

TD Banknorth, N.A.,

Plaintiff

v.

DECISION AND ORDER

Benjamin Hawkins and
Timothy Morse,

Defendants

This matter is before the Court on the Motion of TD Banknorth, N.A., to Strike Demand for Jury Trial.

In this action, Plaintiff seeks to enforce the Defendants' individual guaranties for the repayment of commercial loans issued to Morse Brothers, Incorporated. Defendants request that the matter be tried to a jury. Plaintiff asserts that Defendants have waived their right to a jury trial, and asks that the matter be tried to the Court.

The loan¹ guaranteed by Defendants contains the following language:

BORROWER AND GUARANTORS IRREVOCABLY AND UNCONDITIONALLY WAIVER ANY AND ALL RIGHTS, WHETHER ARISING UNDER THE CONSTITUTION OF THE UNITED STATES OR OF ANY STATE, ANY RULES OF CIVIL PROCEDURE, COMMON OR STATUTORY LAW, OR OTHERWISE, TO DEMAND A TRIAL BY JURY IN ANY ACTION, SUIT OR PROCEEDING OR COUNTERCLAIM INVOLVING LENDER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT OR ANY OF THE SECURITY DOCUMENTS.

¹ The parties executed six amendments to the original loan agreement. The sixth amendment provides "[e]xcept as set forth herein, each Guaranty and each Security Agreement shall remain unchanged and is hereby ratified and confirmed." Because the sixth amendment did not alter the waiver language, the terms of the original loan documents and the guaranty remain in effect.

In addition, the signed written guaranty includes the following language upon which Plaintiff relies to support its contention that Defendants have waived their right to a trial by jury:

GUARANTOR HEREBY IRREVOCABLY AND UNCONDITIONALLY ... WAIVES ANY AND ALL PERSONAL RIGHTS UNDER THE LAWS OF ANY STATE ... TO THE RIGHT, IF ANY, TO TRIAL BY JURY ...

Defendants claim that these provisions are unenforceable because a pre-dispute waiver of a right to jury trial is not favored in the law. Defendants also contend that the waiver, even if enforceable, does not apply to Defendants' counterclaims.

In support of their argument that the waiver is unenforceable, Defendants cite decisions in California and Georgia.² Although courts in California and Georgia have not enforced similar waiver provisions, other jurisdictions, including the federal courts, have enforced pre-dispute waivers. *See e.g., Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837-38 (10th Cir. 1988); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986); *Nat'l Equip. Renal, Ltd. V. Hendriz*, 565 F.2d 255, 258 (2d Cir. 1977); *Chase Commercial Corp. v. Owen*, 588 N.E.2d 705, 706-07 (Mass. App. Ct. 1992).

While the Court should scrutinize the circumstances of a pre-dispute waiver of one's right to a trial by jury, the Court does not believe that there is or should be an absolute prohibition against a pre-dispute waiver. Indeed, such an absolute rule would eliminate parties' ability to agree to resolve disputes by arbitration, a common dispute resolution mechanism particularly among those in the business community. Maine law clearly authorizes parties to contract before a dispute arises to resolve the dispute by way of arbitration.³ As the court noted in *Chase Commercial Corp. v. Owen*, 588 N.E.2d 705, 706-07 (Mass. App. Ct. 1992), arbitration agreements go further than a mere jury trial waiver in that they "eliminate not only the right to a jury trial on the merits of a dispute, but the right to any judicial trial."

² *Grafton Partners L.P. v. Superior Court*, 116 P.3d 479, 484 (Cal. 2005); *Bank S., N.A. v Howard*, 444 S.E. 2d 799, 800 (Ga. 1994).

³ 14 M.R.S. § 5927 (2006) provides in pertinent part, "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy **thereafter** arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. (emphasis added).

Given that waivers are enforceable, the question is whether the waiver was “knowingly, voluntarily and intentionally made.” See *Lowe Enters. Residential Ptnrs., L.P. v. Eighth Judicial Dist. Court*, 40 P.3d 405, 408 (Nev. 2002) (citing *Telum, Inc.*, 859 F.2d at 837; *Leasing Service Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986); *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985); *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977). Although no definitive test exists to determine whether the waiver was “knowingly, voluntarily and intentionally made”, many courts have considered the following factors: “(1) the parties’ negotiations concerning the waiver provision, if any, (2) the conspicuousness of the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party’s counsel had an opportunity to review the agreement.” *Lowe Enters. Residential Ptnrs., L.P.*, 40 P.3d at 411.”

