

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 PNC Bank, N.A., successor to RBC)
 Bank (USA))
)
 Plaintiff,)
)
 v.)
)
 Liberty Cottages, LLC; GW Dorchester,)
 LLC; USS Clarksville, LLC; Liberty)
 Cottages Land, LLC; Royal Beach)
 Properties, LLC; The Brothers of SC, LLC;)
 Deborah Rice-Marko a/k/a Deborah G.)
 Rice-Marko; Evan R. Marko and John E.)
 Marko, Jr.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 IN THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-10-2624

RECEIVED

MAY 26 2015

**ORDER DENYING PLAINTIFF'S
 MOTION FOR SUMMARY JUDGMENT,
 DENYING PLAINTIFF'S MOTION TO
 REFER CASE TO THE MASTER, AND
 GRANTING PLAINTIFF'S MOTION
 TO STRIKE JURY DEMAND**

60 Court of Appeals

2015 MAY -6 AM 8:52
 JULIE J. ARMSTRONG
 CLERK OF COURT

FILED

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This matter came before this Court on Plaintiff's Motion for Summary Judgment, Plaintiff's Motion to Strike Jury Demand and Plaintiff's Motion to Refer the Case to the Master in Equity, argued on April 9, 2015 in Charleston County. After oral argument, and taking this matter under advisement, this Court hereby denies Plaintiff's Motion for Summary Judgment, denies Plaintiff's Motion to refer the case to the Master, and grants Plaintiff's Motion to Strike the Jury Demand.

Plaintiff's Motion for Summary Judgment

In oral argument and its filed pre- and post-trial memoranda, the Plaintiff argues that it is entitled to Summary Judgment as to the Defendants' Breach of Confidentiality counterclaim. The Plaintiff argues that South Carolina law does not provide for a duty of confidentiality in a borrower-lender relationship and asserts that there has been no authority provided to the Court that would suggest such a relationship exists. Defendants argue that the Plaintiff is collaterally

estopped from arguing that no such duty exists, because Plaintiff PNC Bank previously argued in prior litigation in another jurisdiction that it had a fiduciary duty to protect its customer's confidential information in Berrios v. PNC Bank, 2006 WL 2933899 (N.J. Oct. 16, 2006). Plaintiff argues that the argument in Berrios is immaterial, that it does not meet the requirements of collateral estoppel, nor is the decision binding on this Court.

The Court agrees that the Berrios case is not binding on this Court and that collateral estoppel does not apply in this case. Nevertheless, the Court hereby denies the Plaintiff's Motion for Summary Judgment as to the Breach of Confidentiality counterclaim, because the claim appears to be a novel issue in the State of South Carolina and the Court feels that the facts should be further developed. The Court reserves the authority to re-hear arguments on this claim at the directed verdict stage.

Plaintiff's Motion to Strike Jury Demand and Refer Case to the Master

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The Plaintiff also seeks to strike the Defendants' demand for a jury trial, alternatively arguing that the Defendants signed at least 84 loan documents with jury trial waivers, that the counterclaims are permissive counterclaims, and that the Defendants are seeking at least one equitable remedy. They argue that the Defendants are not entitled to a jury trial for any or all of these reasons. The Defendants argue that the Plaintiff cannot enforce the jury trial waivers, because the counterclaims attack the enforceability of the documents. The counterclaims include, but are not limited to, breach of contract, breach of the covenant of good faith and fair dealing, and negligent misrepresentation. They argue that because their counterclaims would entitle them to a determination that the Plaintiff cannot enforce the contracts, the jury trial waivers are unenforceable. The Defendants also argue that their counterclaims are compulsory under N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514 (1989), and Carolina First Bank v. BADD,

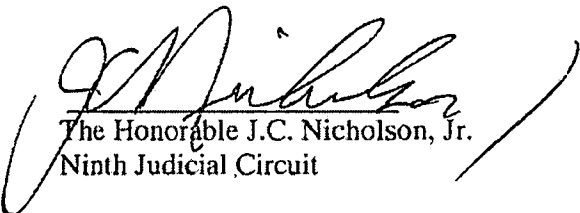
LLC, 2015 WL 340791 because the counterclaims affect the enforceability of the loan documents.

