

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| COTTMAN TRANSMISSION SYSTEMS, | : | CIVIL ACTION |
| Plaintiff | : | |
| | : | |
| v. | : | |
| | : | |
| KEVIN MCENEANY, ET AL. | : | NO. 05-6768 |
| Defendants | : | |

MEMORANDUM AND ORDER

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

January 4, 2007

Plaintiff Cottman Transmission Systems, LLC (“Cottman”), a franchisor, seeks damages from defendants Kevin McEneany and Wendyco, Inc.,¹ franchisees, alleging breach of contract and default under a promissory note. Cottman has moved to strike defendants’ demand for a jury trial. On April 13, 2006, I denied the motion without prejudice, pending completion of discovery on the issue whether the waiver in the license agreement was knowing, voluntary, and intentional. The parties have now completed discovery.

Cottman claims defendants waived their right to a jury trial in this action by signing Cottman’s License Agreement. Defendants contend that in light of the unequal bargaining power between the two parties, McEneany’s relative lack of sophistication, and the lack of opportunity to negotiate the jury waiver provision, the strong presumption against waiver should be invoked. Upon consideration of Cottman’s motion and reply, defendants’ response, and the evidence submitted, I grant plaintiff’s motion to strike defendants’ demand for a jury trial.

¹ McEneany also operated through Wendyco, Inc., a company John Hanzel, his attorney, helped to incorporate.

I. FACTUAL BACKGROUND

This case involves a commercial contract dispute between Cottman, a franchisor of transmission repair businesses, and McEneany. On February 21, 2005, Cottman sent McEneany an offering circular and a copy of a license agreement. (McPeak Affidavit; Ex. 1). As part of his application, McEneany gave Cottman a copy of his resume and answers to a questionnaire. (McPeak Affidavit). McEneany advised Cottman he was a builder/general contractor and owner of a company called Kevin J. McEneany Construction. (Ex. 5).

On March 21, 2005, Kate McPeak, Cottman's licensing coordinator, interviewed McEneany as part of a process to ensure Cottman had complied with state and federal regulations regarding the sale of the franchise. (Ex. 6). During the interview, McEneany answered in the affirmative when asked whether he had an "attorney, accounting or business advisor review the Offering Circular and/or License Agreement." (Ex. 6, p.2). He also answered in the affirmative when asked whether he understood "that both parties have waived their right to a jury trial and that any dispute would be resolved in a non-jury proceeding before a judge or arbitrators." (Ex. 6, p.5).

McEneany testified during his deposition that he had his attorney, John Hanzel, review the terms of the license agreement. (Dep. 112-13). McEneany was informed by Hanzel that nothing in the agreement was in his favor, that "everything is good for Cottman but not so good for [McEneany]." (Dep. 113-14). McEneany also testified that during the compliance interview with McPeak, he had understood the question about the jury waiver provision. He stated: "It means that if there is any problems Cottman is not going to get a jury after me. I agreed to do the

same.” (Dep. 124).

In April, 2005, McEneaney entered into a license agreement with Cottman to purchase and operate a Cottman franchise in Charlotte, North Carolina. (McPeak Affidavit). Section 30 of the executed license agreement was entitled “jury waiver” in capital letters and appeared on the signature page above the last section, section 31, of the agreement. (Ex. 8). Section 30 provided, in capital letters, omitted here, as follows:

Operator and Cottman hereby agree that they shall and hereby do waive trial by jury in any action, proceeding or counterclaim, whether at law or in equity, brought by either of them, or in any matter whatsoever which arises out of or is connected in any way with this agreement or its performance.
(Ex. 8)

II. DISCUSSION

Pursuant to section 29 of the License Agreement, “any matter whatsoever which arises out of or is connected in any way with the Agreement or the franchise shall be governed by and construed and enforced in accordance with the laws of the Commonwealth of Pennsylvania.”

Defendants do not dispute that the Pennsylvania law applies.

Under Pennsylvania law, “the right to a jury trial may be waived either by conduct or by express statement.” Eighth North Val, Inc. v. Parkinson, 773 A.2d 1248 (Pa. Super. 2001) (citing Krugh v. Lycoming Fire Ins. Co., 77 Pa. 15, 1874 WL 13231 (Pa. Oct. 6, 1874); Rodney v. Wise, 500 A.2d 1187 (Pa. Super. 1985); Warden v. Zanella, 423 A.2d 1026 (Pa. Super. 1980); Downs v. Scott, 191 A.2d 908 (Pa. Super. 1963)). Pennsylvania’s practice rules also provide that the right to a jury trial in a civil case may be expressly waived by a contract made independent of litigation. See 7 Standard Pennsylvania Practice 2d § 42:4. “Jury trial waivers contained in

agreements are valid where the waivers are conspicuous, the plaintiffs have the necessary business experience to be aware of and understand the waivers, and the plaintiffs have an opportunity to negotiate contract terms, and there is no disparity in bargaining power. Where the parties have agreed in writing to a nonjury trial, neither party may withdraw from the agreement unilaterally except for good cause.” Id.

