

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Civil Action No. 2011-CP-08-3112

TD Bank, N.A., Successor by merger to)
Carolina First Bank,)

Plaintiff,)

v.)

ORDER

Farm Hill Associates, LLC,)
John H. Hofford, Michael R. Bennett, and)
Hofford Farm Hill, LLC,)

Defendants.)

FILED
2013 SEP 23 AM 11:20
CLERK OF COURT
BERKELEY COUNTY, SC

This matter came before the Court on Thursday, September 5, 2013, upon Plaintiff TD Bank, N.A., Successor by merger to Carolina First Bank's ("TD Bank's") Motion to Strike Defendants' Jury Demand. After carefully reviewing the record in this case and hearing arguments from counsel for TD Bank and Defendants, I hereby **GRANT** TD Bank's Motion to Strike Defendants' Jury Demand and refer this action to the Honorable Robert E. Watson, Master-in-Equity for Berkeley County:

PROCEDURAL HISTORY

1. TD Bank initiated this foreclosure action by way of a Verified Complaint filed on November 9, 2011.
2. In this action, TD Bank seeks to foreclose on real and personal property encumbered by certain mortgages, and modifications thereto, as identified in TD Bank's First and Third Causes of Action. See Plaintiff's Complaint, ¶¶ 10-26 and 36-44.
3. TD Bank attached to the Verified Complaint a note in the original principal amount of \$5,600,000.00 and mortgage from Defendant Farm Hill Associates, LLC, dated

RCH
9/24/13

March 29, 2007, as well as the unconditional guarantees of Defendants John H. Hofford and Michael R. Bennett.

4. The mortgage references real property located in Berkeley County, South Carolina.

5. TD Bank also attached to the Verified Complaint a note in the original principal amount of \$423,819.00, and mortgage from Defendant Hofford Farm Hill, LLC, dated February 26, 2010, as well as the unconditional guarantee of Defendant John H. Hofford.

6. The mortgage references the same real property located in Berkeley County, South Carolina.

7. TD Bank alleges that both loans are in default and seeks to enforce its rights under the subject loan documents, including its right to foreclose on the mortgages on the subject property.

8. Defendants Farm Hill Associates, LLC, John H. Hofford, and Hofford Farm Hill, LLC, filed an Answer on March 5, 2012. Their Answer does not assert any affirmative defenses or counterclaims, but denies that TD Bank is entitled to the requested relief and demands a jury trial. See generally Hofford Answer.

9. Defendant Michael R. Bennett filed an Answer on February 27, 2012, and an Amended Answer and Counterclaims on January 15, 2013. His Amended Answer and Counterclaims denies that TD Bank is entitled to the requested relief, asserts various affirmative defenses, asserts counterclaims for breach of the covenant of good faith and fair dealing and breach of contract accompanied by a fraudulent act, and demands a jury trial. See generally Bennett Answer and Counterclaims.

BLH
9/24/13

10. On August 20, 2013, a status conference was held before this Court in this action and counsel for the parties appeared. At the status conference, this Court signed a consent scheduling order and added this action to the Jury Term of December 9, 2013.

11. TD Bank now moves this Court to strike Defendants' jury trial demand.

CONCLUSIONS OF LAW:

The Defendants are not entitled to a jury trial in this matter for the following reasons:

A. Plaintiff TD Bank's Motion to Strike Defendant's Jury Demand is timely pursuant to South Carolina Rule of Civil Procedure 39(a).

1. First, Defendants asserted that TD Bank's Motion to Strike Defendants' Jury Demand was not timely pursuant to Rule 12(f) of the South Carolina Rules of Civil Procedure.

2. However, Rule 12(f) does not proscribe the time to file a motion to strike an improper request for a jury trial.

3. Rule 39(a) of the South Carolina Rules of Civil Procedure provides that "the trial of all issues so demanded shall be by jury, unless . . . (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist."

