STATE OF VERMONT
WINDSOR COUNTY

KEYBANK NAT'L ASSOC.	)	
	)	**Windsor Superior Court**
v.	)	**Docket No. 249-4-09 Wrcv**
	)	
SPORTS ODYSSEY, INC.,	)	
STEPHEN R. ROLKA,	)	
and JOSEPH L. ROLKA	)	

DECISION ON MOTION TO STRIKE JURY DEMAND

Plaintiff Keybank National Association alleges that defendant Sports Odyssey, Inc., defaulted on a commercial line of credit and that defendants Stephen and Joseph Rolka are personally liable as guarantors. Defendants filed an answer denying the allegations and a counterclaim contending that Keybank breached its contractual duty of good faith and fair dealing, and otherwise acted negligently, in calling for immediate repayment of the debt in full. Defendants also requested a jury trial.

The present matter before the court is Plaintiff's motion to strike the jury demand from the answer and counterclaim for the reason that the parties entered into loan agreements containing express and unambiguous waivers of the right to jury trial. The question here is whether the jury waivers are enforceable under the circumstances presented.

Both parties have submitted well-written and well-researched memoranda concerning the issue, and the court held an evidentiary hearing on September 11th, 2009. Plaintiff was represented by Attorney John Kennelly. Defendants were represented by Attorney Lisa Chalidze. Based on the evidence presented at the hearing, the court makes the following findings of fact, conclusions of law, and order.

Findings of Fact

Stephen and Joseph Rolka are brothers who operate a retail business in Ludlow known as Sports Odyssey. The business borrows money in the ordinary course of operations. To that end, the Rolkas contacted Keybank and other lenders concerning a loan or commercial line of credit.

The Rolkas believed that the terms offered by Keybank were the most favorable of any potential lender, and therefore elected to have Sports Odyssey borrow $300,000 from Keybank. There was some negotiation with Keybank over the amount of the note and the interest rate. The loan documents were prepared by Keybank.

At the loan closing on June 2, 2004, neither Keybank nor the Rolkas were represented by legal counsel. There was no specific discussion of any of the loan terms at the time of closing.

At the closing, the Rolkas signed the promissory note, consisting of one and one-half pages, on behalf of Sports Odyssey. At the same time, both Stephen and Joseph signed personal commercial loan guarantees, consisting of three pages. Earlier, in 2001, acting on behalf of Sports Odyssey, the Rolkas had signed a five-page commercial security agreement in favor of Keybank.

All of these documents contain waivers of the right to jury trial in the event of any disputes arising out of the performance of the agreements. The documents were signed by Stephen Rolka (and also presumably by Joseph Rolka) without being read. Stephen testified at the hearing that nothing prevented him from reading the documents before signing, and that it was his choice not to do so. He further testified that the Keybank representative indicated where he and his brother should sign, and that the whole closing took about five minutes.

Stephen holds a college degree and has been in business for more than twenty years. He admits that if he had read the documents he would have seen the jury trial waiver.

Stephen testified that there was no negotiation beyond the amount of the loan and the interest rate. However, he did not testify that he was refused in any request to negotiate other terms. He also admitted that he could have gone to another lender had he not agreed with the terms offered by Keybank.

The documents read as follows. The first document is the 2001 commercial security agreement, which is five pages in length and signed by both Stephen and Joseph. P. Ex. 4. It contains the following language on pages 4 and 5, with emphasis in original:

> **MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Agreement:
>
> * * *
>
> **WAIVE JURY. All parties to this Agreement hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.**
>
> *** * ***
>
> **GRANTOR HAS READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS COMMERCIAL SECURITY AGREEMENT AND AGREES TO ITS TERMS.**
>
> /s/ Sports Odyssey, Inc., by Joseph L. Rolka (President) and Stephen R. Rolka (Vice President)

The second document is the 2004 promissory note, which is one and one-half pages in length and signed by Joseph and Stephen. P. Ex. 1. It contains the following language on pages 1 and 2, with emphasis in original:

> **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.**
>
> * * *
>
> **PRIOR TO SIGNING THIS NOTE, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE, INCLUDING THE VARIABLE INTEREST RATE PROVISIONS. BORROWER AGREES TO THE TERMS OF THE NOTE.**
>
> /s/ Sports Odyssey, Inc., by Joseph L. Rolka (President) and Stephen R. Rolka (Vice President)

The third document is the 2004 personal guaranty signed by Joseph Rolka, which is three pages in length. P. Ex. 2. It contains the following language on pages 2 and 3, with emphasis in original:

> **MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Guaranty:
>
> * * *
>
> **WAIVE JURY. Lender and Guarantor hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Borrower against the other.**
>
> * * *
>
> **EACH UNDERSIGNED GUARANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS GUARANTY AND AGREES TO ITS TERMS. . . .**
>
> /s/ Joseph L. Rolka

The final document is the 2004 personal guaranty signed by Stephen Rolka, which is three pages in length. P. Ex. 3. It is identical to the personal guaranty signed by Joseph, and contains the language set forth immediately above.