Here, the record includes Exhibits A and B to Plaintiff’s motion, Exhibits 1 – 4 to Defendants’ opposition to Plaintiff’s motion, and the Affidavit of Timothy Morse. Review of the record reveals that the waiver language is clearly conspicuous in both the original loan documents and the guaranty. The language is set forth in capital letters which distinguishes it from the regular text. Although the Court cannot discern from this record whether the parties separately negotiated or discussed the specific waiver provision, the exhibits, including the affidavit of Defendant Timothy Morse also establish that the Defendants had the benefit of counsel during the discussions with Plaintiff before the execution of the loan documents. Finally, the Court is convinced that while the parties might not be of equal bargaining power, all of the parties are experienced in business, and in the negotiation of business agreements.

Based upon its review of the parties’ submissions, and the plain language of the agreements, the Court concludes that the parties knowingly contracted for the waiver of their right to a trial by jury “arising out of and in any way connected with” the parties’ agreement. Additionally, contrary to Defendants’ arguments, the Court concludes that the waiver is equally applicable to direct claims and counterclaims. First, the waiver language in the underlying loan documents explicitly provides that counterclaims are included within the scope of the waiver. In addition, a rule that automatically excluded all counterclaims from the waiver would allow a party to try to a jury by way of counterclaim the same claim that it could not try to a jury if the party filed a direct claim. Such a rule would render the waiver meaningless in many instances.

To determine whether Defendants are entitled to a trial by jury in this case, the Court must determine which claims “arise out of or are in any way connected with” the parties’ agreement. Preliminarily, Plaintiff’s direct claims are plainly within the scope of the waiver. Defendants contend that at least some of the counts of the counterclaims do not arise out of the loan agreement and guaranty. Whether the claims in fact are connected to the loan agreement and guaranty is difficult to ascertain on this record. A review of the Defendants’ counterclaims suggests that it is conceivable that some of the claims asserted therein are not connected to the loan documents and guaranty within the meaning of the parties’ agreement. More specifically, the parties’ defamation claims⁴, and Defendant Morse’s fraud claim could be sufficiently unrelated to the parties’ written agreements so as to be outside the scope of the waiver. Consequently, at this stage of the proceedings, Defendants’ right to a trial by jury on the defamation and fraud claims is preserved.

The Court has not, however, determined whether Defendants have an evidentiary basis for the defamation and fraud claims. In other words, the Court makes no determination as to the merit of Defendants’ claims.⁵ Additionally, because the parties have not completed discovery, with further development of the record, Defendants’ claims of defamation and fraud might be proven to be more clearly outside the scope of the waiver, or within the scope of the waiver. The Court will revisit the issue should Plaintiff renew the motion with additional record evidence upon completion of discovery.

Conclusion

Based on the following analysis, the Court orders:

1. The Court grants the Motion of TD Banknorth, N.A., to Strike Demand for Jury Trial on Plaintiff’s direct claims, and Defendants’ counterclaims, except as to Counts VII and VIII of Defendant Morse’s Counterclaim, and Count VI of Defendant Hawkins’ Counterclaim.

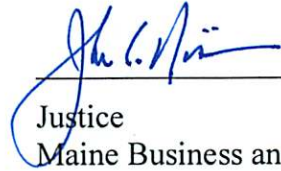
⁴ Defendant Hawkins asserts a defamation claim in Count VI of his counterclaim; Defendant Morse asserts a defamation claim in Count VII of his counterclaim.

⁵ In part, Plaintiff argued that Defendants’ arguments in opposition to Plaintiff’s motion fail because the conduct upon which Defendants’ rely (i.e., statements of Plaintiff’s representatives) does not give rise to an actionable claim. The Court specifically does not reach the merits of Plaintiff’s contention.

2. Plaintiff may renew its request regarding the claims to which Defendants are entitled to a trial by jury provided that Plaintiff provides the Court with additional record evidence to support Plaintiff's contention that the claims are within the scope of the waiver.⁶

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Dated: 1/15/08


Justice
Maine Business and Consumer Court

⁶ Presumably, with the completion of discovery, the parties will have developed a record from which they and the Court can determine whether the counts are within the scope of the waiver.