4. "[I]t is well established that a party (or the court on its own initiative) may move to strike a jury demand at any time, even on the eve of trial." Mowbray v. Zumot, 536 F. Supp. 2d 617, 621 (D. Md. 2008) (citing James William Moore et al., Moore's Federal Practice § 39.13) (interpreting Rule 39 of the Federal Rules of Civil Procedure); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 62, 566 S.E.2d 863, 865-66 (Ct. App. 2002) (noting that South Carolina courts may rely on federal law interpreting a Federal Rule of Civil Procedure to interpret the same South Carolina Rule of Civil Procedure). See also RCSH Operations, L.L.C. v. Third Crystal Park Associates L.P., 115 Fed. Appx. 621, 633, 2004 WL 2596032, 10 (4th Cir. 2004) (affirming the enforcement of a jury waiver provision where the motion to strike the jury demand was made

KJH
9/24/13

approximately four weeks before trial); Tracinda Corp. v. DaimlerChrysler, AG, 502 F.3d 212, 227 (3rd Cir. 2007) (“Because a party may file a motion to strike a jury demand at any time under Rule 39(a), we conclude that DaimlerChrysler did not commit inexcusable delay by filing its motion to strike after the close of discovery.”); Kramer v. Banc of Am. Secs., LLC, 355 F.3d 961, 968 (7th Cir. 2004) (affirming decision granting motion to strike jury demand made two weeks prior to trial); U.S. v. Schoenborn, 860 F.2d 1448 (8th Cir. 1988) (holding no abuse of discretion when request for jury trial was stricken one day prior to trial); Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 1158 (5th Cir. 1982) (noting the trial judge’s grant of a motion to strike jury demand filed on the eve of trial); CPI Plastics, Inc. v. USX Corp., 22 F. Supp. 2d 1373 (N.D. Ga. 1988), aff’d 212 F.3d 599 (11th Cir. 2000) (granting a motion to strike jury demand filed two weeks before trial); Jones-Hailey v. Corporation of Tennessee Valley Authority, 660 F. Supp. 551, 553 (E.D. Tenn. 1987) (granting a motion to strike made one month before the scheduled trial date); Bear, Stearns Funding, Inc. v. Interface Group-Nev., Inc., 03-Civ-8259, 2007 U.S. Dist. Lexis 82557, *9-16 (S.D.N.Y. Nov. 7, 2007) (striking request for jury trial after the end of discovery and coupled with a summary judgment brief).

5. Therefore, Defendants’ argument that TD Bank’s Motion to Strike Defendants’ Jury Demand was not timely is without merit.

B. Defendants expressly waived their right to a jury trial in the subject loan documents.

1. Next, Defendants are not entitled to a jury trial because they expressly and irrevocably waived any rights they may have had to a jury trial in the subject loan documents.

2. It is well-established that a party may waive its right to a jury trial by contract. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002); Leasing Service Corp. v. Crane, 804 F.2d 828, 832-33 (4th Cir. 1986).

KH
9/24/13

3. Because the right to a jury trial is a substantial right, jury waiver provisions should be strictly construed. Id.

4. Nevertheless, jury waiver provisions must be given effect according to their "plain, ordinary and popular meaning." Id.

5. Defendants have repeatedly waived their right to a jury trial in this matter.

6. First, Defendant Farm Hill Associates, LLC, executed the promissory note for \$5,600,000.00, attached to the Complaint as Exhibit A, which contains the following jury trial waiver in all capital letters:

BORROWER AND LENDER WAIVE, TO THE FULL EXTENT PERMITTED BY LAW, THE RIGHT TO A JURY TRIAL IN ANY LITIGATION CONCERNING THIS PROMISSORY NOTE OR ANY AGREEMENT SECURING THIS PROMISSORY NOTE AND IN ANY LITIGATION CONCERNING ANY DEFENSE, CLAIM, COUNTERCLAIM, CLAIM OF SET-OFF OR SIMILAR CLAIM OF ANY NATURE THAT BORROWER MAY ASSERT AGAINST LENDER.

Complaint ¶ 11.

7. Next, Defendant Farm Hill Associates, LLC, executed the Commercial Mortgage of Real Property and Security Agreement to secure the \$5,600,000.00 loan, attached to the Complaint as Exhibit B, which contains the following jury trial waiver in all capital letters:

WAIVER OF JURY TRIAL. BORROWER AND LENDER WAIVE, TO THE FULL EXTENT PERMITTED BY LAW, THE RIGHT TO A JURY TRIAL IN ANY LITIGATION CONCERNING THIS MORTGAGE AND IN ANY LITIGATION CONCERNING ANY DEFENSE, CLAIM, COUNTERCLAIM, CLAIM OF SET-OFF OR SIMILAR CLAIM OF ANY NATURE THAT BORROWER MAY ASSERT AGAINST LENDER.

