

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

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DEC 14 2015

SC Court of Appeals

Appellate Case No.: 2015-001149

PNC Bank, N.A., successor to RBC Bank (USA),

Respondent,

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.,

Appellants.

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TABLE OF CONTENTS

Table of Authorities	iii
Argument	1
1. Respondent misidentifies the issues presented to this Court	1
A. The only jury trial waivers at issue are those in the amended and restated loan agreements	2
B. Appellants do not argue that they were unaware of the jury trial waivers	3
2. Appellants' counterclaims have merit	4
3. <u>Blackburn</u> did not address the issue presented in this case	5
4. There is no South Carolina appellate case holding that to avoid a jury trial waiver a party must challenge the waiver itself and not the contract that contains the waiver.	6
5. Appellants can pursue their breach of contract causes of action and their claim for rescission	8
6. In its analysis, the trial court treated Appellants' counterclaims as if they are legal and compulsory	9
Conclusion	9

TABLE OF AUTHORITIES

Cases

<u>AttorneyFirst LLC v. Ascension Entertainment</u> , 144 Fed. Appx. 283 (4th Cir. 2005)	7
<u>Bank of N.Y. v. Cheng Yu Corp.</u> , 413 N.Y.S.2d 471 (N.Y. App. Div. 1979)	6
<u>Beach Co. v. Twillman, Ltd.</u> , 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002).....	7
<u>Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.</u> , 361 S.C. 544, 606 S.E.2d 752 (2004)	7
<u>C&C Wholesale, Inc. v. Fusco Mgmt. Corp.</u> , 564 So.2d 1259 (Fl. Ct. App. 1990).....	6
<u>City of Beaufort v. Holcombe</u> , 369 S.C. 643, 632 S.E.2d 894 (Ct. App. 2006).....	7
<u>Horton v. Horton</u> , 487 S.E.2d 200 (Va. 1997).....	8
<u>J.P. Morgan Sec., Inc. v. Ader</u> , 127 A.D. 3d 506, 9 N.Y.S.3d 181 (N.Y. App. Div. 2015)	6
<u>Johnson v. Key Equip. Fin.</u> , 367 S.C. 665, 627 S.E.2d 740 (2006).....	4
<u>Jumper v. Queen Mab Lumber Co.</u> , 115 S.C. 452, 106 S.E. 473 (1921)	8
<u>Keels v. Pierce</u> , 315 S.C. 339, 433 S.E.2d 902 (Ct. App. 1993)	7
<u>Lane v. Gilbert Constr. Co., Ltd.</u> , 383 S.C. 590, 681 S.E.2d 879 (2009).....	7
<u>N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.</u> , 307 S.C. 533, 416 S.E.2d 637 (1992)	7
<u>State Farm Mut. Auto. Ins. Co. v. Turner</u> , 303 S.C. 99, 399 S.E.2d 22 (Ct. App. 1990).....	8
<u>Wachovia Bank, Nat. Ass'n v. Blackburn</u> , 407 S.C. 321, 755 S.E.2d 437 (2014)	5-6; 9

Statutes and Court Rules

South Carolina Rule of Civil Procedure 8(a).....	8
--	---

Other Authorities

Restatement (Second) of Contracts § 164.....	3-4
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Restatement (Second) of Contracts § 237.....	8
Williston on Contracts § 63:3	8

ARGUMENT¹

Despite Respondent's attempt to attack Appellants' arguments from every possible angle, one fact remains unchallenged: the trial court struck Appellants' jury trial demand based upon jury trial waivers contained in contracts that Appellants challenge as unenforceable because they were procured by fraud and its bad faith. The trial court's decision, if upheld, would deprive Appellants of the constitutionally-protected right to a jury trial on those claims based upon agreements that very well might not be enforceable at all. The trial court erred in so ruling and this Court should reverse.

1. Respondent misidentifies the issues presented to this Court.

In its brief, Respondent incorrectly identifies the issues before this Court in two key respects. First, Respondent takes the position that all of the jury trial waivers contained in the loan documents entered into between the parties over the course of the nearly fifteen-year banking relationship are at issue. In fact, the only jury trial waivers at issue are those contained in the amended and restated loan agreements, the agreements upon which Respondent's claims against Appellants are based. Second, Respondent devotes a portion of its brief to arguing that parties are bound by the agreements they sign even if they did

