance money for the assets of Robot Printing, Inc., and Robot Properties, L.L.C. Since these same assets were collateral for loans at issue in the subsequent debt purchase agreement and forbearance agreement, the litigation and the agreements share an associated feature and therefore, are related even though plaintiffs did not sue for breach of the agreements. Our finding is buttressed by plaintiffs’ counsel’s concession at the motion hearing that he “can’t say that there’s no connection” between the allegations and the agreements containing the jury trial waivers. On the basis of the whole record, we therefore conclude that plaintiff’s suit falls within the scope of the waivers provisions.

Next, plaintiffs claim that because Zarb did not sign the debt purchase agreement and forbearance agreement, he cannot invoke the jury trial waivers in the agreements. We agree.

Other courts that have addressed this issue have relied on authority regarding arbitration clauses and non-signatories. In these cases, an individual typically has signed a contract, which

contained an arbitration clause, as an agent on behalf of a principal. When the individual is later involved in litigation related to the contract, courts have allowed the individual to avoid the arbitration clause reasoning that the individual did not intend to be bound in an individual capacity. Otherwise, the individual would have signed the contract twice, as both an agent and an individual. See e.g., *Bel-Ray Co v Chemrite Ltd*, 181 F3d 435, 444-446 (CA 3, 1999), *Testerman v Buck*, 667 A2d 649, 651 (Md App, 1995).

In other cases, courts have allowed the individual to invoke the arbitration clause, reasoning that the effect of an arbitration agreement would be nullified if a plaintiff could sue a defendant individually where the defendant only signed the arbitration agreement as an agent, not an individual. See e.g., *Beaver v Cosmetic Dermatology & Vein Ctr*, unpublished opinion per curiam of the Court of Appeals, issued August 16, 2005 (Docket No. 253568), *Woodworth, Inc v Five Pointes Constr Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 1998 (Docket No. 202875), *Pritzker v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 7 F3d 1110, 1121 (CA 3, 1993), *Sunkist Soft Drinks v Sunkist Growers*, 10 F3d 753 (CA 11, 1993) (“certain limited exceptions, such as equitable estoppel, . . . allow nonsignatories to a contract to compel arbitration.”).

In *McCarthy v Azure*, 22 F3d 351, 360-361 (CA 1, 1994), the First Circuit noted the asymmetry in contractual interpretations where an agent seeks to avoid, rather than invoke, an arbitration agreement. It rejected the defendant’s argument that plaintiffs will sue individuals to circumvent arbitration clauses and found that parties could alternatively draft contracts with more specificity to achieve the desired result. *Id.* at 360. It also reasoned that if an agent who signed an arbitration agreement for a disclosed principal would not be bound to arbitrate future claims involving the agent as an individual, then an agent defending a claim as an individual should likewise not be free to compel arbitration. *Id.* at 361.

In the context of jury trial waivers, courts have similarly allowed an individual, who signed contracts containing jury trial waivers on behalf of a principal, to avoid the jury trial waiver because the individual was acting as an agent and did not intend to be bound in an individual capacity. See *Hulsey v West*, 966 F2d 579-580 (CA 10), *Evans v Union Bank of Switzerland*, unpublished opinion of the United States District Court for the Eastern District of Louisiana, issued May 30, 2003 (ED La, Docket No. 01-1507 Section “N”). On the contrary, in *Tracinda Corp v DaimlerChrysler AG*, 502 F 3d 212 (CA 3, 2007), quoting *Roby v Corp of Lloyd’s*, 996 F2d 1353, 1360 (CA 2, 1993), the Third Circuit allowed an agent, who did not sign the contract in an individual capacity, to invoke the jury trial waiver because it would “be too easy to circumvent agreements by naming individuals as defendants instead of the entity’ itself.” See also *In re Credit Suisse First Boston Mtg Capital, LLC*, 273 SW3d 843, 848 (Tex App, 2008) (“because a corporation can act only through its agents and employees, by definition, one who agrees to a jury-waiver clause knows--and intends--that the clause naturally must extend to the corporation’s nonsignatory agents, too).

We conclude that, according to the plain language of the waiver provisions, “each party” agreed to waive any right to trial by jury. In Zarb’s answer to plaintiff’s complaint, he admitted that he was not a party to the agreement between Robot Defined and Comerica Bank. *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 470; 717 NW2d 341 (2006) (“a party is bound by its pleadings”). To interpret these waivers to apply to Zarb, this Court would be required to

rewrite the plain language of the clauses to not only apply to “each party,” but also “agents of each party.” *Henderson*, 460 Mich at 354. Such an interpretation would render language referencing the parties and their agents elsewhere in the agreements surplusage. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003); see Forbearance Agreement, p 6 (certain parties agreed to release Comerica Bank, along with its employees, officers, and directors, from all claims arising through the date of the agreement).

Our conclusion that the plain language of the jury trial waiver does not extend to agents, such as Zarb, who did not sign the contract in their individual capacities, supports the principle that every reasonable presumption should be indulged against the waiver of a fundamental constitutional right such as a jury trial. *Hodges v Easton*, 106 US (16 Otto) 408, 413; 1 S Ct 307; 27 L Ed 169 (1882); *Verbison v Auto Club Ins Ass’n*, 201 Mich App 635, 641-642; 506 NW2d 920 (1993). This presumption is the key distinction between the jury trial waivers and this Court’s trend with respect to arbitration clauses. *Beaver, supra*; *Woodworth, supra*. Whereas every reasonable presumption should be indulged against the waiver of a jury trial, any doubts about the arbitrability of an issue should be resolved in favor of arbitration. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). Furthermore, like the First Circuit explained in *McCarthy*, 22 F3d at 360-361, parties need not fear that arbitration provisions or jury trial waivers could be nullified because plaintiffs may sue defendants individually. Instead, parties should draft those agreements with more care and specificity to apply to agents acting on behalf of a principal and agents acting as individuals.

Our conclusion with respect to this jury trial waivers also corresponds with traditional agency theory. A contract between a principal and a third party is enforceable by the principal against the third party. 3 Am Jur 2d, Corporations, § 313. Only where an agent contracts with the party on behalf of the principal, but in the agent’s own name “or in such manner as to make it the agent’s personal contract,” can the agent sue in his own name to enforce the contract. *Id.* Here, Comerica Bank could invoke the jury trial waiver, but because Zarb did not sign the agreements as an individual or make the agreements his own personal contracts, Zarb cannot invoke the jury trial waiver as an individual. Thus, the trial court erred when it granted Zarb’s motion to strike plaintiffs’ jury trial demand.

In light of our conclusion above, we decline to address plaintiffs’ arguments that Robot Defined, Barclae and Cynba can avoid the jury trial waivers. We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Peter D. O’Connell
/s/ Kurtis T. Wilder