Complaint ¶ 12.

8. Defendants John H. Hofford and Michael R. Bennett also executed a second Commercial Mortgage of Real Property and Security Agreement to provide additional collateral

HCH
9/24/13

to secure the \$5,600,000.00 loan, attached to the Complaint as Exhibit G, which contains the following jury trial waiver in all capital letters:

WAIVER OF JURY TRIAL. MORTGAGOR AND MORTGAGEE WAIVE, TO THE FULL EXTENT PERMITTED BY LAW, THE RIGHT TO A JURY TRIAL IN ANY LITIGATION CONCERNING THIS BENNETT/HOFFORD MORTGAGE AND IN ANY LITIGATION CONCERNING ANY DEFENSE, CLAIM, COUNTERCLAIM, CLAIM OF SET-OFF OR SIMILAR CLAIM OF ANY NATURE THAT MORTGAGOR MAY ASSERT AGAINST MORTGAGEE.

Complaint ¶ 14(c).

9. Furthermore, Defendants John H. Hofford and Michael R. Bennett each executed an Unconditional Guaranty and renewals thereof to secure the \$5,600,000.00 loan, attached to the Complaint as Exhibits L and M, which contain the following jury trial waiver in all capital letters:

WAIVER OF JURY TRIAL. GUARANTOR AND CAROLINA FIRST WAIVE, TO THE FULL EXTENT PERMITTED BY LAW, THE RIGHT TO A JURY TRIAL IN ANY LITIGATION CONCERNING THIS AGREEMENT AND IN ANY LITIGATION CONCERNING ANY DEFENSE, CLAIM, COUNTERCLAIM, CLAIM OF SET-OFF OR SIMILAR CLAIM OF ANY NATURE THAT GUARANTOR OR PRIMARY OBLIGOR MAY ASSERT AGAINST CAROLINA FIRST.

Complaint ¶¶ 28-29.

10. Finally, the jury trial waivers set forth above were incorporated into each of the Modifications, attached to the Complaint as Exhibits E, F, I, and J, and Defendants Farm Hill Associates, LLC, John H. Hofford, Michael R. Bennett, and Hofford Farm Hill, LLC, therein affirmed and restated the jury trial waivers. Complaint ¶ 14.

11. Defendants waived their right to a jury trial several times in the subject loan documents.

HLH
9/24/13

12. Because the jury trial waivers include “any litigation concerning any defense, claim, counterclaim, claim of set-off or similar claim of any nature that [Defendants] may assert against [Plaintiff],” Defendants’ jury trial waivers encompass all of the claims and defenses set forth in this action.

13. Therefore, Defendants are not entitled to a jury trial in this matter based on the plain and ordinary language of their jury trial waivers contained in the subject loan documents.

14. Defendant John H. Hofford asserted that his guaranty of the second loan in the amount of \$423,819.00 did not include a jury waiver provision, and therefore, he has not waived his right to a jury trial in this matter.

15. However, as explained above, Defendant John H. Hofford signed a Commercial Mortgage of Real Property and Security Agreement, Unconditional Guaranty, and Modifications related to the first loan in the amount of \$5,600,000.00, each of which is broad enough to encompass all of the claims and defenses set forth in this action.

16. Defendants also asserted that the jury waiver provisions are not enforceable based on Wachovia Bank v. Blackburn, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011), because the conduct complained of allegedly could not have been contemplated or anticipated when the Defendants signed the jury waiver provisions.

17. Although the Blackburn Court noted that the conduct complained of could not have been contemplated or anticipated when the defendants signed the jury waiver provisions at issue in that case, the decision ultimately rested on whether the counterclaims were within the scope of the jury waiver provisions—not whether the conduct complained of could have been foreseen. 394 S.C. at 589-90, 716 S.Ed.2d at 460.

HH
9/24/13

18. Specifically, the Blackburn court held that the counterclaims alleged did not fall within the scope of the jury waiver provisions at issue, and therefore, the Blackburn defendants were entitled to a jury trial on those counterclaims. Id.