¹ In setting forth its Counter-Statement of the Case, Respondent complains that the Statement of the Case in Appellants' Initial Brief contains "contested matter," "numerous factual inaccuracies," and "improper conclusions and matters." Appellants disagree with Respondent's characterization of Appellants' Statement of the Case, as Appellants' statements are supported by the factual record developed in this case. Additionally, Respondent's Counter-Statement of the Case contains factual allegations to which Appellants do not concede and which are not supported by the record. For example, Respondent states that the parties entered into loan modifications which cross-collateralized the loans in 2009 for the purpose of remedying Appellant Debbie Rice-Marko's under-collateralized position on her line of credit. [Br. of Resp. 5]. In fact, the purpose of the cross-collateralization was to improve the overall collateral position of Respondent. (R. p. 1100a, line 20 – R. p. 1100c, line 7.) Appellants expressly reserve the right to contest all factual allegations contained in Respondent's brief.

not read them or are unaware of their terms. [Br. of Resp. 12]. This argument is irrelevant to the issue before this Court. Appellants do not take the position that they were unaware of the relevant jury trial waivers. The issue, as presented in Appellants' initial brief, is whether, having asserted that Respondent misrepresented material facts and acted in bad faith in inducing Appellants to enter into the amended and restated loan agreements, Appellants are entitled to a jury trial on the enforceability of those agreements.

A. The only jury trial waivers at issue are those in the amended and restated loan agreements.

Respondent focuses on the fact that “[l]oan documents [executed by the parties] as early as 2001 contained jury trial waivers” and that “[o]ver the years, Appellants waived their jury trial rights in at least 84 loan documents.” [Br. of Resp. 7]. But Respondent is not suing on the 2001 loan documents. Respondent is suing on the loan documents as they were amended and restated in 2009 and 2011. At issue in this case is Respondent's ability to proceed against Appellants pursuant to the cross-collateralized, cross-defaulted loan documents—the loan documents executed in 2009 and 2011. It is the enforceability of the jury trial waivers in those documents that is at issue, not the enforceability of every jury trial waiver Appellants have ever executed over the course of the banking relationship between the parties. Because Appellants are attacking the enforceability of the amended and restated loan agreements, it is prejudicial for the court to use jury trial waivers in those documents to deprive Appellants of their constitutionally-protected right.

The trial court found and Respondent argues that even if Appellants were successful in attacking the enforceability of the amended and restated loan documents, prior jury trial waivers executed by Appellants would apply. In so concluding, the trial court improperly decided an issue that was not before it: the enforceability of jury trial waivers contained in

loan documents that are not the basis for Respondent's causes of action against Appellants. The question is whether Appellants are entitled to a jury trial to determine the enforceability of the 2009 and 2011 amended agreements. What happens in the event Appellants prove that Respondent is not entitled to enforce the amended and restated agreements was not before the trial court and is not before this Court. The issue is whether Appellants are entitled to a jury trial on the issue of the enforceability of the amended and restated loans. As set forth in Appellants' initial brief, and discussed further below, this Court should answer that question in the affirmative.

B. Appellants do not argue that they were unaware of the jury trial waivers.

In its brief, Respondent acts as if Appellants have taken the position that they did not read the loan documents or were unaware of the jury trial waivers and, therefore, are not bound by them. Respondent cites law for the propositions that parties are bound by the agreements they sign, that parties who sign documents are responsible for reading the documents they sign and making sure of their contents, and that parties cannot avoid the effect of agreements by claiming they did not read them. [Br. of Resp. 12]. Respondent further states that "South Carolina courts routinely enforce contractual waivers where parties were represented by counsel in connection with the contract." [Br. of Resp. 13]. Nowhere have Appellants taken the position that they did not read the relevant loan documents or that they were unaware of the jury trial waivers.

The relevant law, which Respondent does not address, provides that a contract procured by misrepresentation or bad faith is not enforceable. See Restatement (Second) of Contracts § 164 ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in

relying, the contract is voidable by the recipient.”); Johnson v. Key Equip. Fin., 367 S.C. 665, 668, 627 S.E.2d 740, 741 (2006) (“[W]hen wrongs arise inducing a party to execute a contract and not directly from the breach of that contract, the remedies and limitations specified by the contract do not apply.”). Appellants should not be bound by the jury trial waivers because of Respondent’s bad faith and misrepresentations, not because Appellants claim not to have known about the waivers.

2. Appellants’ counterclaims have merit.

On the one hand, Respondent complains that Appellants spent “a substantial portion of their brief discussing the merits of their counterclaims.” [Br. of Resp. 10]. On the other hand, Respondent argues that “Appellants’ position would render a jury trial waiver virtually meaningless in any agreement because a party seeking to avoid its effect would only need to assert that the agreement is unenforceable to obtain a jury trial.” [Br. of Resp. 23-24].

