

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED

NOV 10 2015

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

Civil Action No. 2014-CP-40-2968
Appeal No.: 2015-000158

Branch Banking and Trust Company Respondent,

v.

Elie Abikhaled and Ghazi Abikhaled Appellants.

RESPONDENT'S FINAL BRIEF

J. Kershaw Spong
Paul H. Hoefler
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Respondent

November 10, 2015

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

Civil Action No. 2014-CP-40-2968
Appeal No.: 2015-000158

Branch Banking and Trust CompanyRespondent,

v.

Elie Abikhaled and Ghazi AbikhaledAppellants.

RESPONDENT'S FINAL BRIEF

J. Kershaw Spong
Paul H. Hoefler
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Respondent

November 10, 2015

TABLE OF CONTENTS

Table of Authorities.....ii

Statement of Issues on Appeal.....iii

Statement of the Case.....1

Statement of Facts.....2

Argument.....5

 I. The trial court properly found the jury waiver provisions are valid and enforceable.....5

 II. The trial court properly found the jury waiver provisions are conscionable.....6

 III. Where Appellants allege equitable counterclaims and legal counterclaims which fall squarely within jury waiver provisions, the trial court properly struck Appellants’ jury demand.....7

 a. Appellants have no right to trial by jury on their equitable counterclaims for Accounting and Appraisal.....7

 b. Appellants’ legal counterclaims consist of “matters or claims arising out of the Guarantees, the Note, and the related loan documents executed in connection therewith” and therefore fall within the jury waiver provisions.....8

 c. Appellants’ legal counterclaims consist of “matters or claims arising out of the conduct of the relationship between Elie and Ghazi and BB&T or Cedar Development and BB&T” and therefore fall within the jury waiver provisions.....8

 d. Appellants inappropriately rely on *Wachovia Bank, N.A. v. Blackburn*, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011), *aff’d in part, rev’d in part*, and further misapprehend the application and analysis of this Court’s decision therein.....10

 e. Whether Appellants’ counterclaims are compulsory or permissive is irrelevant; South Carolina case law supports the trial court’s Order striking the jury demand.....12

Conclusion.....14

TABLE OF AUTHORITIES

Cases

Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004).....7

Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002).....5

Carolina Care Plan, Inc. v. United HealthCare Services, Inc., 361 S.C. 544, 606 S.E.2d
752 (2004).....6

Carolina First Bank v. BADD, L.L.C., Op. No. 27486 (S.C. Sup. Ct. Jan. 28, 2015).....12

Crafton v. Brown, 346 S.C. 347, 550 S.E.2d 904 (Ct. App. 2001).....14

Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315, 440 S.E.2d 367 (1994).....5

N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 416
S.E.2d 637, 638 (1992).....5

Wachovia Bank v. Blackburn, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011) *aff'd in part,*
rev'd in part by Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 755 S.E.2d
437 (2014).....10, 11

Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014) ...5, 10, 11, 12, 13

STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court properly find the jury waiver provisions are valid and enforceable?
- II. Did the trial court properly find the jury waiver provisions are conscionable?
- III. Where Appellants allege equitable counterclaims and legal counterclaims which fall squarely within jury waiver provisions, did the trial court properly strike Appellants' jury demand?

STATEMENT OF THE CASE

This is an appeal by Elie Abikhaled (hereinafter “Elie”) and Ghazi Abikhaled (hereinafter “Ghazi”) from an Order Granting Branch Banking and Trust Company’s (“BB&T”) Motion to Strike Jury Demand entered on December 19, 2014 in the Court of Common Pleas for Richland County.

On May 8, 2014, BB&T filed this action (hereinafter “Guaranty Action”) to collect a debt alleged to be owed by Appellants pursuant to personal guarantees of payment (hereinafter collectively “Guarantees”). Elie and Ghazi responded to the Complaint, denied liability, counterclaimed, and demanded a jury trial.

The Guarantees each contain a jury trial waiver provision in all capitalized, bold text. Based on these waivers, on August 25, 2014, BB&T moved to strike the jury demand. On October 8, 2014, BB&T submitted a Memorandum in Support of its Motion to Strike Jury Demand. On October 16, 2014, Elie and Ghazi submitted a Memorandum in Opposition to the Motion to Strike Jury Demand.

