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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2015-000158

Branch Banking and Trust Company ..... Respondent,

v.

Elie Abikhaled and Ghazi Abikhaled .....Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUE ON APPEAL

DID THE LOWER COURT ERR IN STRIKING APPELLANTS' DEMAND FOR JURY TRIAL?

STATEMENT OF THE CASE

Respondent Branch Banking and Trust Company ("BB&T") filed this action to collect on guaranties given by Appellants Elie Abikhaled and Ghazi Abikhaled ("Guarantors") in connection with a series of loans to Cedar Development II, LLC ("Borrower"). Prior to filing this action, BB&T filed an action to foreclose on the promissory note and mortgage from Borrower (Civil Action No. 2013-CP-40-5115).

In response to BB&T's Complaint in this proceeding, Guarantors filed an Answer in which they asserted counterclaims for breach of 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 BB&T's failure to provide financing that it promised for upfitting the building that is the subject of the foreclosure action. In their Answer, Guarantors demanded a jury trial. BB&T timely filed a Reply to the counterclaims.

BB&T then filed a motion to strike Guarantors' demand for a jury trial. The motion was heard by the Honorable Deadra L. Jefferson on October 16, 2014. On December 19, 2014, Judge Jefferson entered an Order granting the motion and striking Guarantors' demand for a jury trial. Guarantors received written notice of the Order on December 23, 2014, and timely served their Notice of Appeal on January 21, 2015.

STATEMENT OF FACTS

On March 21, 2008, Borrower and BB&T entered into a mortgage loan transaction for the construction of a commercial building in Richland County. In connection with that

transaction, Borrower executed a promissory note and mortgage in favor of BB&T. (R. p. 28, ¶25). The mortgage loan was personally guaranteed by Guarantors pursuant to pre-existing guaranty agreements which had been executed in connection with a prior loan. Pursuant to the terms of those guaranties, Guarantors had guaranteed all obligations of Borrower to BB&T. (R. p. 12, ¶¶7, 8; R. pp. 18-25).

Borrower built the commercial property for the purpose of leasing office and retail space. BB&T was aware of Borrower's purpose in constructing the building and agreed to assist Borrower in developing and leasing the property. (R. p. 28, ¶26). As is customary in commercial leases, prospective tenants often require an upfit allowance or upfit work from the landlord before agreeing to lease office or retail space. In the course of the loan negotiations between Borrower, BB&T, and Guarantors, BB&T agreed to loan Borrower the funds needed to upfit the building to meet the requirements of the prospective tenants. (R. p. 29, ¶¶28, 29).

As prospective tenants became interested in leasing space from Borrower, the need for the upfit funds became imperative. However, BB&T refused to provide the upfitting money. As a result, potential tenants who were ready, willing and able to enter into a lease with Borrower refused to sign leases due to Borrower's inability to upfit the property. Unable to perform the upfits necessary to lease the property, Borrower ultimately defaulted on its loan payments to BB&T.

BB&T subsequently filed an action to foreclose on the promissory note and mortgage from Borrower (Civil Action No. 2013-CP-40-5115). Thereafter, BB&T filed this action, a separate lawsuit based on the guaranties executed by Guarantors. In response to BB&T's Complaint in this proceeding, Guarantors filed an Answer in which they asserted counterclaims for breach of 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 BB&T's failure to provide financing that it promised for upfitting the building that is the subject of the foreclosure action.

ARGUMENTS

I. STANDARD OF REVIEW

Whether a party is entitled to a jury trial is a question of law. *Carolina First Bank v. BADD, LLC*, Opinion No. 27486 (Sup. Ct. 1/28/2015). This question is reviewed de novo by the appellate court, owing no deference to the lower court's decision. *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014).

II. THE LOWER COURT ERRED IN DETERMINING THAT THE JURY TRIAL WAIVER IN THE GUARANTY AGREEMENTS PRECLUDED APPELLANTS' RIGHT TO A JURY TRIAL FOR MISCONDUCT THAT OCCURRED MORE THAN THREE YEARS AFTER THE GUARANTIES WERE SIGNED.

In 2013, BB&T filed an action against Borrower to foreclosure on the promissory note and mortgage, but did not join Guarantors as defendants in that action. Thereafter, on May 8, 2014, BB&T filed this action against Guarantors. (R. pp. 11-25). In response to BB&T's Complaint, Guarantors filed an Answer in which they asserted counterclaims for breach of covenant of good faith and fair dealing, interference with prospective contractual relations, accounting and appraisal, and negligent misrepresentation. (R. p. 28, ¶¶25-27). The factual basis underlying the counterclaims is BB&T's failure to provided financing that it promised for upfitting the building that is the subject of the foreclosure action. (R. p. 29, ¶¶28-29).