19. Here, as explained above, the jury waiver provisions encompass all of the claims and defenses set forth in this action, and therefore, the jury waiver provisions are enforceable regardless of whether the conduct complained of could have been contemplated or anticipated when Defendants signed the jury waiver provisions.

20. Accordingly, TD Bank's Motion to Strike Defendants' Jury Demand is hereby **GRANTED**, and Defendants' request for a jury trial in this action is stricken.

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

ORDERED that TD Bank's Motion to Strike Defendants' Jury Demand is hereby granted;

ORDERED that Defendants are not entitled to a jury trial in this action, and their request for a jury trial in this action is hereby stricken;

ORDERED that this case is referred to the Honorable Robert E. Watson, Master-in-Equity for Berkeley County;

ORDERED that the Master-in-Equity, pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, shall exercise all power and authority which a circuit judge sitting without a jury would have, including but not limited to, making findings of fact and conclusions of law; directing entry of final judgment in this action under Rule 53(b) of the South Carolina Rules of Civil Procedure; to order a sale on any day, not just the first Monday in the month; to hear any issues, including motions, after sale or judgment; issuing any and all Orders and Supplemental

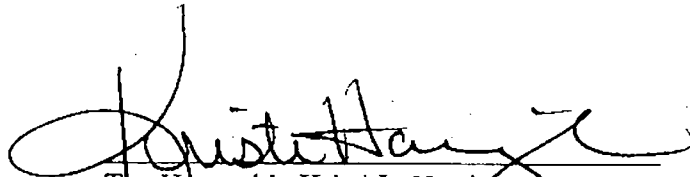
HLH
9/24/13

Orders, Writs of Assistance, and hearing any issues involving possession and/or removal of property and appraisal proceedings under Section 29-3-360, *et. seq.* of the South Carolina Code;

ORDERED that the Master-in-Equity, pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, may return any or all issues triable of right by a jury to the circuit court; and

ORDERED that pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, any appeal from the final judgment entered by the Master-in-Equity shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

AND IT IS SO ORDERED.



The Honorable Kristi L. Harrington
Presiding Judge, Ninth Judicial Circuit

September 24, 2013

Moncks Corner, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BERKELEY COUNTY COURT OF COMMON PLEAS

Kristi Lea Harrington, Circuit Court Judge
Case No.: 2011-CP-08-3112

TD Bank, N. A., Successor by merger to Carolina First Bank..... Plaintiff,

OF WHOM

TD Bank, N. A., Successor by merger to Carolina First Bank is theRespondent,

vs.

Farm Hill Associates, LLC, John H. Hofford, Michael R. Bennett, and Hofford Farm Hill, LLC..... Defendants,

OF WHOM

Michael R. Bennett is the.....Appellant.

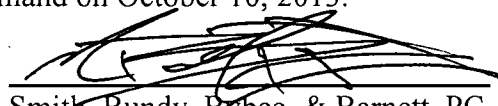
RECEIVED

OCT 30 2013

NOTICE OF APPEAL

SC Court of Appeals

Michael R. Bennett appeals the Order of the Honorable Kristi Lea Harrington, filed October 9, 2013, granting Respondent's Motion to Strike Appellant's Jury Demand. Appellant received electronic mail notice of the entry of the Court's order Granting Respondent's Motion to Strike Appellant's Jury Demand on October 10, 2013.



Smith, Bundy, Bybee, & Barnett, PC
W. H. Bundy, Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mount Pleasant, SC 29465-1542
843-881-1623
Attorneys for Appellant

Mt. Pleasant, South Carolina
October 28, 2013

Other Counsel of Record:

Erik T. Norton, Esquire
B. Keith Poston, Esquire
Nelson Mullins
P.O. Box 11070
Columbia, SC 29211-1070
Attorney for TD Bank, N.A.

Shawn M. French, Esquire
The French Law Firm, LLC
1476 Ben Sawyer Blvd., Suite 3
Mt. Pleasant, SC 29464
Attorney for John H. Hofford and
Hofford Farm Hill, LLC

70240

ewc

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BERKELEY COUNTY COURT OF COMMON PLEAS

Kristi Lea Harrington, Circuit Court Judge

Case No.: 2011-CP-08-3112

TD Bank, N. A., Successor by merger to Carolina First Bank..... Plaintiff,

OF WHOM

TD Bank, N. A., Successor by merger to Carolina First Bank is theRespondent,

vs.