The Court does not need to reach the issue of whether the counterclaims are compulsory or permissive. The Court agrees with the Plaintiff that the counterclaims do not attack the enforceability of every single one of the jury trial waivers signed by the Defendants. While this Court declines to rule that the counterclaims only attack the 2009 Loan Modification and July 2011 Forbearance agreement, the Court agrees that at least one of the loan documents contains a valid, enforceable jury trial waiver. Therefore, the Court hereby strikes the jury trial demand and will place this case on the non-jury roster. Additionally, the Court declines to utilize an advisory jury. The Court also declines to refer the case to the Master in Equity, finding that some of the contested issues are based in law, while some are based in equity. This Court is also concerned with the jurisdictional reach of the Master in Equity, as some of the properties at issue are outside of Charleston County.

Conclusion

In sum, this Court denies the Plaintiff's Motion for Summary Judgment as to the Breach of Confidentiality Counterclaim, denies the Plaintiff's Motion to Refer the Case to the Master in Equity, and grants the Plaintiff's Motion to Strike the Jury Demand. This case will be moved to the non-jury trial roster before this Court not before June 1, 2015.

IT IS SO ORDERED.


The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

Charleston, SC
April 29, 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
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 PNC Bank, N.A., successor to RBC)
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 Defendants.)

IN THE COURT OF COMMON PLEAS
 IN THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2013-CP-10-2624

**AMENDED ORDER DENYING
 PLAINTIFF'S MOTION FOR SUMMARY
 JUDGMENT, DENYING PLAINTIFF'S
 MOTION TO REFER CASE TO THE
 MASTER, AND GRANTING
 PLAINTIFF'S MOTION
 TO STRIKE JURY DEMAND**

FILED
 2015 MAY 13 AM 10:21
 JULIE J. ARSTRONG
 CLERK OF COURT

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This matter came before this Court on Plaintiff's Motion for Summary Judgment, Plaintiff's Motion to Strike Jury Demand and Plaintiff's Motion to Refer the Case to the Master in Equity, argued on April 9, 2015 in Charleston County. This Court filed its original Order on April 31, 2015, denying Plaintiff's Motion for Summary Judgment, denying Plaintiff's Motion to refer the case to the Master, and granting Plaintiff's Motion to Strike the Jury Demand.

Defendants filed a Motion to Alter or Amend on May 1, 2015. Plaintiffs filed their Motion to Alter/Amend on May 4, 2015. This Court hereby alters and amends its original Order, clarifying its justification for granting Plaintiff's Motion to Strike the Jury Demand. This Order supersedes this Court's previous Order, but the result remains the same.

Plaintiff's Motion for Summary Judgment

In oral argument and its filed pre- and post-trial memoranda, the Plaintiff argues that it is entitled to Summary Judgment as to the Defendants' Breach of Confidentiality counterclaim. The

Plaintiff argues that South Carolina law does not provide for a duty of confidentiality in a borrower-lender relationship and asserts that there has been no authority provided to the Court that would suggest such a relationship exists. Defendants argue that the Plaintiff is collaterally estopped from arguing that no such duty exists, because Plaintiff PNC Bank previously argued in prior litigation in another jurisdiction that it had a fiduciary duty to protect its customer's confidential information in Berrios v. PNC Bank, 2006 WL 2933899 (N.J. Oct. 16, 2006). Plaintiff argues that the argument in Berrios is immaterial, that it does not meet the requirements of collateral estoppel, nor is the decision binding on this Court.