The parties do not dispute whether the waivers are ambiguous, or whether the waivers would apply to this case if enforceable. Instead, the sole issue before the court is whether the evidence shows that the defendants knowingly and voluntarily waived their constitutional right to a jury trial.

Conclusions of Law

The Seventh Amendment to the United States Constitution and Chapter II, § 38 of the Vermont Constitution both preserve the right to jury trial in civil cases. It is well-settled, however, that the right to have civil disputes tried to a jury "is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 848–49 (1986); 9 Wright & Miller, Federal Practice and Procedure: Civil 3d § 2321. Thus, the right to a civil jury trial may be waived in a number of ways, such as by agreeing to arbitration or some other form of alternative dispute resolution, by written or oral representations made to the court, by contractual agreement, or simply by failing to affirmatively request a jury trial within the time prescribed by Vermont Civil Procedure Rule 38. See, e.g., Vt. Const., Ch. II, § 38 (preserving right of jury trial in civil cases "except where parties otherwise agree"); *DeGraff v. Burnett*, 2007 VT 95, ¶ 35, 182 Vt. 314 (oral waiver of jury trial on record); *Bloomer v. Gibson*, 2006 VT 104, ¶¶ 9–14, 180 Vt. 397 (pro se litigant waived jury trial by failing to serve and file demand within time prescribed by Rule 38); see also, e.g., *Sydnor v. Conseco Financial Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (explaining that "the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.") (citation omitted).

Contractual waivers of the right to jury trial are common, especially in loan agreements and other financial transactions, and are regularly enforced by the courts. *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007); *Bear Stearns Funding, Inc. v. Interface Group-Nevada, Inc.*, 2007 WL 3286645 at *2 (S.D.N.Y. Nov. 7, 2007). In the context of loan agreements and other commercial transactions, jury waivers and arbitration agreements are reasonable because they offer benefits both to the lender and the borrower: lenders are able to obtain cost certainty and ensure that disputes will be resolved by professional adjudicators, and borrowers are able to obtain more favorable rates than would otherwise be possible. *IFC Credit Corp. v. United Business & Indus. Federal Credit Union*, 512 F.3d 989, 993 (7th Cir. 2008).

The general rule emerging from the cases is that a contractual waiver of the right to jury trial is enforceable so long as the waiver was made knowingly, intelligently, and voluntarily.[1] *Allegheny Energy, Inc.*, 500 F.3d at 188. The party seeking enforcement of the waiver bears the burden of proving that the waiver was knowing and voluntary, and courts indulge every reasonable presumption against waiver. *National Equipment Rental, Ltd. v.*

[1] But see *IFC Credit Corp*, 512 F.3d at 993 (challenging view that enforcement of jury waivers requires extra evidence beyond that necessary to prove voluntariness of contract as a whole). Judge Easterbrook asserts that the general rule requiring extra evidence of negotiation or voluntariness is inconsistent with ordinary contract law, the law governing the enforceability of arbitration agreements, and Civil Procedure Rule 38(d)—which provides that even accidental and unknowing failures to demand jury trials in accordance with the rule result in waiver. *Id.*; accord *Bloomer*, 2006 VT 104, ¶ 14 (holding that the right to jury trial may be forever lost by a pro se litigant who was unaware of the requirements of Rule 38). Thus, Judge Easterbrook argues, it does not make sense to require parties seeking enforcement of a contractual jury waiver to show "evidence of voluntariness beyond what is required to make the rest of the contract legally effective." 512 F.3d at 993. Although this court agrees that there is tension between the general waiver rule and Rule 38(d), it is not necessary to decide in this opinion whether to adopt the 7th Circuit standard as a matter of Vermont law because the evidence here shows that the contractual waiver was knowing, intelligent, and voluntary.

Hendrix, 565 F.2d 255, 258 (2d Cir. 1977). In determining whether a contractual jury waiver was entered into knowingly and voluntarily, courts consider factors such as the negotiability of the contract terms and the negotiations between the parties concerning the waiver provision, the conspicuousness of the waiver provision in the contract, the relative bargaining power of the parties, the business sophistication of the party opposing the waiver, and whether the party opposing the waiver was represented by counsel. *Bear Stearns Funding*, 2007 WL 3286645 at *2; *In re Oakwood Homes Corp.*, 378 B.R. 59, 72–73 (Bankr. D. Del. 2007); *In re Charlotte Commercial Group, Inc.*, 288 B.R. 715, 721 (Bankr. M.D. N.C. 2003); *Oei v. Citibank, N.A.*, 957 F. Supp. 492, 523 (S.D.N.Y. 1997); *Cooperative Finance Assoc., Inc. v. Garst*, 871 F. Supp. 1168, 1172 (N.D. Iowa 1995).

