

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.

RETURN TO RESPONDENTS' PETITION FOR REHEARING

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ARGUMENT

Respondents ask this Court to reconsider its decision filed February 26, 2014 because they believe the Court overlooked or misapprehended certain issues. To the contrary, this Court correctly determined that Respondents waived their right to a jury trial on all of their counterclaims, and Petitioner respectfully requests that Respondents' Petition for Rehearing be denied.

It is axiomatic that the purpose of a petition for rehearing is not to have the case tried in the appellate court for the second time. *Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Instead, the petition's purpose is to identify facts or arguments that this Court overlooked or misapprehended. Rule 221, SCACR (2013).

Here, Respondents' first four assignments of error all fail to identify any issue or fact that the Court overlooked or misapprehended. Accordingly, those assignments should be rejected summarily.

I. RESPONDENTS' KNOWINGLY AND VOLUNTARILY WAIVED THEIR RIGHT TO A JURY TRIAL.

Respondents attempt to argue to the Court that the Court's affirmance of established South Carolina law regarding jury waivers in commercial contracts somehow disregarded Respondents' constitutional rights. This argument was fully briefed and argued for the Court, and there is no evidence that the Court's decision not to rule in Respondents' favor was a result of a misapprehension or overlook of Respondents' arguments in this regard.

It is well established in South Carolina that “a party may waive the right to a jury trial by contract.” *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002). Respondents admit they executed the Note and Guaranty agreements. There is no evidence presented to suggest that the Respondents, who executed these loan documents to facilitate their purchase of investment property, are ignorant or unwary. As with other contract terms, Respondents cannot avoid the waivers to which they agreed simply by claiming that they failed to see them. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). “[E]very contracting party owes a duty to the other party to the contract and to the public to learn the contents of the document before he signs it.” *Burwell v. S.C. Nat’l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986). Respondents are not entitled to rehearing on this issue.

II. EVEN IF RESPONDENTS’ COUNTERCLAIMS ARE COMPULSORY, THEY ARE STILL COVERED BY THE EXPRESS LANGUAGE OF THE WAIVER.

Respondents’ second assignment of error similarly does not result from a misapprehension or overlook by the Court, but instead is merely a request for the Court to change its mind about the need to reach an issue in light of the Court’s ruling on the validity of the jury waiver. As this Court made clear in its opinion, because the waivers were executed knowingly and voluntarily, it is unnecessary for the Court to decide whether Respondents’ counterclaims are permissive or compulsory – either way, Respondents’ are not entitled to a jury trial because they have waived that right.

Even assuming that Respondents’ counterclaims are compulsory, they are still barred by the express scope of the jury waivers in this case. The waivers are sufficiently

broad to apply to claims related to “any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect hereto.”

Respondents try to create an artificial distinction between the “sale/loan transaction” and the “note/guaranties” in an effort to escape the broad language of the waivers to which they agreed. But this attempted distinction defies simple logic. The “loan transaction” necessarily includes the loan documents, including the “note/guaranties”. The subject loan was a purchase-money loan. The sales transaction is clearly “related to” the Note and Guaranty because it is the very basis for the loan itself. Indeed, the Note states that the funds could only be used to “purchase investment property.” (R. p. 14, Note. p. 1.) Petitioner had nothing to gain from the Respondents’ purchase of the subject property unless they borrowed the money from Petitioner to do so. Thus, all of Petitioner’s actions with respect to the Respondents’ purchase were inextricably intertwined with the subject Note and Mortgage.

Despite Respondents’ apparent desire to create multiple tests to determine when claims are compulsory and when those same claims are subject to a broad waiver, South Carolina law is clear that no special test is needed here. Jury waivers are enforceable according to their plain and unambiguous language. *See N. Charleston Joint Venture v. Kitchen’s of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992) (enforcing jury waiver according to its plain terms); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (holding that jury waivers are construed according to their “plain, ordinary and popular meaning”); *see also S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (holding that releases are generally enforceable according to their plain language).

