

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-WB-RE-10-16

CAMDEN NATIONAL BANK,)
)
Plaintiff/Counterclaim)
Defendant,)
)
v.)
)
D & F PROPERTIES, LLC, DUMONT'S)
PIT STOP, INC., DUANE J. DUMONT,)
and FRANCES DUMONT,)
)
Defendants/Counterclaim)
Plaintiffs/Cross-claim)
Plaintiffs,)
)
COASTAL ENTERPRISES, INC.,)
)
Party-in-Interest/Cross-claim)
Defendant,)
)
and)
)
U.S. SMALL BUSINESS)
ADMINISTRATION,)
)
Party-in-Interest)
_____)
)
D & F PROPERTIES, LLC, DUMONT'S)
PIT STOP, INC., DUANE J. DUMONT,)
and FRANCES DUMONT,)
)
Third-party Plaintiffs,)
)
v.)
)
DIANE McMANUS and SUZANNE)
UMLAND,)
)
Third-party Defendants)
)

ORDER
(Motion to Strike Jury Trial)

Camden National Bank and Diane McManus move to strike the jury-trial demand on the counterclaims and third-party claims brought by D & F Properties, LLC, Dumont's Pit Stop, Inc., Duane J. Dumont, and Frances Dumont (collectively, "the Dumont parties"), based on ten jury waivers signed by the Dumont parties in their various capacities over the course of their business relationship with the Bank.

The first five jury waivers (the "2006 waivers") signed by the Dumont parties relate to a 2006 loan in the amount of \$195,900 made by the Bank to the Dumont parties. Four of these waivers are essentially identical, and only vary as to whether the Dumonts were acting as the borrowers or guarantors in the note (Exh. 1) and personal guaranties (Exhs. 2-4). These waivers provide:

It is mutually agreed by the Bank, the Debtor and the Guarantor that the Bank, the Debtor and the Guarantor shall, and hereby do, waive trial by jury in any action, proceeding, counterclaim, objection to claim in a bankruptcy case or other litigation of any type brought by the Bank, the Debtor or the Guarantor against any of the others on any matter whatsoever arising out of, related to, or in any way connected with this Guaranty and/or the transactions or documents contemplated hereby.

(Exh. 2 at 4; Exh. 3 at 5; Exh. 4 at 5.) The fifth jury waiver is in the mortgage related to the 2006 loan, and provides:

GRANTOR HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES AND GRANTEE, BY ITS ACCEPTANCE OF THE NOTE, IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY AND ALL RIGHTS TO TRIAL BY JURY IN ANY ACTION, SUIT, OR COUNTERCLAIM ARISING IN CONNECTION WITH, OUT OF, OR OTHERWISE RELATING TO THE LOAN, THE NOTE, THIS MORTGAGE, OR ANY OTHER OF THE LOAN DOCUMENTS.

(Exh. 5 at 19.)

The next four jury waivers (the "2007 waivers") signed by the Dumont parties relate to a 2007 loan in the amount of \$20,000 made by the Bank to the Dumont parties. Similar to the

2006 note and guaranties, these four waivers are essentially identical, and again only vary as to whether the Dumonts were acting as borrowers or guarantors in the note (Exh. 6) and personal guaranties (Exhs. 7-9.) The waivers provide:

Guarantor hereby expressly and voluntarily waives and an all rights whether arising under the Maine constitution, and any Rules of Civil Procedure, common law or otherwise, to demand a trial by jury in any action, suit, proceeding or counterclaim involving Lender as to any matter, claim or cause of action whatsoever *arising out of or in any way related to any agreement or loan with Lender or any of the transactions contemplated between the parties.*

(Exh. 7 at 1; Exh. 8 at 1; Exh. 9 at 1 (emphasis added).)