Here, the evidence shows that the parties knowingly and voluntarily waived the right to jury trial in four separate documents: the commercial security agreement, the promissory note, and the two personal guarantees. Although each of these documents was prepared by the lender, the jury waiver is set forth in bold typeface and in its own separate paragraph. The waivers are written in straightforward language and are not hidden or hard to see. Mr. Rolka admitted that he would have seen the waivers if he had read the contracts. The court accordingly concludes that there is no unfair surprise in the inclusion of the waiver in the contracts. *KPC Corp. v. Book Press*, 161 Vt. 145, 151 (1993); *Joder Building Corp. v. Lewis*, 153 Vt. 115, 119 (1989).

Moreover, the Rolkas are experienced businessmen who had the opportunity to be represented by counsel if they so chose. There is no evidence that they could not afford counsel. Instead, they decided not to obtain representation prior to entering into the transactions. They explored the marketplace before selecting Keybank as the most attractive lender, and they negotiated other terms of the loan agreements. The bargaining power between the parties was not so unequal as to make enforcement of the contracts unconscionable.

The Rolkas contend that they did not knowingly and intelligently waive the right to jury trial because they did not read the contracts before signing them. By signing the agreements, however, the Rolkas expressly agreed that they had read and understood all of the terms in the agreements. Statements to this effect were in bold face and capital letters directly above the signature line in all four of the documents submitted into evidence, which spanned two separate transactions separated by three years. Moreover, Mr. Rolka candidly admitted at the hearing that he had the opportunity to read the documents, but simply chose not to do so. Under these circumstances, the rule is that parties are bound by the plain and express meanings of the contracts they enter into knowingly and voluntarily. If they do not read the whole contract before signing, they are charged with responsibility for and knowledge of its terms, "whatever they may be." *Lamoille Grain Co. v. St. Johnsbury & Lamoille County R.R.*, 135 Vt. 5, 8–9 (1976); see also *Sydnor*, 252 F.3d at 306 (explaining that an elementary principle of contract law is that a party signing a written contract has a duty "to inform himself of its contents before executing it, . . . and in the absence of fraud or overreaching he will not be allowed to impeach the effect of the instrument by showing that he was ignorant of its contents or failed to read it") (citation omitted).

The Rolkas also contend that the jury waiver is not enforceable because they did not specifically negotiate for its inclusion in the contract. However, the promissory note and loan guarantees contain many terms that are enforceable even though they were not specifically

negotiated by the parties. Moreover, the Rolkas shopped around to many different lenders before determining that Keybank offered the most attractive terms. The jury waiver and other similar restrictions in the contract are part of what enabled Keybank to offer the loan on the terms that it did. *IFC Credit Corp*, 512 F.3d at 993. In other words, the waiver was part of the bargain. If the Rolkas did not like the terms of the bargain, they were free to choose a different lender.

Finally, there is no indication here that the jury waiver was fraudulent, or that the Rolkas were rebuffed in any attempts to negotiate the jury waiver in any detail. See *Oei*, 957 F. Supp. at 523 (explaining that facts that contract was prepared by lender and waiver was not actually negotiated does not mean that the waiver was not negotiable). Nor does the case law support the view that jury waivers must be initialed to be enforceable, or that there must be evidence that the parties affirmatively and verbally discussed the waiver (although such would be additional proof of voluntariness). Instead, the burden of proof is met where, as here, the contract was entered into knowingly and voluntarily, the parties were sophisticated businessmen engaged in a commercial transaction, the parties negotiated at least some terms of the contract, the waiver was plainly stated in the contract and not hidden, and the parties signed the agreement directly under bold-faced and capitalized text stating that they had read, understood, and agreed to all of the provisions in the contract.

For these reasons, the court concludes that Plaintiff has met its burden of proving that the jury waiver was entered into knowingly, voluntarily, and intelligently. The motion to strike the jury demand is accordingly granted.

ORDER

Plaintiff's Motion to Strike Jury Demand (MPR #3), filed June 10, 2009, is ***granted***.

Dated at Woodstock, Vermont this ____ day of September, 2009.

_____
Hon. Harold E. Eaton, Jr.
Superior Court Judge