As noted above, the waiver language here is broad, and encompasses “any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect hereto.” Respondents’ claims squarely attack Petitioner for its course of conduct, course of dealing, statements and actions with respect to the circumstances underlying the execution of the loan documents. As such, there can be no question that Respondents’ claims – whether compulsory, permissive, even unnaturally divided between the sales transaction and the loan transaction – fall within the scope of the valid jury waivers they executed.

III. STRICT CONSTRUCTION OF THE JURY WAIVERS COVERS RESPONDENTS’ COUNTERCLAIMS.

Respondents’ third assignation of error takes issue with this Court’s paraphrase of the text of the jury waivers on page 61 of its opinion, but offers no reason to believe that the Court failed to consider the actual text of the jury waivers at issue. Quite to the contrary, the Court correctly quotes the precise language of the waivers on page 55 of the opinion and further notes that strict construction is required on page 62 of the opinion. Respondents point to the paraphrase to suggest that the Court has misread the jury waiver, but this is simply another attempt to reargue their preferred construction of the jury waiver – an issue to which ample briefing, significant time during oral argument, and careful consideration of the Court already have been devoted.

Under South Carolina law, strict construction “should not be applied so as to defeat the plain and obvious purpose of the instrument.” *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998). That the terms of the waiver are broad is of no consequence because South Carolina courts recognize that a provision may be both broad and clear.

Abu-Shawareb v. S.C. State Univ., 364 S.C. 358, 363, 613 S.E.2d 757, 760 (Ct. App. 2005) (“Although the release is broad, it is not ambiguous.”).

According to the Respondents, the very purpose of the alleged pre-loan conduct was to induce them to enter into the loan. (R. pp. 73-83, Second Am. Ans. ¶¶ 22, 30, 45, 49, 60-63, 73.) It is well settled in South Carolina that claims arising out of promises allegedly made to induce one party to enter into a contract are subject to, and within the scope of, a broad waiver provision in that contract. *See, e.g., Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 553-54, 606 S.E.2d 752, 757 (2004) (holding that allegations of fraud in the inducement were subject to broadly worded arbitration clause and must be submitted to arbitration). As discussed above, the Respondents’ counterclaims easily fit within the plain language of the waiver provisions at issue, even when the plain language is strictly construed.

IV. THIS COURT PROPERLY REJECTED THE “OUTRAGEOUS AND UNFORESEEABLE TORTS” EXCEPTION AS INAPPLICABLE TO COMMERCIAL JURY WAIVERS.

Respondents’ fourth assignation of error arises from a substantive disagreement with the Court, rather than from an issue that the Court has overlooked or misapprehended. Respondents criticize the Court for rejecting the Court of Appeals’ application of consumer arbitration standards to commercial jury waivers without thorough explanation¹, but, again, Respondents are simply seeking an opportunity to have this Court reconsider the merits of their arguments that have already been presented, considered, and ruled upon. This is beyond the scope of a petition for rehearing.

¹ Respondents fail to recall that the Court of Appeals similarly applied the consumer arbitration standard without any explanation other than that to say they were “instructive.”

Respondents argue that this Court should have provided some explanation for why it refused to apply consumer arbitration standards to commercial jury waivers. Until this case, no South Carolina court had applied the *Aiken v. World Finance Corporation of South Carolina* exception outside the scope of an arbitration agreement. 373 S.C. 144, 644 S.E.2d 705 (2007). Although Respondents believe that “the standard for invalidating jury trial waivers should be much less stringent” than the standard for invalidating arbitration provisions, Respondents ignore the substantial differences between arbitrations and bench trials. Bench trials preserve all of a party’s normal procedural rights except the right to a jury, whereas arbitrations deprive parties of the right to pre-trial discovery, the application of the rules of evidence, dispositive motions practice, written findings of fact and conclusions of law, appellate review, and other procedural safeguards mandated by the Due Process Clause and the Rules of Civil Procedure.