On October 16, 2014, BB&T’s motion was heard before the Honorable Deadra L. Jefferson, Circuit Court Judge. By Order entered December 19, 2014, Judge Jefferson struck the jury demand finding Elie and Ghazi have no right to a jury trial on their equitable counterclaims (accounting and appraisal) and no right to a jury trial on their legal counterclaims (breach of the covenant of good faith and fair dealing, interference with prospective contractual relations, and negligent misrepresentation) because such legal counterclaims fall squarely within the scope of the jury waiver provisions. On January 21, 2015, Elie and Ghazi filed this appeal.

STATEMENT OF FACTS

Cedar Development II, LLC (hereinafter "Cedar Development") executed a Promissory Note dated June 29, 2011 in favor of BB&T for Seven Hundred Thirty Thousand Four Hundred Eleven Dollars and 44/100 (\$730,411.44) (hereinafter "Note #4").¹ (R. p. 11, ¶4). Note #4 was signed by Elie J. Abikhaled as Member and Manager of Cedar Development. (R. p. 11). Note #4 was secured by a mortgage (hereinafter "Mortgage") on real property with improvements thereon known as 3715 Broad River Road, Columbia, South Carolina (hereinafter "Broad River Road Property"). (R. p. 28, ¶25).² Pursuant to Guaranty Agreements, which were executed in connection with a prior loan and are continuing in nature, Elie and Ghazi each personally guaranteed payment by Cedar Development of the Note #4 obligations.³ (R. p. 12, ¶¶ 7-8). The Guarantees each contain the following jury waiver provision located at the bottom of Page 2 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 OR 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

¹ Note #4 acted to restructure the terms of a March 2008 BB&T mortgage loan to Cedar Development ("Note #3") made for purposes of Cedar Development's construction of a building on the Broad River Road Property. (Hearing Tr., R. p. 57, lines 18-22).

² Cedar Development is a single asset entity formed by members Elie and Ghazi to hold the Broad River Road Property.

³ The Guarantees are dated October 9, 2007 and were executed in connection with a prior promissory note ("Note #1") evidencing an original loan from BB&T to Cedar Development for purchase of the Broad River Road Property. (R. pp. 18-25).

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.

Thereafter, Cedar Development defaulted under terms of Note #4, and Elie and Ghazi defaulted under terms of the Guarantees. (R. p. 12, ¶¶10-11). On August 28, 2013, BB&T filed an action in the Richland County Court of Common Pleas against Cedar Development to foreclose the Mortgage (Civil Action No. 2013-CP-40-5115) (hereinafter "Foreclosure Action"). (Hearing Tr., R. p. 44, line 23–p. 45, line 2).⁴ Cedar Development answered the Foreclosure Action and asserted counterclaims against BB&T premised on allegations that BB&T broke promises to provide Cedar Development additional loan funds for the purpose of improving the Broad River Road Property for potential tenants (hereinafter "Upfit Financing").⁵ (Hearing Tr., R. p. 42, line 19–p. 43, line 1).

In this Guaranty Action, BB&T seeks judgment against Elie and Ghazi for the deficiency amount resulting from the foreclosure sale. Elie and Ghazi have asserted equitable counterclaims (accounting and appraisal), and legal counterclaims (breach of the covenant of good faith and fair dealing, interference with prospective contractual relations, and negligent misrepresentation) based on BB&T's alleged failure to provide

⁴ Elie and Ghazi were not named individually as defendants in the Foreclosure Action. (Hearing Tr., R. p. 47, lines 14-15).

⁵ At the time of the hearing before Judge Jefferson, the Foreclosure Action was pending and not yet resolved. The Foreclosure Action has now been resolved by Master's Order and Judgment of Foreclosure and Sale recorded on May 19, 2015, and an Order of Deficiency Judgment was entered against Cedar Development on July 20, 2015 in the amount of \$551,185.02. (Masters Order and Judgment of Foreclosure and Sale, R. pp. 80–92).

Upfit Financing (the same claims Cedar Development asserted in the Foreclosure Action). (R. pp. 28-33). Some of Elie's and Ghazi's factual assertions in support of their counterclaims are quoted as follows:

- Appellants' Tenth Defense and by way of Counterclaim (Breach of the Implied Covenant of Good Faith and Fair Dealing) (Answer, R. pp. 28-29):

Answer ¶27: "During the loan negotiations between CDII, the Abikhaleds, and BB&T, Plaintiff agreed to provide CDII with money for upfitting space to meet tenant needs, as well as other services and amenities designed to assist Cedar Development in renting the Broad River Road space."

