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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

On *Certiorari* to the Court of Appeals of South Carolina
Opinion No. 4874 (S.C.Ct.App. filed Aug. 24, 2011)

Wachovia Bank, National Association, ... Petitioner,

v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner; Watson E. Felder; Gary F. Ownbey; and South Island Plantation Association, Inc. are, ... Defendants,

Of Whom William E. Blackburn; Judith Blackburn, are,..... Respondents,

v.

Winyah Bay Holdings, LLC; Source One Properties, LLC; and Waterpointe Realty, LLC,.....Third-Party Defendants.

RESPONDENTS' PETITION FOR REHEARING

March 11, 2014

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Pursuant to Rule 221, SCACR, Respondents William E. Blackburn and Judith Blackburn hereby petition the Court for rehearing of the decision filed on February 26, 2014 in the above-captioned case. Respondents contend that the Court overlooked or misapprehended the following issues:

1. By finding that mere signature on a document equates to "knowing and voluntary waiver", the Court negates the requirement of case law of the United States Supreme Court and the federal courts which impose the need for a finding that the party actually knew and intentionally gave up the constitutional right before finding a valid waiver.

2. Since the waiver was not knowing and intentional, the Court does need to make a finding as to whether the counterclaims were compulsory. Since the counterclaims "arose out of the transaction or occurrence that is the subject matter of the opposing party's claim" under Rule 13(a), they are compulsory; since the counterclaims are not "significantly related" to the document containing the jury trial waiver (the note/guarantys), the terms of the waiver do not apply. The Court's conclusion that the answer to the compulsory/permissive question necessarily is the same to the significantly related question is in error.

3. The Court's finding that the counterclaims are covered by the express language of the waiver is incorrect since a strict construction of the waiver (as is required) does not cover the counterclaims.

4. The Court's reversal of the Court of Appeals' application of the "outrageous/unforeseeable torts" exception is made in a conclusory manner without basis or explanation.

5. The Court's factual reference to the "Respondents" signing personal guaranties in its recitation of the facts is in error , since Mr. Blackburn did not sign a personal guaranty, only the note and mortgage. This may be significant since the Court later found the waiver in the guaranties to conspicuous, noting the waiver language was "directly above the signature line, thus making the conspicuous font even more noticeable, even at a quick glance." Footnote 8 of Opinion. Since on the document Mr. Blackburn signed (the note) the waiver language is neither directly above the signature line nor was the font more noticeable since that page of the Note includes other language in that identical font, this should be significant as to the personal liability of Mr. Blackburn even if the Court finds the clauses in the guaranties signed by the other defendants was conspicuous.

6. The Court's conclusion that filing the cross claims and third party claims were "permissive" since the foreclosure was a non-jury proceeding is in error since the they were in conjunction with the compulsory counterclaims to which a jury trial right should attach. If the jury trial waivers are found to be invalid or inapplicable, then the Court's ruling on the cross claims and third party claims should likewise be reversed.

7. Since the issues of unconscionability and Rule 39(b) discretion were both raised and ruled on by the circuit court, they are preserved on appeal and the Court should issue a decision on those issues.

These grounds are more fully explained in Respondents Memorandum in Support of its Petition for Rehearing. For the foregoing reasons, the reasons set forth in Respondents' Memorandum, and any other reason supported by the Record, Respondents respectfully request that the Court grant REHEARING of the decision, REVERSE the decision, and AFFIRM the Court of Appeals decision to grant a jury trial.

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Of Whom William E. Blackburn; Judith Blackburn, are, ... Respondents,

v.

Winyah Bay Holdings, LLC; Source One Properties, LLC; and Waterpointe Realty, LLC, ... Third-Party Defendants.

RESPONDENTS' MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

March 11, 2014

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Pursuant to Rule 240, SCACR, Respondents file this Memorandum in support of their Petition for Rehearing.

ISSUE I. THE COURT'S FINDING THAT MERE SIGNATURE CONSTITUTES A VALID KNOWING AND VOLUNTARY WAIVER OF THE CONSTITUTIONAL RIGHT TO A JURY TRIAL IS IN ERROR.