Appellants devoted a substantial portion of their initial brief to the merits of their counterclaims in order to illustrate that this is not a case in which Appellants have asserted hollow counterclaims that find no support in the factual record of the case just to try to avoid a jury trial waiver. To the contrary, this is a unique case in which the uncontroverted factual record supports the conclusion that Respondent, in its dealings with Appellants, misrepresented material facts, acted in bad faith, and improperly divulged confidential and personal information about Appellants to third parties. Appellants are not advocating for a blanket rule of law that a counterclaim challenging the enforceability of a contract automatically negates any jury trial waiver contained within that contract. Appellants

simply are advocating that, based on the factual record in this case, Appellants must be entitled to a jury trial to determine the enforceability of the loan documents at issue.

Moreover, while Respondent expresses concern that adopting Appellants' position would render jury trial waivers meaningless because a party could avoid the effect of the waiver by attacking the enforceability of the agreement, Respondent's position poses a greater concern. In Respondent's view, a jury trial waiver is valid and enforceable without regard to the validity and enforceability of the contract containing the waiver. This is completely contrary to the strict scrutiny with which South Carolina courts view jury trial waivers and simply cannot be the law. If the contract as a whole is not enforceable, there is no waiver of the right to a jury trial.

3. Blackburn did not address the issue presented in this case.

Respondent argues the South Carolina Supreme Court's decision in Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014) is controlling. However, nowhere in the Blackburn decision did the court address the issue presented in this case. In Blackburn, the court first considered whether jury trial waivers contained in loan documents were broad enough to cover counterclaims asserted by foreclosure defendants. After determining that the jury trial waivers were broad enough to cover the counterclaims, the court then considered whether the jury trial waivers were knowingly and voluntarily executed by the defendants. There is no discussion or ruling anywhere in the Blackburn decision concerning whether the defendants' attack on the enforceability of the agreements containing the jury trial waivers impacted their right to a jury trial on that issue. That issue was not presented to the court and was not ruled upon by the court. Respondent simply assumes, based on the similar factual posture of the Blackburn case to the instant case, that

the Blackburn court considered and dismissed that argument. Such an assumption is not supported by the Blackburn opinion and the issue before this Court is a novel one.

4. There is no South Carolina appellate case holding that to avoid a jury trial waiver a party must challenge the waiver itself and not the contract that contains the waiver.

While Respondent advocates for the position, Respondent does not cite—and Appellants are not aware of—any South Carolina case law that stands for the proposition that in order to avoid a jury trial waiver a party must challenge the waiver itself and not the broader contract containing the waiver. While Respondent cites cases from some jurisdictions supporting that proposition, cases from other jurisdictions support the opposite conclusion. See, e.g., J.P. Morgan Sec., Inc. v. Ader, 127 A.D. 3d 506, 507, 9 N.Y.S.3d 181, 184 (N.Y. App. Div. 2015) (holding that a contractual jury waiver provision is inapplicable to a cause of action that challenges the validity of the underlying agreement); C&C Wholesale, Inc. v. Fusco Mgmt. Corp., 564 So.2d 1259 (Fla. App. 1990) (recognizing that, if there were allegations that a lease as a whole was legally unenforceable, the jury waiver provision was inapplicable to claims arising out of the lease); Bank of N.Y. v. Cheng Yu Corp., 413 N.Y.S.2d 471 (N.Y. App. Div. 1979) (allowing jury trial on defense of misrepresentation because the allegations, if proven, “would void the instrument as to [the defendant], including the jury waiver clause.”).

Respondent also notes that “a party cannot avoid *arbitration* through rescission of an entire contract when there is no independent challenge to the arbitration clause itself.” [Br. of Resp. 15]. Respondent argues that the Court should treat jury trial waivers the same as arbitration agreements. Respondent’s argument in this respect suffers from an obvious flaw, however, as South Carolina courts treat arbitration clauses and jury trial waivers very

differently. “South Carolina law generally *favors arbitration*.” Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004) (emphasis added). “Any doubts concerning the scope of arbitrable issues should be resolved *in favor of arbitration*.” Id. (emphasis added). In fact, “unless the Court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” Id.

To the contrary, the right to a trial by jury is a fundamental right in South Carolina and “any abridgement of that right is *subject to strict scrutiny*.” Lane v. Gilbert Constr. Co., Ltd., 383 S.C. 590, 600, 681 S.E.2d 879, 884 (2009) (emphasis added) (citing City of Beaufort v. Holcombe, 369 S.C. 643, 632 S.E.2d 894 (Ct. App. 2006); see also Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2002); N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992); Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). As the Fourth Circuit has recognized, “courts must indulge every reasonable presumption *against waiver*.” AttorneyFirst LLC v. Ascension Entertainment, 144 Fed. Appx. 283, 290 (4th Cir. 2005) (emphasis added).

