STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
Branch Banking and Trust Company,	)	Case No.: 2014-CP-40-2968
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER GRANTING PLAINTIFF'S**
	)	**MOTION TO STRIKE**
Elie Abikhaled and Ghazi Abikhaled,	)	**DEFENDANTS' JURY DEMAND**
	)	
Defendants.	)	
	)	

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's Attorney:	Paul Hoefer, Esq.
Defendant's Attorney:	Tommy Lydon, Esq.
Date of Hearing:	October 16, 2014
Court Reporter:	Aminah Hardy

This matter came before the Court for a hearing on Plaintiff's Motion to Strike Defendants' Jury Demand, filed August 25, 2014. Plaintiff, Branch Banking and Trust Company (Bank or BB&T), moved to strike the demand for a jury trial asserted by Defendants (Borrowers) in their Answer and Counterclaims. Present at the hearing were attorney for Plaintiff, Paul Hoefer, Esquire, and attorney for Defendants, Tommy Lydon, Esquire. Based on the pleadings and supporting memoranda filed herein and the arguments of counsel, this Court hereby GRANTS Plaintiff's Motion to Strike Defendants' Jury Demand. This Court makes the following findings of fact and conclusions of law.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a collection action on a debt alleged to be owed to Plaintiff by Defendants pursuant to personal guarantees of payment. The underlying commercial loan is evidenced by a Promissory Note executed by Cedar Development II, LLC (Borrower) dated June 29, 2011 in favor of Bank for $730,411.44 (the Note), and which is further secured by a mortgage on real

property in Richland County, South Carolina (the Mortgage). Plaintiff's foreclosure suit against Borrowers is ongoing in a separate lawsuit currently pending before the Master in Equity, Case Number 2013–CP–40–5115. The present action is separate from the foreclosure action; in the instant case, Plaintiff prays for a personal, deficiency judgment against Borrowers in order to satisfy the loan balance not recovered from the foreclosure and sale of the subject property.

The guaranty agreements executed by Defendants each provide unconditional, joint and several guarantees of all indebtedness of Borrower to Bank whether then existing or thereafter arising (collectively the Guarantees). The Guarantees each contain the following jury trial waiver provision in all capitalized, bold text:

> **WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OF CLAIMS ARISING OUT OF THIS GUARANTY OR THE BORROWER'S NOTE(S), AND THE RELATED LOAN DOCUMENTS EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND THE BANK OR THE BORROWER AND THE BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO ACCEPT THIS GUARANTY AND TO MAKE THE LOAN(S) TO THE BORROWER. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISON.**

In response to Plaintiff's Complaint, Defendants filed an Answer in which they asserted counterclaims for breach of the covenant of good faith and fair dealing, interference with prospective contractual relations, accounting and appraisal, and negligent misrepresentation. The factual basis underlying the counterclaims is Plaintiff's alleged failure to provide additional financing to Borrower to upfit the building that is the subject of the Mortgage.

II. STANDARD

An action to collect on a guaranty is an action at law. Crafton v. Brown, 346 S.C. 347, 351, 550 S.E.2d 904, 905 (Ct. App. 2001). "A mortgage foreclosure is an action in equity." Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 440–41 (2014), *reh'g denied* (Apr. 2, 2014) (citing Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "However, '[w]hether a party is entitled to a jury trial is a question of law.'" Id. citing (Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010)).

A party may waive the right to a jury trial by contract, but such waiver will be strictly construed as the right to a jury trial is a substantial right. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63–64, 566 S.E.2d 863, 866 (Ct. App. 2002) (citing N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992)). "However, terms in a contract provision must be construed using their plain, ordinary and popular meaning." Id. (citing Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994)). A jury trial waiver must be made knowingly and voluntarily. See Blackburn, 407 S.C. at 332, 755 S.E.2d at 443; Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437–38 (1995) ("intentional relinquishment of a known right" required for waiver).