The Court agrees that the Berrios case is not binding on this Court and that collateral estoppel does not apply in this case. Nevertheless, the Court hereby denies the Plaintiff's Motion for Summary Judgment as to the Breach of Confidentiality counterclaim, because the claim appears to be a novel issue in the State of South Carolina and the Court feels that the facts should be further developed. The Court reserves the authority to re-hear arguments on this claim at the directed verdict stage.

Plaintiff's Motion to Strike Jury Demand and Refer Case to the Master

The Plaintiff also seeks to strike the Defendants' demand for a jury trial, alternatively arguing that the Defendants signed at least 84 loan documents with jury trial waivers, that the counterclaims are permissive counterclaims, and that the Defendants are seeking at least one equitable remedy. The jury trial waivers contained in these documents were either capitalized, bolded, or both. Plaintiff argues that the Defendants are not entitled to a jury trial for any or all of these reasons. The Defendants argue that the Plaintiff cannot enforce the jury trial waivers because the counterclaims attack the enforceability of the documents. The counterclaims include, but are not limited to, breach of contract, breach of the covenant of good faith and fair dealing,

and negligent misrepresentation. They argue that because their counterclaims would entitle them to a determination that the Plaintiff cannot enforce the contracts, the jury trial waivers are unenforceable. The Defendants also argue that their counterclaims are compulsory under N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514 (1989), and Carolina First Bank v. BADD, LLC, 2015 WL 340791 because the counterclaims affect the enforceability of the loan documents.

The Court does not need to reach the issue of whether the counterclaims are compulsory or permissive. The Court agrees with the Plaintiff that the counterclaims do not attack the enforceability of every single one of the jury trial waivers signed by the Defendants. While this Court declines to rule that the counterclaims only attack the 2009 Loan Modifications and July 2011 Forbearance agreements, the Court agrees that at least one of the loan documents contains a valid, enforceable jury trial waiver.



In their Motion to Alter/Amend, Defendants state that because the Plaintiff seeks to enforce the restructured notes and agreements and because the Plaintiff has not offered to return the banking relationship to the status prior to the restructure, the Plaintiff "cannot rely on the jury trial waivers contained in loan documents which subsequently have been restructured." This Court disagrees, finding that even if restructured documents are invalidated by any of the counterclaims, the action would revert back to the language of the original notes and guarantees that contained valid jury trial waivers. Even if the restructured loan documents are invalid, the jury trial waivers in the original loan documents are valid and enforceable. In contrast, if the restructured loan documents are valid, then those jury trial waivers are valid and all liabilities and encumbrances of the previous documents are incorporated into the restructured agreements.

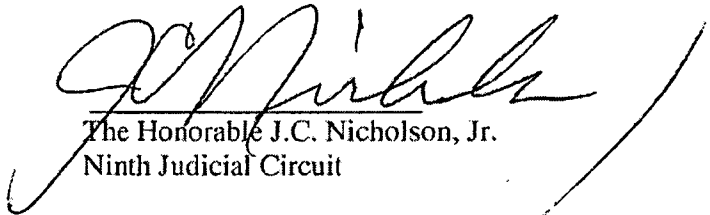
Regardless, there was a valid waiver of a jury trial either in the original documents or the restructured documents.

Therefore, the Court hereby strikes the jury trial demand and will place this case on the non-jury roster. The Court declines to utilize an advisory jury. The Court also declines to refer the case to the Master in Equity, finding that some of the contested issues are based in law, while some are based in equity. This Court is also concerned with the jurisdictional reach of the Master in Equity, as some of the properties at issue are outside of Charleston County.

Conclusion

In sum, this Court denies the Plaintiff's Motion for Summary Judgment as to the Breach of Confidentiality Counterclaim, denies the Plaintiff's Motion to Refer the Case to the Master in Equity, and grants the Plaintiff's Motion to Strike the Jury Demand. This case will be moved to the non-jury trial roster before this Court not before June 1, 2015.

IT IS SO ORDERED.



The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

Charleston, SC
May 12 2015