



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD 703-352-4139

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January 31, 2018

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Jon F. Mains

JON F. MAINS & ASSOCIATES, L.L.C.
3955 Chain Bridge Road, 2nd Floor
Fairfax, Virginia 22030
Counsel for Plaintiff

Mohamed Seifeldein

LAW OFFICES OF SEIFELDEIN & ASSOCIATES
6066 Leesburg Pike, Suite 420
Falls Church, Virginia 22030
Counsel for Defendants Abdela Mohammed and Mohaba Mohaba

John C. Altmiller

PESNER KAWAMOTO, PLC
7926 Jones Branch Dr, Suite 930
McLean, Virginia 22102
Counsel for Defendant DMV Realty LLC

Re: *HZ Retail LLC vs. Abdela Mohammed et al.*, CL-2017-8328

Dear Counsel:

In this commercial lease dispute, the plaintiff, HZ Retail Inc., a Virginia LLC (“HZ Retail”) moves the court to strike the defendants, Mr. Abdela Mohammed and Mohaba Mohaba (“Defendants”) demand for a trial by jury against HZ Retail, based upon a provision in the lease agreement between the parties (“the Agreement”). That provision purported to waive, each party's right to a jury trial arising out of disputes concerning the Agreement. Defendants contend that this contractual provision should not be legally enforced. For the reasons set out below, this court holds that the written jury waiver executed by the Parties is enforceable, and, as a result, the motion to strike the jury demand is granted.

OPINION LETTER

BACKGROUND

On July 7, 2016 the parties entered into a 25 page written Agreement as well as a 4-page guarantee of lease agreement for a commercial space located in Annandale, Virginia. The lease contracted for the specific purpose of establishing a deli/market in the commercial space. To preserve the diversity of businesses in the area, the lease stipulated that the only authorized use would be for a deli/market as set forth in the contract. The lease sets forth a commercial space of approximately 1900 square feet and requires that the Defendants observe all local and state laws, including ordinances.

The lease further stipulated that Defendants monthly rent payment was to begin 90 days after the parties had commenced the Agreement. However, after applying for a permit to operate the deli/market, Defendants contend that a letter dated September 20, 2016 from the Fairfax County Zoning Department indicated that a quick-service food store was not allowed on the premises. Defendants further contend that they met with the Plaintiff on September 30, 2016 to return keys to the premises and inform the Defendant that they would not take the property. Defendants assert that the Plaintiffs knew or should have known that the premises would not be authorized to support a deli/market and that the Defendants relied on Plaintiff's false promises that they could operate a deli/market.

Plaintiffs contend that the Agreement can be used for the intended purpose and is enforceable. On 13 February 2017, counsel for the Plaintiff informed the Defendants in writing that they believed the Plaintiffs to be in breach of the Agreement. With no reply from Defendants, Plaintiffs filed a two (2) count complaint against the Defendants on June 13th, 2017. The Plaintiffs complaint alleges in Count I that Defendants are in breach of a written Lease providing for the rental of commercial retail space in a shopping center owned by Plaintiff. The breaches alleged are Defendants' failure to pay rent and their subsequent abandonment of the premises. Count II alleges the breach of a written Guarantee which provides for the payment of rent by the guarantors in the event that tenants do not pay.

Central to this litigation is a conspicuous clause, set out in all capital letters where all parties agree to a waiver of jury trial in the event of litigation. The provision in the Lease reads as follow:

“LANDLORD, TENANT, GUARANTORS AND GENERAL PARTNERS WAIVE TRIAL BY JURY IN ANY ACTION, CLAIM OR COUNTERCLAIM BROUGHT IN CONNECTION WITH ANY MATTER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS LEASE, THE LANDLORD-TENANT RELATIONSHIP, TENANT'S USE OR OCCUPANCY OF THE PREMISES OF ANY CLAIM OF INJURY OR DAMAGE.”

The 4-page guarantee of lease similarly has waiver of jury trial language: “Guarantor waives trial by jury in connection with any action, preceding, or counterclaim with respect to this Guarantee.”