III. NATURE OF DEFENDANTS' COUNTERCLAIMS

Plaintiff argues Defendants defaulted under terms of the Guarantees and that because its suit on the Guarantees is not an equitable action, the dispositive issue is not whether Defendants' counterclaims are permissive or compulsory at law as discussed by the Supreme Court in Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 440–41 (2014), *reh'g denied* (Apr. 2, 2014). Rather, Plaintiff argues, the issue is simply whether Defendants contractually waived their rights to a jury trial as to their counterclaims. Additionally, Plaintiff

argues Defendants' counterclaims are included within the scope of the jury trial waiver in the Guarantees.

Defendants argue that had Plaintiff included the guarantors as defendants in its equitable foreclosure action, Blackburn would be controlling. Additionally, Defendants argue the waiver clause is unconscionable. Both parties contend Blackburn is inapplicable in the present case. The parties arguments regard whether Defendants counterclaims are encompassed within the scope of the waiver and whether the waiver is unconscionable.

The Supreme Court in Blackburn clarified the analytical framework for determining whether borrowers are entitled to a jury trial on their counterclaims. See Blackburn, 407 S.C. at 329–30, 755 S.E.2d at 441–442. Ultimately, however, the court declined to definitively determine whether the borrowers' counterclaims were legal or equitable, compulsory or permissive. See id. at 331–32, 755 S.E.2d at 442–43. The court held that the only way borrowers could obtain a jury trial was if their waivers were not knowingly and voluntarily made and thus invalid and unenforceable. See id. at 332, 755 S.E.2d at 443.

Here, Plaintiff's Complaint is legal, but Defendant's counterclaims are both legal and equitable; therefore, the analytical framework expounded in Blackburn is inapplicable. See id. at 329–30, 755 S.E.2d at 441–442; Rushing v. McKinny, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006) (breach of the covenant of good faith and fair dealing and negligent misrepresentation are legal causes of action); United Ed. Distribs., LLC v. Ed. Testing Serv., 350 S.C. 7, 14, 564 S.E.2d 324, 328 (Ct. App. 2002) (interference with prospective contractual relations is a tort action for damages and an action at law); Historical Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) (an action for an accounting is an action in equity); see also Consignment Sales LLC v. Tucker Oil Co., 391 S.C. 266, 272, 705 S.E.2d 73, 76–77 (Ct. App. 2010); Santoro v. Schulthess, 384 S.C. 250, 259, 681 S.E.2d 897,

901–902 (Ct. App. 2009) (citing Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005)). Consequently, this Court need not determine whether borrowers' counterclaims are permissive or compulsory. Defendants have no right to a trial by jury on their equitable accounting and appraisal counterclaim. See Historical Charleston Holdings, LLC, 381 S.C. at 427, 673 S.E.2d at 453; Blackburn, 407 S.C. at 332, 755 S.E.2d at 443. Similarly, Defendants have no right to a jury trial on their legal counterclaims because such claims are squarely within the scope of the waiver clause. See Blackburn, 407 S.C. at 332, 755 S.E.2d at 443. Consequently, this Court must determine only whether the waivers were executed knowingly and voluntarily. See id.

IV. VALIDITY OF WAIVER

Defendants presented no evidence or argument that Borrowers were unable to freely, voluntarily, intelligently, and knowingly waive their right to a jury trial. Accordingly, this Court finds the waivers are valid and enforceable. Further, the waivers were conspicuous, noticeable, and unambiguous, printed in all capital letters in bold type with a bold heading. See Blackburn, 407 S.C. at 334, n.8, 755 S.E.2d at 433, n.8.