An action to collect on a guaranty is any action at law. *Crafton v. Brown*, 346 S.C. 347, 550 S.E.2d 904 (Ct. App. 2001). As such, either party is entitled to a jury trial. However, the

form guaranty which serves as the basis for BB&T's lawsuit contains a provision that attempts to waive Guarantors' right to a jury trial. The waiver states that it extends to "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." (R. p. 18-25, Exhibits B and C). Although a party may waive the right to a jury trial by contract, such a waiver must be strictly construed, as the right to trial by jury is a substantial right. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002).

The actions of BB&T in failing to provide promised financing for upfitting are not related to the pre-existing lending relationship between the parties. Therefore, the counterclaims asserted by Guarantors are not subject to the jury trial waiver. Guarantors could not have contemplated that in signing the guaranties more than three years before the mortgage loan transaction that is the subject of this action, they were waiving their right to a jury trial on claims arising from future misrepresentations and misconduct by BB&T.

To the extent that the jury trial waiver attempts to waive Guarantors' right to a jury trial on matters not directly related to the loan that is the subject of the guaranty, the waiver is unconscionable. In South Carolina, 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 Services., 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. *Simpson v. MSA of*

Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). To extend the scope of the waiver to BB&T's actions in future dealings with Guarantors would be unconscionable.

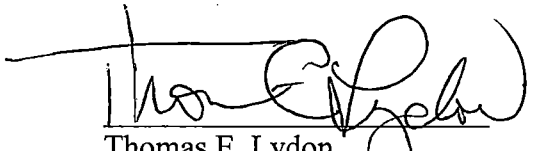
South Carolina appellate courts have recently addressed the issue of jury trial waivers in the context of mortgage foreclosure actions. *See Carolina First Bank v. BADD, LLC*, Op. No. 27486 (S.C. Sup. Ct. 1/28/2015); *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *Wachovia Bank, N.A. v. Blackburn*, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011). In *Wachovia Bank v. Blackburn*, the Court of Appeals held that the jury trial waivers did not extend to the counterclaims filed by the borrower and the guarantors, because the borrower and guarantors could not have contemplated that in signing the note and guaranty, they were waiving the right to a jury trial on future claims they may have against the lender. The Supreme Court subsequently reversed the Court of Appeals, but not because it found that the defendants had waived their right to a jury trial solely by virtue of the language of the note and guaranties. Instead, the Supreme Court held that because the underlying action was an action in equity, the defendants were not entitled to a jury trial on any counterclaims that were beyond the scope of the waiver since such counterclaims would be permissive, *citing Johnson v. S.C. National Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). However, the matter before this Court is not an equitable action, it is an action at law. *Crafton v. Brown*, 346 S.C. 347, 550 S.E.2d 904 (Ct. App. 2001). Likewise, the holding in *Carolina First Bank v. BADD, LLC* that the guarantors were not entitled to a jury trial is also inapplicable because that case was also decided in the context of a mortgage foreclosure action.

In this case, BB&T filed an equitable action to foreclosure the promissory note and mortgage against Borrower. Had it included Guarantors as defendants in that action, the Supreme Court's decisions in *Carolina First Bank v. BADD, LLC* and *Wachovia Bank v. Blackburn* would

be controlling. Instead, BB&T brought two separate actions: an equitable action to foreclosure the mortgage and this action at law against the guarantors. As such, BB&T cannot avail itself of the Supreme Court's holdings in *Wachovia Bank v. Blackburn* and *Carolina First Bank v. BADD, LLC*. The alleged actions of BB&T in failing to provide promised financing are not related to the pre-existing lending relationship between the parties. Therefore, the counterclaims asserted by Guarantors are beyond the scope of the jury trial waiver contained in the guaranty. Guarantors could not have contemplated that in signing the guaranty, they were waiving their right to a jury trial on claims arising from future misrepresentations and misconduct by BB&T.

CONCLUSION

The guaranties that are the subject of this action were executed by Appellants in 2007. The underlying loan was not made until 2011, and the misconduct by BB&T did not occur until after that. The jury trial waiver contained in the original guaranty agreements should not preclude Appellants' right to a jury trial for misconduct that occurred in connection with a loan that was made more than three years after the guaranties were executed.



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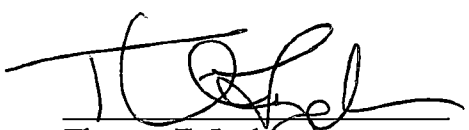
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellants complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I hereby certify that I have this 6th day of November, 2015, served the Final Brief of Appellants and the Certificate of Counsel by mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

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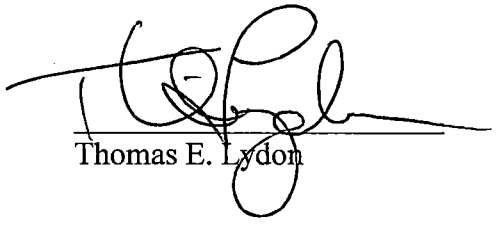

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