Farm Hill Associates, LLC, John H. Hofford, Michael R. Bennett, and Hofford Farm Hill, LLC..... Defendants,

OF WHOM

Michael R. Bennett is the.....Appellant.

RECEIVED

OCT 30 2013

SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on TD Bank, N. A., Successor by merger to Carolina First Bank by depositing a copy of it in the United States Mail, postage prepaid, on October 28, 2013, addressed to its attorneys of record, Erik T. Norton, Esquire and B. Keith Poston, Esquire, Nelson Mullins, P.O. Box 11070, Columbia, SC 29211-1070, as well as the attorney for John H. Hofford and Hofford Farm Hill, LLC, Shawn M. French, Esquire, The French Law Firm, LLC, 1476 Ben Sawyer Blvd., Suite 3 Mt. Pleasant, SC 29464



Smith, Bundy, Bybee, & Barnett, PC
W. H. Bundy, Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mount Pleasant, SC 29465-1542
843-881-1623
Attorneys for Appellant

Mt. Pleasant, South Carolina
October 28, 2013

SMITH, BUNDY, BYBEE & BARNETT, P.C.

ATTORNEYS AT LAW
1037 CHUCK DAWLEY BOULEVARD
SUITE 100, BUILDING F
POST OFFICE BOX 1542
MOUNT PLEASANT, SC 29465
(843) 881-1623
FAX (843) 881-4406
FED. ID # 57-0988087

M. BRENT MCDONALD
bmcdonald@s3blaw.com
Direct Line (843) 513-1032

ELLISON D. SMITH, IV
W.H. BUNDY, JR.
RICHARD D. BYBEE
STAN BARNETT

M. BRENT MCDONALD

October 28, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Appeals Court of South Carolina
1015 Sumter Street
Columbia, SC 29201

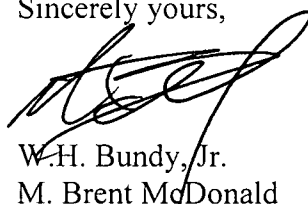
Re: TD Bank, N. A., Successor by merger to Carolina First Bank, vs. Farm Hill Associates, LLC, John H. Hofford, Michael R. Bennett, and Hofford Farm Hill, LLC, Case No.: 2011-CP-08-3112

Dear Ms. Gee:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondents.
- (2) A copy of the Order filed October 9, 2013,
- (3) A filing fee of \$100.00.

Sincerely yours,



W.H. Bundy, Jr.
M. Brent McDonald
P.O. Box 1542
Mt. Pleasant, SC 29464
(843) 881-1623
Attorneys for Michael R. Bennett

RECEIVED
OCT 30 2013
SC Court of Appeals

MBM/sfr
Enclosures

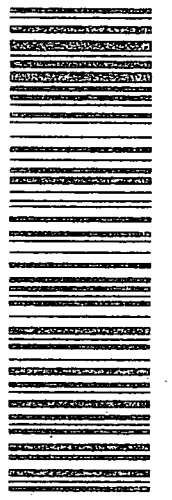
cc:
Erik T. Norton, Esquire
B. Keith Poston, Esquire
Nelson Mullins
P.O. Box 11070
Columbia, SC 29211-1070

cc:
Shawn M. French, Esquire
The French Law Firm, LLC
1476 Ben Sawyer Blvd., Suite 3
Mt. Pleasant, SC 29464

cc:
Honorable Kristi L. Harrington
Berkeley County Clerk of Court
300 California Avenue.
Moncks Corner, SC 29461

CERTIFIED MAIL

91 7108 2133 3932 3654 1717



UNITED STATES POSTAL SERVICE
000802002
MAILED FROM

11-038

SMITH, BUNDY, BYBEE & BARNETT, P.C.

ATTORNEYS AT LAW

1037 CHUCK DAWLEY BOULEVARD
SUITE 100, BUILDING F
POST OFFICE BOX 1542
MOUNT PLEASANT, SC 29465-1542

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

The Honorable **Jenny Abbott Kitchings**
Clerk of Appeals Court of South Carolina
1015 Sumter Street
Columbia, SC 29201