

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

TODAY'S MAN, INC.,	:	
FELD & FELD, INC.,	:	
D&L, INC., and	:	
BENMOL, INC.,	:	
	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 99-479
	:	
NATIONSBANK, N.A.,	:	
FLEET NATIONAL BANK, and	:	
THE BANK OF NEW YORK,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J.

JUNE 22, 2000

Before this Court are Motions to Strike Plaintiff's Jury Demand and for Leave to File a Joint Amended Answer and Counterclaim filed by Defendants Nationsbank, N.A., Fleet National Bank and the Bank of New York ("Defendants" or "Banks"). In this case, Plaintiffs have alleged that Defendants committed various wrongs in connection with the Amended and Restated Credit Agreement (the "Agreement") entered into between the parties on November 17, 1995. For the following reasons, Defendants' Motion for Leave to File a Joint Amended Answer and Counterclaim will be granted, and Defendants' Motion to Strike Plaintiffs' Jury Demand will be granted.

I. MOTION FOR LEAVE TO FILE AMENDED ANSWER AND COUNTERCLAIM

Section 11.03 of the Agreement contains an indemnification provision which provides, in pertinent part:

The Borrowers agree to pay or reimburse each of the Banks and each Agent (including without limitation, reasonable counsels' fees) in connection with (i) any Event of Default . . .

Section 11.03 further provides:

The Borrowers hereby agree (i) to indemnify each Agent and each Bank . . . from, and hold each of them harmless against, any and all . . . expenses incurred by any of them (including without limitation, any and all . . . expenses incurred by such Agent or any Bank, whether or not such Agent or any Bank is a party thereto) arising out of or by reason of any . . . litigation . . . relating to extensions of credit hereunder

Defendants contend that the costs that they have incurred in this lawsuit, and those expected to be incurred in the future, fall within the scope of the Agreement's indemnification provisions. As a result, Defendants request, pursuant to Rules 13(f) and 15(a) of the Federal Rules of Civil Procedure, leave to amend their Joint Answer to include a counterclaim for indemnification for fees and costs incurred to date in this action, and those expected to be incurred in the future. Furthermore, Defendants request leave to assert additional affirmative defenses arising under Section 9 of the Agreement.

Plaintiffs take the position that Defendants' proposed counterclaim would be futile because any such claim has been discharged in bankruptcy. Plaintiffs also argue that Defendants have assigned their rights to any such claim to third parties.

Plaintiffs add that leave to amend should not be granted if Plaintiffs are not given adequate opportunity to conduct discovery regarding the proposed counterclaim, as undue prejudice would result; however, Plaintiffs' discovery concerns are now moot in light of this Court's issuance of an Order on May 16, 2000, extending the discovery deadline to September 15, 2000.

Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend its pleading "by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Only where there is "[u]ndue delay, bad faith, or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment" should leave to amend be denied. Foman v. Davis, 371 U.S. 178, 182 (1962).

Like Rule 15(a), Rule 13(f) of the Federal Rules of Civil Procedure has been interpreted as requiring a liberal standard to the determination of whether a defendant may add counterclaims to its answer.¹ Fort Washington Resources v Tannen, 153 F.R.D. 565, 566 (E.D. Pa. 1994); Gregory v. Correction Connection, Inc., No. 88-7990, 1990 WL 178209, *1

¹ Specifically, Rule 13(f) provides that: "When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment." Fed. R. Civ. P. 13(f).

(E.D. Pa. 1990). Indeed, "[t]he clause in Rule 13(f) permitting amendments `when justice requires' is especially flexible and allows the court to exercise its discretion and permit amendment whenever it seems desirable to do so." Perfect Plastics Indus. v. Cars & Concepts, 758 F. Supp. 1080, 1081-82 (W.D. Pa. 1991) (citations omitted).