Answer ¶28: "Despite promising Cedar Development and the Abikhaleds that upfit money and assistance would be provided, BB&T refused to provide money or additional assistance."

Answer ¶29: "Because of the refusal by BB&T to finance or otherwise assist Cedar Development in upfitting the Broad River Road space, the Broad River Road Property became very difficult to lease. Potential tenants who were ready, willing and able to sign lease agreements and move into the space refused, due to the inability to obtain upfits for the rental space."

- Appellants' Eleventh Defense and by way of Counterclaim (Interference with Contractual Relations) (Answer, R. p. 30):

Answer ¶36: "BB&T improperly failed and refused to extend financing for upfits or otherwise assist the potential tenants, therein 'killing the deal' and causing potential tenants to look elsewhere for commercial office space."

- Appellants' Thirteenth Defense by way of Counterclaim (Negligent Misrepresentation) (Answer R. pp. 30-31):

Answer ¶42: "CDII, the Abikhaleds, and BB&T entered into an agreement, wherein BB&T represented to the Abikhaleds and CDII that BB&T would assist in developing the Broad River Road property by providing upfit money to customize and otherwise make the Broad River Road commercial space attractive as rental space to prospective tenants."

Answer ¶43: "BB&T's representation was false, in that BB&T has failed and refused, and continues to fail and refuse, to provide any upfit allowance, loan, or assistance to CDII."

Answer ¶48: “As a direct and proximate result of the Abikhaleds and CDII’s reliance on BB&T’s misrepresentations, and BB&T’s failure to provide any upfit allowance, loan, or other assistance, CDII has been unable to fill the 3715 Broad River Road property with tenants.”

ARGUMENT

I. The trial court properly found the jury waiver provisions are valid and enforceable.

A party may waive the right to a jury trial by contract. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 332-33, 755 S.E.2d 437, 443 (2014) (citing *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002)). The waiver will be strictly construed because a right to a jury trial is a substantial right. *Beach Co.*, 351 S.C. at 64, 566 S.E.2d at 867 (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)).

The applicable waiver provision states:

THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR 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.

BB&T’s claims to enforce the Guarantees and Elie’s and Ghazi’s counterclaims premised on allegations that BB&T broke promises to provide Upfit Financing all arise out of the Guarantees, Note, and related loan documents and out of the conduct of the relationship between the parties, and thus each falls squarely within these waiver

provisions. Elie and Ghazi cannot repudiate jury waiver provisions which are clear, unambiguous, prominently placed in the documents, and which BB&T expressly relied on when making the subject loan. As the contracts are clear and no adequate basis exists to challenge enforcement of the jury waiver provisions therein, the plain meaning of these agreements must be given effect.

II. The trial court properly found the jury waiver provisions are conscionable.

Appellants argue that because their counterclaims are not directly related to the loan which the Guarantees first secured, enforcement of the waiver provisions in this case is unconscionable. Appellants cite no authority to support that position. In fact, the Guarantees specifically apply to future loans made to Cedar Development. Instead of citing authority to support their proposition, Appellants cite *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) for the proposition that “unconscionability is defined as the absence of meaningful choice on the part of one party due to one-side 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.” Appellants set forth no evidence of their unsophistication, being taken advantage of, lacking meaningful choice in executing the Guarantees, or that the Guarantees contain terms that no reasonable person would make and no fair and honest person would accept.

The fact that the alleged misconduct by BB&T occurred more than three years after the Guarantees were signed is irrelevant. The Guarantees specifically contemplate future conduct, providing absolute and unconditional guarantees to Bank of “the due and punctual payment of any and all notes, drafts, debts, obligations and liabilities, primary or

secondary of Borrower, at any time, now or hereafter, incurred with or held by Bank” and “shall remain in force until a written notice revoking it has been received by Bank.” The Guarantees further provide that each is unlimited and “apply to all indebtedness of Cedar Development, whether then existing or thereafter arising.” Thus, the very clear terms of the Guarantees provide BB&T security for future obligations of Cedar Development, and there should be no surprise that BB&T would enforce the Guarantees and their provisions in this case.