Federal law is consistent with this. “Although the Seventh Amendment guarantees a right to a civil jury trial, this right may be waived by contract as long as it is done knowingly and voluntarily.” Bishop v. GNC Franchising, LLC, 2006 WL 2266251 *1 (W.D. Pa. Jan. 13, 2006) (citing AAMCO v. Marino, 1990 WL 10024 (E.D. Pa. Feb. 7, 1990)). To determine whether a jury trial waiver was knowing and voluntary, a federal court considers the following factors: “(1) whether there was a gross disparity in bargaining power between the parties; (2) the business or professional experience of the party opposing the waiver; (3) whether the clause containing the waiver was inconspicuous; and (4) whether the opposing party had an opportunity to negotiate contract terms.” Bishop, 2006 WL 2266251 *1.

McEneany argues the strong presumption against waiver should be invoked because of the unequal bargaining power between the two parties, his relative lack of sophistication, and the lack of opportunity to negotiate the jury waiver provision. He does not argue the clause containing the waiver was inconspicuous.

After analyzing the above factors, I find that all four factors weigh in favor of enforcement of the waiver. Nothing in the record suggests a gross disparity of bargaining power between McEneany and Cottman. The issue is not whether there was “unequal” bargaining power, but whether there was a “gross disparity” of bargaining power. McEneany points to nothing in the

record to corroborate his assertion that “the waiver provision was not a bargained-for term” or that the agreement “in no way deviated from the boiler-plate format and was presented on a take it or leave it basis.” (Pl. Br. 2). McEneaney had an attorney who reviewed the agreement. There is also nothing that shows McEneaney could not negotiate or bargain for any terms. In fact, Kate McPeak represents in her affidavit that “[a]lthough Mr. McEneaney never requested any change be made to his License Agreement, during my tenure at Cottman, it was not uncommon that some provisions of the License Agreement were negotiated and changed through side letter agreement.” (McPeak Affidavit)

Moreover, nothing suggests McEneaney lacked the sophistication to understand the waiver provision. McEneaney testified at his deposition that he understood the waiver provision and explained in his own words what he understood it to mean. The record shows McEneaney was a builder/contractor who owned his own contracting business and possessed the business sophistication to incorporate a company, Wendyco, Inc., with the help of his attorney. (Dep. 123). McEneaney also had his attorney review the terms of the license agreement with Cottman. Finally, it is uncontroverted that the waiver provision was conspicuous and written in plain English.

In AAMCO v. Marino, 1990 WL 10024, on which McEneaney relies, the court held the franchisees possessed virtually no bargaining power and the waiver provision was not subject to negotiation. In that case, however, the agreement was presented as a non-negotiable, “take-it-or-leave-it” proposition and the franchisees were told explicitly by the franchisor that the agreement terms were “locked in concrete” and were not subject to negotiation. Id. at *2. Moreover, the waiver provision was section 49 out of 54 and was no more or less conspicuous than the other

provisions. It does not appear that any of the franchisees in that case were represented by an attorney.

In Bishop, 2006 WL 2266251, the court found the jury waiver provision had been entered into knowingly and voluntarily. Id. at *2. The court reasoned that although the franchisor had told the franchisees the agreements were not negotiable and the franchisees did not have an attorney present, those two facts were not sufficient to nullify the contractual terms to which they knowingly and voluntarily agreed to be bound. Id. The court noted that even though the franchisees had not had an opportunity to negotiate the contract terms, they had been under no pressure to purchase the franchises at issue. Similarly, McEneany was not under any pressure to purchase the Cottman franchise.

Finally, defendants' fraud claims do not invalidate the jury waiver provision. Allegations of fraud relating specifically to a jury waiver provision may suspend application of that provision. See Gurfein v. Sovereign Group, 826 F.Supp. 890, 921 (E.D. Pa. 1993) (Pollak, J.). Defendants' general allegations of fraud, however, do not affect application of the jury waiver provision and in no way suggest waiver of the right to a jury trial was involuntary or not knowing. Id.

Accordingly, and for these reasons, I find the jury waiver provision was entered into knowingly and voluntarily. Cottman's motion to strike McEneany's jury demand is GRANTED. An appropriate order follows.