Given the paragraphs in both the Lease and Guarantee which provide that all parties agreed to waive their right to a jury trial, Plaintiff did not request a jury trial as to either count. On December 21st, 2017, Plaintiff with the Court's permission filed an amended complaint. Plaintiff, mindful of the jury trial waiver provision, again did not ask for a jury. Defendants,

however, have with respect to all of the counts in their counterclaim, against HZ Retail and DMV Realty LLC, asked for “a trial by jury for all issues so triable”. In response, the Defendants filed a counterclaim with four (4) Counts -- Fraud in the Inducement, (Count I), Breach of the lease (Count II), the document in which the jury trial waiver provision is found. The counterclaim also includes claims for conversion, and unjust enrichment (Count V and VII) This motion only relates to the Motion to Strike Jury Demand filed by HZ Retail.

ANALYSIS

This case involves the balancing of the fundamental right to a jury trial laid out in the Virginia Constitution against the liberty interest of individuals to enter into binding contracts. Article 1, § 11 of the Commonwealth of Virginia's Constitution declares “[t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.” V. CONST., art. I, § 11 (emphasis added). And on the other hand, The Supreme Court of Virginia has held that a “party may enter into an agreement in which he waives a significant right.” *Gordonsville Energy, LP v. Va Electric and Power Co*, 257 Va. 344, 355, 512 S.E.2d 811, 811 (1999). Indeed, in *Azalea Drive-in Theater, Inc. v Sargoy*, 215 Va. 714, 214 S.E.2d 131(1999) the Supreme Court of Virginia held that a contractual waiver of the right to a jury trial is enforceable, so long as the underlying contract is valid and enforceable. *Id.* The Virginia Supreme Court, however, has not yet addressed whether a jury waiver provision in an enforceable contract may itself be invalid.

Count II of the Counterclaim is the Count that directly deals with the Breach of the Lease. The United States Supreme Court has recognized that although “trial by jury is a fundamental guarantee of the rights and liberties of the people” and “every reasonable presumption should be indulged against its waiver,” parties may “stipulate in writing for the waiver of a jury.” *Hodges v. Easton*, 106 U.S. 408,412 (1882). This fundamental right to a jury trial must be juxtaposed against the equally well-recognized right of a citizen to contract privately as the right to contract has long been recognized as “no small part of the liberty of the citizen.” *Atlantic Greyhound Lines v Skinner*, 172 Va 428, 439, 2 S.E.2d 441, 446–7 (1939).

It is the duty of the court, not the jury, to interpret a contract when its terms are clear and unambiguous. *D.C. McClain, Inc. v Arlington County*, 249 Va. 131, 135, 452 S.E.2d 659, 662 (1995); *Winn v. Aleda Const. Co.*, 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984). It is axiomatic in Virginia that courts are bound to conclude that the parties intend what their written contracts plainly declare. *W.F. Magann Corp. v Virginia–Carolina Elec Works, Inc.*, 203 Va 259, 264, 123 S.E.2d 377, 381 (1962). As a result, when interpreting any part of a contract, courts must construe the contract as a whole. *Landsdowne Dev. Co v Xerox Realty Corp*, 257 Va 392, 401, 514 S.E.2d 157, 161 (1999); *Vega v Chattan Assocs.*, 246 Va. 196, 199, 435 S.E.2d 142, 143 (1993). Indeed, Virginia law presumes that parties have not needlessly inserted words or provisions into their contracts, and therefore, all words contained in a contract must be given effect if it is reasonably possible to do so. *Ames v. American Nat'l Bank*, 163 Va. 1, 38, 176 S.E. 204, 216–217 (1934); see also *Winn v Aleda Constr. Co*, 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984); *Barrett v. Vaughan & Co*, 163 Va. 811, 817, 178 S.E. 64, 68 (1935). Thus, no word or provision in a contract will be treated as meaningless, if a reasonable construction can be given to it. *Winn* at 307, 315 S.E.2d at 194; *Barrett*, 163 Va. at 817, 178 S.E. at 68. Ultimately, courts

must enforce contracts as written, and a contract “becomes the law of the case unless the contract is repugnant to some rule of law or public policy.” *D C. McClain, Inc. v. Arlington County*, 249 Va 131, 135, 452 S.E.2d 659, 662 (1995); *Mercer v S Atlantic Ins. Co.*, 111 Va. 699, 704, 69 S.E. 961, 962 (1911).

In this case, the provision in the Lease reads as follow:

“LANDLORD, TENANT, GUARANTORS AND GENERAL PARTNERS WAIVE TRIAL BY JURY IN ANY ACTION, CLAIM OR COUNTERCLAIM BROUGHT IN CONNECTION WITH ANY MATTER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS LEASE, THE LANDLORD-TENANT RELATIONSHIP, TENANT’S USE OR OCCUPANCY OF THE PREMISES OF ANY CLAIM OF INJURY OR DAMAGE.”

