

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-07-08

TD Banknorth, N.A.,

Plaintiff

v.

Benjamin Hawkins and
Timothy Morse,

Defendants

ORDER
(Motion for Reconsideration)

This matter is before the Court on Defendant Morse's Motion for Reconsideration. Through his motion, Defendant Morse requests that the Court reconsider its April 1, 2009, Order, by which the Court granted Plaintiff's request for a jury trial on Defendant Morse's fraud claim.

In his motion, Defendant Morse contends that the Court's April 1, 2009, Order, constitutes a reversal of an earlier decision of the Court. In particular, Defendant argues that in January 2008, the Court denied Plaintiff's motion to strike the jury trial as to Defendant's fraud claim, and the most recent order represents a reversal of that decision.

Contrary to Defendant's contention, a fair and objective reading of the Court's January 2008, Order, demonstrates that while the Court did not grant Plaintiff's motion to strike the trial by jury on Defendant's fraud claim, the Court clearly placed the parties on notice that the Court was prepared to revisit the jury trial issue upon further development of the record. The Court wrote:

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 claims, 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.

(Decision and Order, p. 4). Further, in a footnote, the Court observed, "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." (Decision and Order, p. 5, n. 6). Consistent with that observation, the Court explicitly ordered that "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." (Decision and Order, p. 5). Thus, Defendant's contention that the Court's most recent order on the jury trial issue is a reversal of or inconsistent with the Court's previous order is unsupported by the record.

Defendant also questions the timing of the Court's decision given the June trial date. In particular, Defendant writes that "[u]p until April 1, 2009, Defendant Morse understood that he was entitled to a trial before a jury of his peers on the fraud claims." (Defendant Morse's Motion for Reconsideration, p. 1). First, as explained above, Defendant was plainly on notice that the Court was prepared to consider the jury trial issue upon further development of the record. Additionally, to the extent that the nature of the trial (i.e., jury trial or bench trial) impacts or informs Defendant's trial strategy and/or trial preparation, the Court notes that the decision was issued nine weeks before the start of the trial. Nine weeks is sufficient time within which Defendant can develop a trial strategy and prepare for trial. In other words, the Court does not believe that the timing of the decision resulted in any prejudice to Defendant.

As to the Defendant's substantive arguments, Defendant has not identified any arguments that were not presented to and considered by the Court at the time that it entered its order denying Defendant's right to a trial by jury on his fraud claim. As the Court explained in its Decision and Order on Plaintiff's Motion for Summary Judgment, the record reveals that Defendant's fraud claim is based upon Defendant's allegation that he signed the Sixth Guaranty as the result of misrepresentations made by Plaintiff's agents. In other words, Defendant maintains that part of the consideration for Defendant's execution of the Sixth Guaranty was Plaintiff's promise to advance additional funds to Morse Brothers, Inc. In this way, in the Court's view, the fraud claim arises out of or relates to the parties' agreement, including the Sixth Guaranty.

The Court recognizes, however, that at least under certain circumstances, misrepresentations made in connection with the negotiation and formation of an agreement can generate claims that would not be within the scope of the jury trial waiver at issue in this case. Although the Court previously determined that Defendant Morse's fraud/misrepresentation claim was within the scope of the jury trial waiver because the claim arose out of or was related to the parties' agreement, the Court was prepared to reassess the record and analyze the issue again in order to determine whether its prior ruling was correct. However, the Court's reconsideration of the issue is rendered moot by the Court's Decision and Order on Plaintiff's Supplemental Motion for Summary Judgment, which decision the Court issued on this date. That is, because the Court has granted Plaintiff's motion and directed the entry of judgment in favor of Plaintiff on Defendant Morse's fraud/misrepresentation claim, a trial on Defendants' counterclaims is not necessary. The jury trial issue is, therefore, moot. Accordingly, Defendant Morse's Motion for Reconsideration is dismissed as moot.

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

Date: 5/27/09



Justice, Maine Business & Consumer Docket