In this case, Plaintiffs first contend that the proposed claim which Defendants seek to assert would be futile because any such claim has been discharged in bankruptcy. According to Plaintiffs, they each filed voluntary Chapter 11 Bankruptcy Petitions in the United States Bankruptcy Court of the District of Delaware after the Amended Agreement was executed. Thus, Plaintiffs argue that any right of indemnification arising under the Amended Credit Agreement is a pre-petition claim for purposes of the Plaintiffs' bankruptcy proceedings.

However, Defendants respond that their indemnification claims are not pre-petition claims subject to discharge in bankruptcy because these claims were triggered by Plaintiffs' post-confirmation plan lawsuit, filed after Plaintiffs' Second Amended Plan of Reorganization. Thus, Defendants argue that the indemnification claims were not foreseeable, or even knowable, before the bankruptcy filing.²

² The Banks have also pointed out that they did not receive any distribution from the bankruptcy proceeding and, therefore, their counterclaim against the Plaintiffs, which arose

Furthermore, Defendants argue that “[i]t would be inequitable to immunize Today’s Man from the Banks’ counterclaim under one provision of the Amended Credit Agreement [while] at the same time Today’s Man is asserting claims based on its interpretation of other provisions of the very same contract.” (Defs.’ Reply at 2.) In this regard, the Third Circuit has held that “a debtor may not assume the favorable aspects of a contract . . . and reject the unfavorable aspects of the same contract” Lee v. Schweiker, 739 F.2d 870, 876 (3d Cir. 1984). Under such circumstances, where the creditor’s claim against the debtor and the debtor’s claim against the creditor arise out of the same contract, the doctrine of recoupment has been applied. Id. at 875.

Recoupment . . . allows the creditor to assert that certain mutual claims extinguish one another in bankruptcy, in spite of the fact that they could not be ‘setoff’ under 11 U.S. C. § 553. The justification for the recoupment doctrine is that where the creditor’s claim against the debtor arises from the same transaction as the debtor’s claim, it is essentially a defense to the debtor’s claim against the creditor rather

only after the discharge, is not subject to the release of claims provision of Section 11.1 of the Second Amended Plan of Reorganization. According to the Banks, the release of claims provision was specifically designed to cover “an Entity which may hereafter assert a claim for contribution and/or indemnification against [Today’s Man] with respect to pre-petition acts as well as pre-confirmation acts.” Thus, the Banks contend that because this release provision only applied to “Entities” that received distributions, the Banks are outside its scope and their indemnification claims were preserved.

than a mutual obligation, and application of the limitations on setoff in bankruptcy would be inequitable.

Id. (citing In re Monongahela Rye Liquors, 141 F.2d 864, 869 (3d Cir. 1944)). Here, Plaintiffs' claims as well as Defendants' indemnification claim arise out of the Amended and Restated Credit Agreement. Accordingly, even if Plaintiffs' claims are pre-petition claims, Defendants rights to indemnification are rights to recoupment that survive the bankruptcy.³

As for Plaintiffs' argument that an assertion that Defendants' indemnification claim would be futile based on their assignments of rights to third parties, Defendants respond that the Agreement reflected an agreed upon allocation of risks between the Banks and Today's Man, including the risks of possible disputes. Defendants submit that the assignment agreements between the Banks and third parties must be read in harmony with the Amended Credit Agreement so that the scope of the assignment preserves the original allocation of risks. Thus,

³ In its Sur-Reply Memorandum, Today's Man characterizes any recoupment rights that the Banks have as an affirmative defense, rather than a counterclaim. (Pl.'s Sur-Reply Mem. at 10-11.) Such a distinction is not made clear by the case law in this circuit. See Long Term Disability of Hoffman-La Roche v. Hiler (In re Hiler), 99 B.R. 238, 243 (Bankr. E.D. Pa. 1989) ("A recoupment claim arises out of the same transaction that forms the basis of the plaintiff's cause of action."); University Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.), 973 F.2d 1065, 1079 ("Recoupment `is the setting up of a demand arising from the same transaction as the plaintiff's claim or cause of action, strictly for the purpose of abatement or reduction of such claim.'").