And therefore, since a party may waive by contract any right conferred by law or contract, if the party being charged with relinquishment of a right had knowledge of the right and intended to waive it, the waiver will be enforced. *See Roenke v. Virginia Farm Bureau Mut Ins Co*, 209 Va. 128, 135, 161 S.E.2d 704, 709 (1968). And, a “[w]aiver applies to any right conferred by law or contract. This right may or may not be exercised by the person holding it. Being for his own benefit, no one is concerned in its relinquishment save himself. Hence, the owner of such right may waive it expressly, either in writing or by parol, and impliedly by inconsistent conduct.” *Id.* *See also Telum, Inc v E F. Hutton Credit Corp.*, 859 F.2d 835, (10th Cir. 1988) (general allegations of fraud insufficient to invalidate waiver of jury trial in lease agreement).

In this case, it is clear from the “waiver clause” that is included in the lease that the parties intended to waive jury trial. Therefore, Motion to Strike Jury Trial as to Count II is **granted**.

As to Count I, Fraud in the Inducement, Defendants contend that the Plaintiffs HZ Retail fraudulently induced them into signing the lease as HZ Retail allegedly made misrepresentations about the size of the commercial space and the ability for it to be used as a market/deli. Given these alleged misrepresentations, Defendants contend that the contract and therefore the waiver of jury trial clause is unenforceable. However, Defendants do not contend that the waiver of jury trial clause itself was fraudulently induced.

A similar question of whether a claim of fraud in the inducement of the entire contract is to be resolved by the court, or whether the matter is to be referred to the arbitrators was answered by the United States Supreme Court in *Prima Paint Corp v. Flood & Conklin Mg Co*, 388 U.S. 395 (1967). In that case, the Court ruled that except where the parties otherwise intend -- arbitration clauses as a matter of federal law are “separable” from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud. *Id.* *See Weitz v. Hudson*, 262 Va. 224, 229, 546 SE 2d 732,737 (2001) (arbitration clause broadly applied as to whether partner had converted funds). *See also McMullin v*

Union Land & Mgmt Co., 242 Va. 337, 342, 410 SE 2d 636, 639 (1991) (arbitration clause upheld as it related to overall partnership agreement).

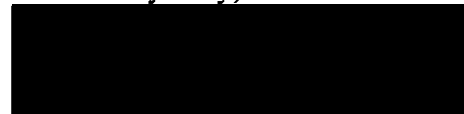
Similar to *Prima Paint*, in this case, since the Fraud in the Inducement is not being claimed to the specific clause in the lease that deals with the “Waiver of Jury Trial”, the waiver clause is separable from the contract in which it is embedded. See *Prima Paint Corp*, 388 U.S. 395. Therefore, the Motion to Strike as to Count I, Fraud in the Inducement is **granted**.

Lastly, as to Counts V and VII, while these are common law claims, as per Defendant/Counter Plaintiff’s own allegations in the Counterclaim, they arise from the “Landlord-Tenant Relationship” and therefore, the language in the waiver which states that a trial by jury is waived “*in any action, claim or counterclaim brought in connection with any matter arising out of or in any way connected with this lease, the landlord-tenant relationship*” is relevant. (emphasis added). This Court in *Ahern v Toll Brothers Inc.* 55 Va. Cir. 18 (Cir. Ct. 2001), citing *McMullen v. Union Land & Mgmt Co*, 242 Va. 337, 341, 410 S.E.2d 636 (1991) determined the contractual terms “arising out of or relating to” are recognized as broad arbitration clauses that encompass contract-related disputes however labeled as opposed to narrow language such as “arising hereunder” which is restricted to contract interpretation and performance. Hence, the term of the lease that deals with “Waiver of Jury Trial” are clear and broadly encompassing. Therefore, given that the Conversion claim and the Unjust Enrichment claim arise out of the “Landlord Tenant Relationship” between the parties, the Motion to Strike for Jury Trial as to Counts V and VII is also **granted**.

CONCLUSION

For the reasons stated above, Plaintiff’s Motion to Strike Jury Demand is granted.

Very truly,

A solid black rectangular box redacting the signature of the court clerk.

Bruce D. White