

Exhibit A

IN THE STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 SKYWAVES I CORPORATION,)
)
 Plaintiff,)
)
 v.)
)
 BRANCH BANKING AND TRUST)
 COMPANY, Successor in merger to)
 BRANCH BANKING AND TRUST)
 COMPANY OF SC, a/k/a/ BB&T, and)
 JAMES EDAHL.)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

Civil Action No.: 2009-CP-10-7516

FILED
 2015 FEB -9 PM 12:25
 CLERK OF COURT

ORDER GRANTING DEFENDANT
 BB&T and DEFENDANT EDHALS'
 MOTION TO STRIKE PLAINTIFF'S
 DEMAND FOR JURY TRIAL

Defendants Branch Banking & Trust Company ("BB&T") and James Edahl ("Edahl") filed motions to strike the Plaintiff Skywaves I Corporation ("Skywaves") demand for a trial by jury in this matter. The Defendants maintain the Plaintiff contractually waived its right to a jury trial in the Factoring and Security Agreement ("Factoring Agreement") between the parties that is the subject of this lawsuit.

Statement of the Facts

The Plaintiff and Defendant BB&T¹ entered into two promissory notes, one loan agreement, two security agreements and the Factoring Agreement. The Factoring Agreement contains the following waiver upon which BB&T relies:

[T]o the fullest extent permitted by applicable law, Client hereby knowingly, intelligently and expressly waives demand, protest, notice of protest, notice of default or dishonor, notice of payment or nonpayment, and notice of default, release, compromise, settlement, extension, or renewal of any instruments or guaranties held by BB&T on which Client may in any way liable; *trial by jury*

¹ Defendant James Edahl was an employee of Defendant BB&T at the time the contract was entered into and was its agent, servant and employee acting within the scope and course of his employment at all relevant times. Therefore he is entitled to enforcement of the jury trial waivers as well.

and right to trial by jury on any issue in any way pertaining to this Agreement or any transaction or occurrences arising hereunder or governed hereby (which right BB&T likewise waives); and notice of BB&T's acceptance of this agreement. (emphasis added)

Discussion

The conflict at issue arises because North Carolina law provides, "[a]ny provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable." N.C. Gen. Stat. Ann. § 22B-10.

As a result, the Plaintiff maintains the jury waiver provision is void and is not a part of the parties' contractual agreement because such provisions are unconscionable and violates North Carolina public policy. A choice-of-law clause in a contract will not be enforced if application of foreign law results in a violation of South Carolina public policy. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007). However, such a waiver clearly does not violate South Carolina public policy as the long-standing principle that "[a] party may waive the right to a jury trial by contract" was recently re-affirmed in Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014).

Traditional South Carolina choice of law rules dictate that "contracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view." See Lister V. NationsBank of Del. NA., 329 S.C. 133, 144, 494 S.E.2d 449, 455 (Ct. App. 1997) (quoting Livingston v. Atlantic Coast Line RS., 176 S.C. 385, 391 180 S.E. 343, 345 (1935)); see also Witt v. American Trucking Associations, Inc., 860 F. Supp. 295 (D.S.C. 1994) (in contract actions, South Carolina courts apply substantive law of place where contract was formed as to issues concerning contract formation, interpretation, or validity; however, as to performance, law of place of performance governs).



Parties to a contract are free to include in their agreement a provision as to the applicable law; however, such an agreement would only be effective as to substantive issues, and would not be used by the forum as a reference point for determining, for instance, the applicable statute of limitations. Robert A. Brazener, Annotation, *Choice of Law as to Applicable Statute of Limitations in Contract Actions*, 78 A.L.R.3d 639, § 2[b](1977).

The general rule is that “[t]he right to a jury trial in civil cases, which is enshrined in the Seventh Amendment and similar state provisions, is only a right and not a requirement, so that such right can be waived, such as by an agreement between the parties.” Jay M. Zitter, Annotation, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R.5th 53 (1996).

While no South Carolina case appears on point, the Supreme Court of Kansas did decide the issue in Vanier v. Ponsoldt, 251 Kan. 88, 833 P.2d 949, 19 UCC Rep.Serv.2d 90 (1992). That court noted the Restatement of Conflict of Laws § 594 (1934), provides: “The law of the forum determines whether an issue of fact shall be tried by the court or by a jury”, and the Restatement (Second) of Conflict of Laws § 129 (1969) states: “The local law of the forum determines whether an issue shall be tried by the court or by a jury.”

The Kansas Supreme Court then quoted with favor Professor Robert A. Leflar, who wrote :

[T]he method of trial of a case, that is, whether by court or jury, seems to be a matter of procedure rather than of substantive rights, and the weight of authority so holds. Even though it be entirely possible that a jury might arrive at a different conclusion than would a judge trying the same fact issue, the legal rights of the parties to the issue depend upon the facts and the law as they exist prior to the trial, whereas this possible difference in result depends upon the manner of conducting the trial.

Leflar, *American Conflicts Law* § 122, 242 (3d ed. 1977).

Professor Leflar noted some authority to the contrary of this general rule. Those cases, however, deal with contributory negligence, mode of levying execution, and other matters that



are not applicable here.

The case at hand is a lender liability case stemming from a contractual relationship between Skywaves and BB&T. The claims are all causes of action in contract, breach of contract, promissory estoppel and breach of the covenant of good faith and fair dealing (which is not a separate cause of action in South Carolina but rather implied in every contract and therefore part of the breach of contract cause of action).

The parties do not challenge that waiver of trial by jury was not voluntarily, knowingly, and intelligently waived. Presumably the parties negotiated or had the opportunity to negotiate most of the standardized provisions provided in the Factoring Agreement by Defendant BB&T. Standing alone, there is no reason the jury waiver is not enforceable against Skywaves, with every appearance being that the provision was freely negotiated by sophisticated businessmen who were equal in their bargaining positions. The waiver was conspicuously set off in all capital letters. Therefore, this Court finds that both parties voluntarily, knowingly, and intelligently waived the right to jury by trial.

As noted above, the general rule seems to be that the right to a jury trial, while a substantial right, is a procedural right. With respect to causes of action sounding in contract, it does not violate South Carolina public policy to contractually waive a right to a jury trial. The right to freedom of contract is no small part of a citizen's liberty, and this Court must enforce and maintain a contract between two experienced parties. While it appears waiver violates the public policy of North Carolina as pronounced by the North Carolina legislature, the plaintiff has chosen to bring this lawsuit in South Carolina, not North Carolina.

Conclusion

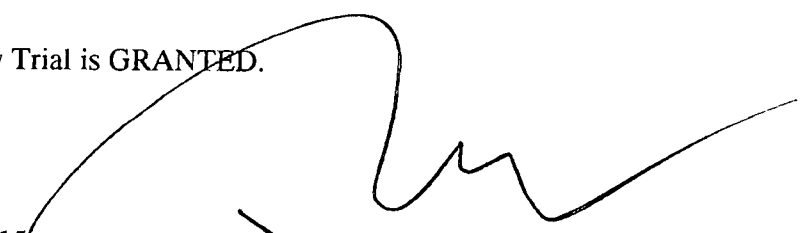
IT IS THEREFORE ORDERED that Defendant BB&T and Defendant Edhal's Motion to

A handwritten signature in black ink, appearing to be the initials 'P' followed by a stylized flourish.

Strike Plaintiff's Demand for Jury Trial is GRANTED.

IT IS SO ORDERED.

2/9, 2015
Charleston, South Carolina



Roger M. Young, Sr.
Circuit Court Judge