By finding that mere signature on a document equates to "knowing and voluntary waiver", the Court negates the requirement of case law of the United States Supreme Court and the federal courts which impose the need for a finding that the party actually knew and intentionally gave up the constitutional right before finding a valid waiver. The Court extended the exact same rule that applies to ordinary contract terms to jury trial waivers, and this negates the protection that the United State Supreme Court and the federal courts have afforded. If mere signature were all that was needed to satisfy the "knowing and voluntary" standard, there would be no need for the standard at all. The Court has essentially obliterated the knowing and voluntary requirement by concluding that mere signature equates to knowledge when it comes to constitutional rights. This ignores the holdings cited in our Brief by the Fourth Circuit, the Second Circuit and the U.S. Supreme Court. See Leasing Service Corp v. Crane, 804 F.2d 828 (4th Cir. 1986): "...[W] agree with those courts that have held that the party seeking enforcement of the waiver must provide that consent was both voluntary and informed". Further, please see these U.S. Supreme Court cases cited by the Second Circuit when dealing with jury trial waivers: "It is elementary that the *Seventh Amendment* right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally. *Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938); Heyman v. Kline, 456 F.2d 123, 129 (2d Cir. 1972), cert. denied, 409 U.S. 847, 34 L. Ed. 2d 88, 93 S. Ct. 53 (1972).*

Indeed, a presumption exists against its waiver. *Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 81 L. Ed. 1177, 57 S. Ct. 809 (1937).* ...

> The right to a jury trial, however, is far more fundamental than the right to personal service, and cannot be waived absent a showing that its relinquishment is knowing and intentional. *Fuentes v. Shevin, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972)* provides a compelling analogy. There, the Court refused to uphold a contractual provision waiving due process rights, noting that there was "no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights." *Id. at 95.* No such showing has been made here."
>
> National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2nd Cir. 1977).

All of that language is rendered moot if the Court allows the current ruling to stand. Constitutional rights will have no greater protection than any other contractual term. Surely the Court is not prepared to equate the right to a jury trial with all other contractual rights, but that is the effect of the ruling as currently written. Respondents would implore the Court to follow the U.S. Supreme Court's lead on this issue and accord the constitutional right to a jury trial the heightened protection it deserves.

ISSUE II. THE COURT ERRED IN FINDING UNNECESSARY A DETERMINATION OF WHETHER THE COUNTERCLAIMS ARE COMPULSORY OR PERMISSIVE.

The Court essentially concluded that it need not make a decision on the compulsory or permissive nature of the counterclaims since in any event a knowing and voluntary waiver occurred. Since no knowing, voluntary waiver occurred as shown in Issue I above, the finding is necessary.

The Court concluded that if the sales transaction in this case was separate from the loan transaction, the counterclaims would be permissive and therefore jury trial waived. The Court also concluded that if the sales and loan transactions were all one continuous transaction or occurrence, they would be compulsory but waived anyway because of the signed jury trial waiver. Since the jury trial waiver is ineffective as outlined is Issue I above and Issue III below, it does become important to determine whether the counterclaims were compulsory or permissive. Since the counterclaims "arose out of the transaction or occurrence that is the subject matter of the opposing party's claim" under Rule 13(a), they are compulsory. Since the waivers are ineffective, the compulsory nature of the counterclaims should result in the preservation of a jury trial.

Both at oral argument and in the opinion, it appears the Court equated the standard to determine compulsory/permissive with the standard to determine whether the counterclaims are significantly related to the underlying contract. These are two different issues and recognition of that difference is crucial to this case. The Bank argued, and the Court questioned at oral argument how we could argue it both ways: essentially arguing the claims arise out of the same transaction/occurrence to determine the compulsory nature of the claims, but then argue they are not the same transaction/occurrence for purposes of determining if the waivers apply. The problem with this question is that it equates and therefore confuses the two tests. The first test, as to compulsory/permissive, is set by Rule 13: "(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim...against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Thus, the

"compulsory" test in this case is whether the counterclaims arise out of the transaction/occurrence that is the subject matter of the bank's claim. In this case, the bank's foreclosure claim is based on the mortgage and its deficiency judgment claims are based on the note and guaranties. Since the Blackburns' duties to pay arise from those documents, and the Blackburns are attempting to negate those duties to pay with the counterclaims asserted, certainly the counterclaims arise out of the transaction or occurrence that is the subject matter of the bank's claim. Thus, they are clearly compulsory.