III. Where Appellants allege equitable counterclaims and legal counterclaims which fall squarely within jury waiver provisions, the trial court properly struck Appellants’ jury demand.

a. Appellants have no right to trial by jury on their equitable counterclaims for Accounting and Appraisal.

In their Twelfth Defense and by way of Counterclaim, Appellants claim they are entitled to an accounting of the amounts alleged to be owed and to a currently valued appraisal of the Broad River Road Property.

Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions. *Bateman v. Rouse*, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct. App. 2004) (internal citation omitted). Whether an action is legal or equitable is primarily determined by the allegations in the complaint. *Id.* (omitting internal citations). Because the relief Appellants seek in their Twelfth Defense and Counterclaim is equitable, they have no right to a jury trial on claims for Accounting and Appraisal.

- b. Appellants' legal counterclaims consist of "matters or claims arising out of the Guarantees, the Note, and the related loan documents executed in connection therewith" and therefore fall within the jury waiver provisions.**

Whether or not BB&T broke an oral promise to provide additional Upfit Financing is directly related to the Guarantees, Note, Mortgage, and the related loan documents executed in connection therewith. Appellants claim the alleged BB&T promises of Upfit Financing were made during the actual loan negotiations, the same time when the loan documents were agreed to and executed. (See Answer, R. p. 28, ¶27). Had BB&T provided the alleged Upfit Financing, the additional loan funds would have been assumed and secured under the existing Guarantees and Mortgage. Any new funding would necessarily tie to the Mortgage because it was allegedly sought to improve the Broad River Road Property. Additionally, Appellants claim the bank's failure to provide the promised Upfit Financing caused and resulted in the default under the Guarantees, Note, Mortgage, and related loan documents due to its alleged inability to lease the Broad River Road Property. (See Answer, R. p. 29, ¶¶29-32). For all of the foregoing reasons, Appellants' legal counterclaims fit squarely within the jury waiver provisions.

- c. Appellants' legal counterclaims consist of "matters or claims arising out of the conduct of the relationship between Elie and Ghazi and BB&T or Cedar Development and BB&T" and therefore fall within the jury waiver provisions.**

The alleged Upfit Financing would have affected the entire relationship between BB&T and Elie and Ghazi, and between BB&T and Cedar Development, including the amount secured under the Mortgage and Guarantees, and the value of the bank's mortgaged property. The alleged promises of Upfit Financing involve the same bank,

borrower, guarantors, credit file and loan relationship, and mortgaged property.

This Court needs to look no further than the specific language of Elie's and Ghazi's Answer which references the actual loan negotiations and transaction, the Note, Mortgage, Broad River Road Property, and Guarantees. Some of the factual assertions are more specifically restated as follows:

- Appellants' Tenth Defense and by way of Counterclaim (Breach of the Implied Covenant of Good Faith and Fair Dealing) (Answer, R. pp. 28-29) :

Answer ¶27: "During the loan negotiations between CDII, the Abikhaleds, and BB&T, Plaintiff agreed to provide CDII with money for upfitting space to meet tenant needs, as well as other services and amenities designed to assist CDII in renting the Broad River Road space."

Answer ¶30: "The implied covenant of good faith and fair dealing exists between CDII and BB&T, relative to Notes and Mortgages by and between CDII and BB&T, and any personal guarantees by and between BB&T and the Abikhaleds."

- Appellants' Eleventh Defense and by way of Counterclaim (Interference with Contractual Relations) (Answer, R. p. 30):

Answer ¶36: "BB&T improperly failed and refused to extend financing for upfits or otherwise assist the potential tenants, therein 'killing the deal' and causing the potential tenants to look elsewhere for commercial office space."

- Appellants' Thirteenth Defense and by way of Counterclaim (Negligent Misrepresentation) (Answer, R. p. 31):

Answer ¶45: "As the Abikhaleds and CDII were both long time customers of BB&T, to which the Abikhaleds and CDII looked to BB&T for experience and advice, BB&T owed the Abikhaleds and CDII a duty of care to see that truthful information was communicated."