Given the fact that South Carolina courts view jury trial waivers with much greater scrutiny than they view arbitration agreements, Respondent’s attempt to equate the two is unavailing. The law favors arbitration agreements. The law disfavors jury trial waivers. There is no South Carolina law that supports Respondent’s position that in order to avoid the effect of a jury trial waiver a party must challenge the waiver itself and not the broader contract containing the waiver. And given the law’s protection of the constitutional right to a jury trial, this Court should not adopt that position.

5. Appellants can pursue their breach of contract causes of action and their claim for rescission.

Respondent argues that “Appellants cannot maintain causes of action for breach of [contract] against Respondent while also seeking rescission of those very same contracts and the jury trial waivers contained therein.” [Br. of Resp. 23]. Respondent’s position in this respect is not supported by the law. First, Rule 8(a), SCRPC, makes clear that “[r]elief in the alternative or of several different types may be demanded.” Appellants seek various forms of relief, including money damages and rescission, for claims sounding in breach of contract and tort. Respondent has not filed a motion seeking to require Appellants to elect their remedy and that issue is not before this Court.

Moreover, the causes of action asserted and remedies sought are not inconsistent. To the contrary, Appellants’ have asserted separate causes of action that, if proven, may preclude Respondent from enforcing the agreements or may entitle Appellants to a monetary judgment against Respondent. Appellants assert a cause of action for negligent misrepresentation. In addition to money damages, one possible remedy for negligent misrepresentation in connection with the execution of a contract is rescission of the contract. See, e.g., State Farm Mut. Auto. Ins. Co. v. Turner, 303 S.C. 99, 102, 399 S.E.2d 22, 23 (Ct. App. 1990) (citing Jumper v. Queen Nab Lumber Co., 115 S.C. 452, ___, 106 S.E. 473, 476 (1921)); Restatement (Second) of Contracts § 164. Appellants also assert a cause of action for breach of the express terms of the contracts and breach of the implied covenant of good faith and fair dealing. These breaches may entitle Appellants to money damages or may result in Respondent not being entitled to enforce the contracts against Appellants. See, e.g., Williston on Contracts § 63:3 (citing Horton v. Horton, 254 Va. 111, 487 S.E.2d 200 (1997)); Restatement (Second) of Contracts § 237. Appellants have asserted

various causes of action and requested various forms of relief and they are entitled to do so under the law. Respondent's argument that Appellants' position is inconsistent is unavailing.

6. In its analysis, the trial court treated Appellants' counterclaims as if they are legal and compulsory.

Respondent contends that this Court does not need to determine whether Appellants' counterclaims are (1) legal or equitable and, if legal, (2) compulsory or permissive. Appellants agree because the trial court treated Appellants' counterclaims as if they are legal and compulsory, and Appellants do not challenge that conclusion.

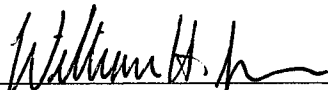
In Blackburn, the South Carolina Supreme Court established that, in determining whether a counterclaim asserted in response to an equitable complaint gives rise to the right to a jury trial, the court must first determine whether the counterclaim is legal or equitable. 407 S.C. at 329-330, 755 S.E.2d at 442-42. Second, if the counterclaim is legal, the court must determine whether the counterclaim is permissive or compulsory. Id. Finally, if the counterclaim is legal and compulsory, "the defendant has a right to a jury on the counterclaim *unless a valid jury trial waiver exists that encompasses the counterclaim.*" Id. (emphasis added). In this case, the trial court, by focusing its decision on the enforceability of the jury trial waivers, determined that Appellants' counterclaims are legal and compulsory. Discussion of whether the waivers were effective would not have been relevant if the court determined otherwise. Accordingly, Appellants agree with Respondent that this Court need only consider whether Appellants waived the right to the jury trial.

CONCLUSION

Appellants are entitled to a jury trial in this matter. The jury trial waivers contained in the 2009 and 2011 amended and restated loan documents that are the basis of

Respondent's claims against Appellants cannot deprive Appellants of their constitutional right to a jury trial because Appellants have asserted meritorious counterclaims that attack the very enforceability of those documents. Additionally, previously-executed loan documents that contain jury trial waivers are of no consequence because, in the present action, Respondent seeks to enforce the amended and restated loan documents. The trial court erred in striking Appellants' jury demand and this Court should reverse.

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CERTIFICATE OF COUNSEL

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

[Signatures follow]

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