Consumer arbitration provisions and commercial jury waivers are not fungible. Indeed, South Carolina law has already defined the standards for determining the validity and boundaries of jury waivers in a simple and concise rule: Jury waivers are enforceable according to their plain language. *See N. Charleston Joint Venture*, 307 S.C. at 535, 416 S.E.2d at 638 (enforcing jury waiver according to its plain terms); *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866 (holding that jury waivers are construed according to their “plain, ordinary and popular meaning”); *see also S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (holding that releases are generally enforceable according to their plain language). As discussed above, Respondents’ jury demand is precluded by the plain language of the waivers they executed.

V. RESPONDENT WILLIAM BLACKBURN'S WAIVER WAS CONSPICUOUS.

Respondents argue that the Court appears to have mistakenly believed Respondent William Blackburn executed a personal guaranty and argues that this mistake is significant because the jury waiver contained in the Note signed by Respondent William Blackburn was not conspicuous.

The difference between the waiver contained in the Note and the waiver contained in the Guaranty is of no consequence to the Court's holding. The language contained in both waivers is virtually identical. Moreover, the waiver contained in the Note is equally conspicuous, containing bold, all capital letters, just like the waiver contained in the Guaranty. The Note waiver is set off from the remainder of the Note provisions by a separate paragraph, also just like the waiver contained in the Guaranty. The only difference between the two formats is that, although both waivers are the last provision contained in the respective documents, the Guaranty waiver ended up being on the same page as the signature block, whereas the Note waiver is positioned at the bottom of the page prior to the signature block.

There is no requirement in South Carolina that a jury waiver be located on the signature page in order to be enforceable. Moreover, as this Court held, "when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents." Op. at pg. 62. Respondents' arguments regarding the difference between the Note and Guaranty point to a distinction without a difference and do not warrant a rehearing.

VI. RESPONDENTS' ARGUMENTS REGARDING THE CROSS-CLAIMS AND THIRD-PARTY CLAIMS WERE NOT PROPERLY PRESERVED.

As this Court noted in footnote 4 on page 56 of its opinion, Respondents did not appeal the circuit court's ruling that Respondents' choice to raise cross-claims and third-party claims in a non-jury foreclosure proceeding waived any right to a jury trial on those claims. Respondents do not challenge this Court's determination that they failed to appeal that holding, but still request that the Court reverse the circuit court's determination. Because Respondents did not properly appeal, the law of the case is that any jury right as to those claims has been waived and rehearing on these issues would be inappropriate. *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000); *Resolution Trust Corp. v. Eagle Lake & Golf Condominiums*, 310 S.C. 473, 427 S.E.2d 646 (1993).

VII. RESPONDENTS' ARGUMENTS REGARDING THE ISSUES OF UNCONSCIONABILITY AND RULE 39(B) DISCRETION WERE NOT PROPERLY PRESERVED.

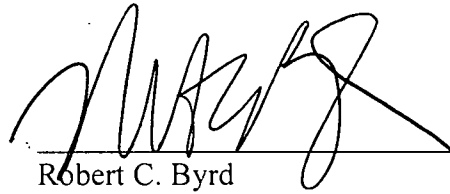
Respondents assign as error the Court's conclusion they failed to preserve their arguments regarding unconscionability and the discretion of a trial judge under Rule 39(b), SCRPC. Upon further review of the record, it appears that these arguments have not properly been preserved. Respondents argue that because the circuit court's order makes reference to the affidavit they filed in opposition to the motion, the circuit court necessarily ruled upon the issue of unconscionability. The circuit court's order, however, never mentions either unconscionability or Rule 39(d). Under these circumstances, this Court correctly concluded that a Rule 59(e) motion was required to preserve these issues

for appeal. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) “(A party *must* file such a [Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review”) (emphasis in original).

To the extent the Court determines it appropriate to review the merits of Respondents’ unconscionability and Rule 39(b) arguments, Petitioner fully incorporates the arguments contained in Sections VII and VIII of its Reply, explaining that the jury waivers in question are not unconscionable and that the discretion provided the circuit court in Rule 39(b) only comes into play where a party otherwise had a right to a jury trial and failed to assert that right in a timely fashion.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that Respondents’ Petition for Rehearing be DENIED.



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PROOF OF SERVICE

I certify that I have served the **Reply of Petitioner** on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on March 20, 2014, to the following addresses:

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