Answer ¶47: "The Abikhaleds and CDII justifiably relied on BB&T's representation in that CDII and the Abikhaleds borrowed the construction money from BB&T and attempted, and continue to attempt to populate the building with tenants."

Answer ¶48: "As a direct and proximate result of the Abikhaleds and CDII's reliance on BB&T's misrepresentations, and BB&T's failure to

provide any upfit allowance, loan, or other assistance, CDII has been unable to fill the Broad River Road property with tenants.”

- Appellants’ Fourteenth Defense and by way of Counterclaim (Negligent Misrepresentation) (Answer, R. p. 32):

Answer ¶52: “BB&T represented to the Abikhaleds and CDII that BB&T would take a deed in lieu of foreclosure from the Abikhaleds and CDII, and forego seeking any deficiency from CDII or the Abikhaleds.”

Each of Appellants’ legal counterclaims recited above references conduct arising out of the relationship BB&T has with its borrower Cedar Development and the relationship BB&T has with its guarantors Elie and Ghazi. This conduct and relationship relates directly to the loan on the Broad River Road Property which is under BB&T’s Mortgage and secured by the Guarantees. By the clear terms of the jury waiver provisions, each of Appellants’ legal counterclaims falls squarely within the jury waiver provisions.

- d. Appellants inappropriately rely on *Wachovia Bank, N.A. v. Blackburn*, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011), *aff’d in part, rev’d in part*, and further misapprehend the application and analysis of this Court’s decision therein.**

Appellants appear to rely on this Court’s analysis in *Wachovia*, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011) (reversed in part by *Wachovia*, 407 S.C. 321, 755 S.E.2d 437 (2014) on its determination as to whether Respondents waived their right to a jury trial on counterclaims) to support their argument that the jury waivers do not extend to their counterclaims because “the alleged actions of BB&T in failing to provide promised financing are not related to the pre-existing lending relationship between the parties.”

Wachovia, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011) is no longer valid precedent on this subject, but if this Court is to consider its application, the key factual differences between it and the instant case should be recognized. In *Wachovia*, 394 S.C.

579, 716 S.E.2d 454 (Ct. App. 2011), the counterclaims were based on allegations that Wachovia partnered with third-parties to promote and sell properties at a “high-pressure” sales event, which included a lottery, and defrauded buyers by artificially inflating property values and making misrepresentations regarding the construction of amenities in the development. This Court found the allegations of sales misrepresentations and pre-purchase fraud did not arise out of the standard promissory note or loan documents but instead were based on a sales contract, the promotional literature regarding the development, the lottery procedure, and the promises regarding amenities. Therefore, because the counterclaims involved only the separate sales transaction and were not related to the loan transaction, this Court found the counterclaims fell outside the scope of the jury waiver provisions. In contrast, in the instant case, Appellants’ counterclaims all fall squarely within the parameters of the parties’ lending relationship and loan negotiations.

Elie’s and Ghazi’s counterclaims all relate to the actual loan transaction, loan documents, and ongoing loan relationship involving the same mortgaged property. There are no third parties involved, no high pressure sales events, no lotteries, no sales transactions, and no allegations of fraud. The facts forming the basis of Elie’s and Ghazi’s counterclaims arise out of the standard commercial loan relationship formed and existing between bank, borrower, and guarantors. Whereas, in *Wachovia*, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011), the counterclaims involved the bank’s participation and alleged fraud in third-party sales transactions unrelated to the underlying loan relationship. Thus, even if this Court is inclined to follow the reversed decision of *Wachovia*, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011), the significant factual

distinction from the instant case highlights and supports Respondent's argument that Appellants' counterclaims fall within the jury waiver provisions.

e. Whether Appellants' counterclaims are compulsory or permissive is irrelevant; South Carolina case law supports the trial court's Order striking the jury demand.

Appellants note that recent South Carolina appellate court decisions ruling on the enforceability of jury waiver provisions have been made in the context of foreclosures originated by an equitable cause of action. *See Carolina First Bank v. BADD, L.L.C.*, Op. No. 27486 (S.C. Sup. Ct., Jan. 28, 2015) and *Wachovia*, 407 S.C. 321, 755 S.E.2d 437, (2014). Appellants argue that because BB&T brought two separate actions, an equitable action to foreclose the mortgage and this action at law against the guarantors, BB&T cannot avail itself of the Supreme Court's holdings in *Wachovia*, 407 S.C. 321, 755 S.E.2d 437 (2014) and *Carolina First*, Op. No. 27486 (2015).