However, the standard is not the same to determine the applicability of the waivers. That test is whether the counterclaims are "significantly related" to the underlying notes and guaranties. Sutton v. Hollywood Entertainment Corporation, 181 F.Supp.2d 504, 510-5112 (D.Md. 2002). See also Aiken v. World Finance Corporation, 373 S.C. 144, 644 S.E.2d 705 (2007): "Applying what amounts to a "but-for" causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement...Such a result is illogical and unconscionable... 'The mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement..." Thus, the counterclaims can be related to the transaction but not significantly related to the note/guaranties at the same time.

The focus on the compulsory test is on the transaction/occurrence; the focus of the second test is on the specific note/guaranties that contain the jury trial waiver. Thus, a counterclaim could arise from the same transaction or occurrence (i.e., the sale/loan

transaction) for purposes of the compulsory test, yet not be "significantly related" to the note/guaranties. Certainly the counterclaims have some relationship to the note/guaranties because they arise from the same sales/loan transaction for purposes of determining their compulsory nature. The next question becomes whether the counterclaims have a "significant relationship" to the notes/guaranties such that the waiver applies. Thus, the answer to the two questions can be different and, in this case, are different. Do the counterclaims at some level arise out of the loan and sale transaction/occurrence which is the subject matter of the bank's claim? Yes. Are the counterclaims significantly related to the note/guaranties? No.

Thus, a finding does need to be made by the Court regarding the compulsory/permissive nature of the counterclaims. And with a finding that they are compulsory, joined with the finding from Issue I that mere signatures do not constitute a presumption of waiver, the Court's decision should be reversed.

ISSUE III. THE COURT'S FINDING THAT THE COUNTERCLAIMS ARE COVERED BY THE EXPRESS LANGUAGE OF THE WAIVER IS INCORRECT SINCE A STRICT CONSTRUCTION OF THE WAIVER (AS IS REQUIRED) DOES NOT COVER THE COUNTERCLAIMS.

The language of the waiver cited by the Court was incomplete and not in full context, and thus led to the improper conclusion. The Court states on page 9 of the opinion: "Respondents waived their right to a jury trial for any claim related to 'any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party' involving the loan documents." The "involving the loan documents" at the end of that sentence is not part of the actual clause. The actual language in the Note (Appendix, p. 18) finishes that sentence with: "with respect hereto" (the guaranties also

similarly end with: "with respect hereto"). The Court's added language of "involving the loan documents" is much broader than "with respect hereto". To find the counterclaims are covered by the waiver language you must find that they are part of the course of conduct with respect to the Note or the Guaranties. They are not, particularly if you give the clause strict construction (as is required) as opposed to normal or broad construction. The counterclaims, for the most part, have to do with pre-sale promises, the illegal nature of the sales process, and fraud/misrepresentation in the sale of the property. Thus, the counterclaims' factual basis are centered on the sale which pre-dated the Note/Guaranties by approximately six months. They are not part of the course of dealing with respect to the Note/Guaranties. If the Blackburns were asserting some infirmity of the Note itself or the Guaranty itself, those claims would be "with respect" to those documents. But since the counterclaims arise largely out of the course of dealing with respect to the pre-sale and sales contract, under a strict construction they do not arise from the course of dealing with respect to the Note/Guaranties signed much later.

As such, even if the Court finds the waivers were knowing and voluntary (which is vehemently contested in Issue I above), the waivers do not apply to most of the counterclaims when utilizing a strict construction of those waivers.

ISSUE IV. THE COURT'S REVERSAL OF THE COURT OF APPEALS' APPLICATION OF THE "OUTRAGEOUS/UNFORESEEABLE TORTS" EXCEPTION IS MADE IN A CONCLUSORY MANNER WITHOUT BASIS OR EXPLANATION.

The Court's opinion refers to the Court of Appeals' application of the above doctrine, but does not discuss why that doctrine/exception should not be applied in this case. It simply found that the waivers were knowing and voluntary and thus did not

reach this issue with any specificity. A determination of whether such exception can be applied to jury trial waivers is needed for future cases. And as argued extensively in our previous briefs and by the Court of Appeals, we would submit the exception should be applied to jury trial waivers.

ISSUE V. AS NOTED ABOVE, RESPONDENT WILLIAM BLACKBURN DID NOT SIGN A PERSONAL GUARANTY AND THE WAIVER LANGUAGE IN THE NOTE HE DID SIGN WAS NOT CONSPICUOUS.