V. SCOPE OF WAIVER AND COUNTERCLAIMS

Defendants argue that the subject of their counterclaims—Plaintiff's failure to extend financing to upfit the subject property—are not related to the existing relationship between the parties and, therefore, their counterclaims are beyond the scope of the jury trial waiver contained in the Guarantees. In contrast, Plaintiff argues Defendants' counterclaims concern matters or claims arising out of either the Guarantees or the Note and the related documents executed in connection with the Guarantees, or claims occurring as a result of the relationship between the Bank and Borrowers. Simply stated, Borrowers executed the subject Guarantees in connection with the Note and Mortgage obtained from Plaintiff. The Guarantees encompass all claims

regarding the Note, Mortgage, and subject property. Defendants concede that their claims are based on Plaintiff's conduct growing out of Plaintiff and Defendant's fiduciary relationship and, ultimately, from the underlying Note attached to the property: Defendants argue that Plaintiff breached its promise to extend future financing relating to the subject property. The waiver expressly provides: THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OF CLAIMS ARISING OUT OF THIS GUARANTY OR THE BORROWER'S NOTE(S), AND THE RELATED LOAN DOCUMENTS EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND THE BANK OR THE BORROWER AND THE BANK. Therefore, the counterclaims asserted by Defendants are within the scope of the jury trial waiver provision contained in each of the Guarantees, in which Defendants contractually waived their right to a jury trial.

VI. UNCONSCIONABILITY OF WAIVER

Defendants argue they could not have contemplated that in signing the Guarantees, they were waiving their right to a jury trial on claims arising from future misrepresentations and misconduct by Plaintiff and, thus, the waiver is unconscionable. Unconscionability is defined "as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). "If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result." RESTATEMENT OF CONTRACTS (SECOND) § 208 (1981). "Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear

grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." Gladden v. Boykin, 402 S.C. 140, 145, 739 S.E.2d 882, 884–85 (2013). "[T]he proper test is whether an important clause was particularly inconspicuous, as if the drafter intended to obscure the term." Id.

"Further, South Carolina's 'general principle ... is that it is not the function of the court to rewrite contracts for the parties.'" York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 90, 749 S.E.2d 139, 151 (Ct. App. 2013) (citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007)). Thus, the court must determine whether unconscionability is "due to both an absence of meaningful choice and oppressive, one-sided terms." Id. (citing Simpson, 406 S.C. at 25, 644 S.E.2d at 669). "In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Id. at 86, 749 S.E.2d at 148–49 (citing Simpson, 406 S.C. at 25, 644 S.E.2d at 669). The loss of the right to a jury trial is relevant to this determination. Id. (citing Simpson, 406 S.C. at 27, 644 S.E.2d at 670). "Terms are oppressive when 'no reasonable person would make them and no fair and honest person would accept them.'" See id. at 87–88, 749 S.E.2d at 149–150 (citing Simpson, 406 S.C. at 25, 644 S.E.2d at 668).

Having found Borrowers' waivers were made knowingly and voluntarily, this Court finds the waiver provision is conscionable and declines to strike the clause from the parties' contract. Defendants failed to present any evidence or argument that the waivers were entered into by

Borrowers as a result of any procedural unconscionability, or bargaining unfairness, and substantive unfairness. Defendants argue the waivers contained in the Guarantees purport to waive future claims on matters not directly related to the loan that is the subject of the Guarantees, and are thus unconscionable. Defendants also argue they could not have possibly contemplated waving future claims by signing the Guarantees. Defendants presented no evidence or case law supporting their argument. Whereas surprise and hardship caused by the waiver provision is just one factor to be assessed in the court's overall determination of unconscionability, according to the prevailing case law, the scope of the waiver term is not a factor to be considered in this analysis. Ultimately, this Court finds the record does not support a conclusion that Borrowers lacked meaningful choice whether to accept any one-sided terms of the Guarantees, including the waiver provision; accordingly, this Court declines to strike the waiver clause based on unconscionability.

VII. CONCLUSION

Therefore, IT IS HEREBY ORDERED that Plaintiff's Motion to Strike Defendants' Jury Demand is GRANTED.

AND IT IS SO ORDERED.

Deadra L. Jefferson
Presiding Judge

December 16, 2014
Charleston, South Carolina
At Chambers

8