Respondent agrees that *Wachovia*, 407 S.C. 321, 755 S.E.2d 437 (2014) and *Carolina First*, Op. No. 27486 (2015) are factually distinguishable as equitable foreclosures, but the decisions are instructive as to the enforceability of jury waiver provisions against legal counterclaims. In the equitable setting, the analysis first focuses on whether the counterclaims are compulsory or permissive. *See Wachovia*, 407 S.C. at 330, 755 S.E.2d at 441 (2014). If a defendant asserts a legal/permissive counterclaim in an equitable action, that defendant waives the right to a jury trial. *Id.* If a defendant asserts a legal/compulsory counterclaim in an equitable action, then, assuming a jury trial waiver provision exists, the question turns to whether or not that counterclaim falls within the waiver provision. *Id.*

In *Wachovia*, 407 S.C. 321, 755 S.E.2d 437 (2014), an equitable foreclosure action, the South Carolina Supreme Court ultimately determined it unnecessary to determine whether the counterclaims were compulsory or permissive, because the Court found either way the guarantors were not entitled to a jury trial. The Court noted the guarantors consistently argued the sales and loan transactions were separate transactions and that therefore the jury waiver provisions did not apply to their counterclaims. *Id.* at 331, 755 S.E.2d at 442. However, the Court noted the guarantors also argued their counterclaims were compulsory, meaning they arose out of the same transaction or occurrence as Wachovia's loan foreclosure claim. *Id.* The Court found the guarantors could not have it both ways. If the loan and sales transactions were separate, then by definition the counterclaims would be permissive and there would be no right to a jury trial. *Id.* On the other hand, if the sales and loan transactions were viewed as one continuous transaction such that the counterclaims were compulsory, then by definition the jury trial waivers would necessarily apply – the logic being that if the counterclaims arise out of the same transaction and occurrence, then they must also fit within the specific language of the waiver provisions. *Id.* at 332, 755 S.E.2d at 443.

In the instant case, BB&T's only cause of action alleges Appellants defaulted under terms of the Guarantees. 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). Therefore, because the instant action was not originated as an equitable action, the dispositive issue is not whether Appellants' counterclaims are permissive or compulsory, but rather simply whether Appellants contractually waived their rights to a jury trial as to the specific matters raised. *See Wachovia*, 407 S.C. 321, 755 S.E.2d 437 (2014). Here, as stated in

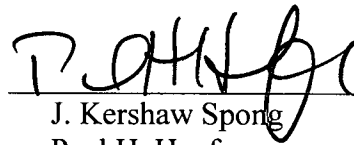
Argument sections III (b), (c), and (d), Appellants' counterclaims fit squarely within the jury waiver provisions. Therefore, the trial court's Order Striking Jury Demand should be affirmed.

CONCLUSION

Based on the foregoing, the facts relied upon in the record come within the scope of the jury waiver provisions and the waivers should be enforced. The trial court's decision should be affirmed.

Dated this 10th day of November, 2015.

By: _____



J. Kershaw Spong
Paul H. Hoefler
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

Civil Action No. 2014-CP-40-2968
Appeal No.: 2015-000158

RECEIVED
NOV 10 2015
SC Court of Appeals


Branch Banking and Trust Company Respondent,

v.

Elie Abikhaled and Ghazi Abikhaled Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.



J. Kershaw Spong
Paul H. Hoefler
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Respondent

November 10, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

NOV 10 2015

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

SC Court of Appeals

Civil Action No. 2014-CP-40-2968
Appeal No.: 2015-000158

Branch Banking and Trust CompanyRespondent,

v.

Elie Abikhaled and Ghazi AbikhaledAppellants.

PROOF OF SERVICE

I hereby certify that I have this 10th day of November served the Respondent's Final Brief by mailing it postage prepaid, in the United States mail, with postage affixed as follows:

Thomas E. Lydon
McAngus Goudelock & Courie, LLC
1320 Main Street, 10th Floor
Post Office Box 12519
Columbia, SC 29211



J. Kershaw Spong, Esq.
Paul H. Hoefler, Esq.
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Respondent

November 10, 2015