Finally, the jury waiver in the commitment letter sent by the Bank to the Dumonts related to the unconsummated 2009 loan (the “2009 waiver”) provides: “Borrower and each Guarantor hereby expressly waives trial by jury *in any action, proceeding or counterclaim brought by Bank against all or any one of them based upon, arising out of, or connected with this Commitment or any other document executed in connection with the Loan.*” (Exh. 10 at 10 (emphasis added).) Based on these waivers, the Bank and McManus contend that the Dumont parties have waived their right to a jury trial in their counterclaims and third-party claims against them. (M. Strike 4-7.)

At oral argument the parties agreed that the proper analysis for the Court to apply is that set forth in *Medical Air Technology Corp. v. Marwan Investment, Inc.*, 303 F.3d 11 (1st Cir. 2002). Noting that “[t]here is a presumption against denying a jury trial based on waiver, and waivers must be strictly construed,” the first step is to determine whether the plain language of the waiver “unambiguously covers the claims asserted.” *Id.* at 18-19. If “a contractual jury waiver does encompass the asserted claims, courts will not enforce the jury waiver unless it was entered into knowingly and voluntarily.” *Id.* at 19. Whether a jury waiver has been entered into knowingly and voluntarily is based on the totality of the circumstances at the time the parties

signed the agreement, including factors such as “the waiving party’s education and business experience, the respective roles of the parties in determining the terms of the waiver, the amount of time the waiving party had to consider the waiver, whether the waiving party was represented by counsel,” and consideration for the waiver. *Id.* at 19 n.4.

In the present case, the counterclaims and third-party claims asserted by the Dumont parties all relate to the failed 2009 loan transaction, and were asserted in response to the Bank’s foreclosure action on the 2006 and 2007 notes. Based on the plain language of the 2006 waivers, the Court concludes that those waivers do not encompass the counterclaims and third party claims asserted. The waivers within the note, guaranties, and mortgage limit their applicability to the subject transaction, i.e. the 2006 loan, and do not extend to any other transaction between the parties. Similarly, the 2009 waiver also does not encompass the asserted counterclaims and third-party claims. The 2009 waiver specifically limits its application to “any action, proceeding or counterclaim brought by Bank”; the waiver does not apply to actions, proceedings, or counterclaims brought by the Dumont parties. Thus, the only waivers that could potentially limit the Dumont parties’ right to a trial by jury are the 2007 waivers.

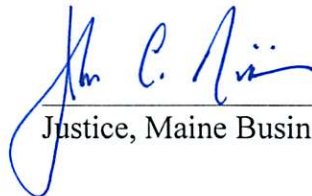
The 2007 waivers prohibit a jury trial “in any action, suit, proceeding or counterclaim involving Lender as to any matter, claim or cause of action whatsoever arising out of or in any way related to any agreement or loan with Lender or any of the transactions contemplated between the parties.” The Bank and McManus contend that the 2007 waivers prohibit a jury trial on the Dumont parties’ counterclaims and third-party claims because 1) the counterclaims were brought in response to a foreclosure action on the 2007 note, and 2) the plain language states that the waiver applies to “any action whatsoever arising out of or in any way related to any agreement or loan with Lender.”

The Bank's arguments are unavailing. As noted, jury trial waivers must be strictly construed because they involve the relinquishment of a fundamental right. *See Medical Air Technology Corp.*, 303 F.3d at 18. Simply stated, neither the 2007 waivers, nor any other waiver signed by the Dumont parties, expressly provides for the waiver of a right to a trial by jury for all future transactions. Indeed, had Camden National Bank and Diane McManus considered the 2007 waivers to apply to all future transactions, they would have had no need to include a waiver in the documentation prepared in connection with the proposed 2009 transaction. The Court concludes, therefore, that the Dumont parties have not waived their right to a trial by jury on the issues generated by the counterclaims that they have asserted in this action.

Based on the foregoing analysis, the Court denies the motion to strike jury trial filed by Camden National Bank and Diane McManus.

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

Date: 9/29/11



Justice, Maine Business & Consumer Court

Entered on the Docket: 9-30-11
Copies sent via Mail Electronically

STATE OF MAINE
Business and Consumer Court

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