The Court's factual reference to the "Respondents" signing personal guaranties in its recitation of the facts is in error, since Mr. Blackburn did not sign a personal guaranty, only the note and mortgage. This may be significant since the Court later found the waiver in the guaranties to conspicuous, noting the waiver language was "directly above the signature line, thus making the conspicuous font even more noticeable, even at a quick glance." Footnote 8 of Opinion. Since on the document Mr. Blackburn signed (the note) the waiver language is neither directly above the signature line (Appendix, p. 19) nor was the font more noticeable since that page of the Note includes a multitude of other language in that identical font (Appendix, p. 18), this should be significant as to the personal liability of Mr. Blackburn even if the Court finds the clauses in the guaranties signed by the other defendants were conspicuous.

ISSUE VI. THE COURT'S CONCLUSION THAT THE CROSS CLAIMS AND THIRD PARTY CLAIMS WERE "PERMISSIVE" SINCE THE FORECLOSURE WAS A NON-JURY PROCEEDING IS IN ERROR.

Since they were filed in conjunction with the compulsory counterclaims to which a jury trial right should attach, the cross-claims and third party claims should not lose their rights to a jury trial. If the jury trial waivers are found to be invalid as argued

above, then the Court's ruling on the cross claims and third party claims should likewise be reversed.

ISSUE VII. SINCE THE ISSUES OF UNCONSCIONABILITY AND RULE 39(B) DISCRETION WERE BOTH RAISED AND RULED ON BY THE CIRCUIT COURT, THEY ARE PRESERVED ON APPEAL AND THE COURT SHOULD ISSUE A DECISION ON THOSE ISSUES.

In Footnote 6 of the opinion, the Court notes that issues of unconscionability and the Court's discretion to award a jury trial under SCRCP 39(b) have not been preserved since no motion to reconsider was filed. We would contend that is because those issues were raised to the court below and ruled upon [see Memorandum Opposing Plaintiff's Motion to Strike Jury demand (Appendix, pp. 109-118, specifically unconscionability on pp. 114-115 and Rule 39(b) on pp. 116-117)]. Also see the Transcript of Hearing where both issues were raised: unconscionability on Appendix p. 93, ll. 3-5 and Rule 39(b) on Appendix p. 94, ll. 9-22. There was no need for a motion to reconsider because the issues had been raised to the court and the court ruled on them: the Order (Appendix, pp. 1-7) specifically says it has "considered the arguments of counsel" (Appendix, p. 2), and thus no need for a motion to reconsider to preserve the issues for appeal. Further, in our view the Court's Order explicitly ruled on both issues by its statement just quoted and in the terms of the Order: on Appendix page 5 the Court's Order addresses the lack of negotiation of the jury trial waiver and the Bank's superior bargaining position, both factors involved with the determination of unconscionability; further, on Appendix page 6 of the Court's Order (while not referring to Rule 39 by number, it references our argument that the Court could "ignore the parties' contractual waiver" which was clearly our Rule 39(b) argument leaving it in the Court's discretion to order a jury trial even in

the face of a waiver). Thus, the circuit court had already seen our Memorandum addressing these issues, had already heard our arguments at hearing, and addressed them in the Order. While the Order may not call them by name, the ruling explicitly addresses the issues and rules against us. It is axiomatic that motions to reconsider are not necessary to preserve issues argued and ruled upon already. Thus, we believe this court should consider and rule upon those two issues as previously briefed by the parties. (Further, SCACR 220(c) says: "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Thus, the Court of Appeals' ruling in our favor can be affirmed by this Court upon any ground appearing in the record, which certainly includes these two issues.)

CONCLUSION

Respectfully, Respondents request a rehearing in this matter to address more fully the arguments described above.

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PROOF OF SERVICE

I certify that I have served one (1) copy of the Respondents' Petition for Rehearing and Memorandum in Support of Petition for Rehearing on each other party, by depositing copies of same in the United States Mail, postage prepaid, on March 11, 2014, addressed at the addresses set forth on the attached page.

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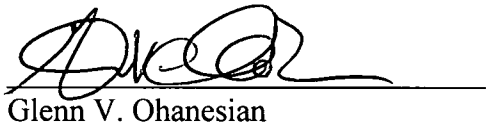

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