Defendants argue that because the Banks held the right to indemnification at the time of the events giving rise to the underlying complaint and Today's Man has chosen to sue the Banks and not the Banks' assignees, the indemnification rights must remain with the party being sued in order to preserve the agreed upon risk structure of the Agreement.

Having reviewed the Assignment Agreements submitted under seal by the parties, it appears that both the Fleet Assignment and the BNY Assignment expressly operate to assign all rights of Fleet and BNY having any connection to the Amended Credit agreement. NationsBank, on the other hand, carved out certain rights of indemnification from its assignment, but not in a way which preserves the indemnification rights presently asserted.⁴ Thus, as Defendants note, a common-sense construction of the express terms of the Assignment Agreements gives this Court a basis from which to rule that the Banks are precluded from asserting any indemnification claim or right against Today's

⁴ The NationsBank Assignment Agreement specifically withholds "any right under the credit documents to indemnification or to receive reimbursement of expenses due to Assignor to the extent such right[s] . . . relate[] to actions taken prior to the Closing Date." See NationsBank Assignment Agreement at ¶ 1. The "Closing Date" is defined in the NationsBanks Assignment Agreement as no later than February 7, 1997. Thus, Today's Man argues that because the Bank's proposed indemnification claim relates to actions taken after February 7, 1997 - specifically, Today's Man's action of filing its lawsuit against Defendants in 1999 - the exception for assignment of indemnification rights does not arise, and any such claim by NationsBank has been assigned.

Man. However, because a more fully developed record would be beneficial to deciding the issue at hand, this Court will grant the Banks' motion to amend with the understanding that Plaintiffs will be free to move for summary judgment and request dismissal of the counterclaim based on their construction of the Assignment Agreements. Accordingly, Defendants' Motion to File a Joint Amended Answer and Counterclaim shall be granted.⁵

II. MOTION TO STRIKE PLAINTIFFS' JURY DEMAND

Defendants have also asked this Court to strike Plaintiffs' Jury Demand based on a provision within the Amended Credit Agreement that expressly waives the right of any party to seek a jury trial in the event of a dispute related to or arising out of the Credit Agreement. That section of the Agreement reads as follows:

EACH OF THE BORROWERS, EACH AGENT AND EACH BANK HEREBY IRREVOCABLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

⁵ The Banks also wish to amend the Answer to add additional affirmative defenses based on Section 9 of the Agreement which covers "Events of Default." More specifically, Defendants seek to raise section 9(c) of the Agreement, which pertains to false or misleading representations, and section 9(e) of the Agreement, which pertains to admissions of inability to pay debts. Because Plaintiffs will have the opportunity to conduct discovery on these issues and, thus, will not suffer any prejudice, the Banks' request to add these defenses shall be granted.

Amended Credit Agreement, § 11.11.

Notwithstanding the above, Plaintiffs have demanded a jury trial in this action and argue that Defendants have waived their right to object to Plaintiffs' jury trial demand. Plaintiffs also argue that the above jury trial waiver provision does not apply to all of Plaintiffs' claims.

Federal courts have consistently enforced contract provisions waiving the Seventh Amendment right to a jury trial as long as the waiver is knowing, voluntary and intelligent.⁶ See, e.g., Corestates Bank, N.A. v. Signet Bank, No. Civ. A. 96-3199, 1997 WL 117010, *5 (E.D. Pa. March 13, 1995); Curtis Center Limited Partnership v. Sumitomo Trust & Banking Co., Civ. A. No. 95-1465, 1995 WL 365411 (E.D. Pa. June 15, 1995). Rather than argue that any of the above elements were lacking, Today's Man first contends that Defendants have waived their right to object to Plaintiffs' Jury Demand because they neglected to consolidate the instant motion to strike with the other Rule 12 objections and defenses previously asserted under Rule 12. (Pls.' Resp. at 3-4.) According to Plaintiffs, Rule 12(g) of the Federal Rules of Civil Procedure requires a party who seeks dismissal in a

⁶ A waiver is knowing, voluntary and intelligent when the facts show that (1) there was no gross disparity in bargaining power between the parties; (2) the parties are sophisticated business entities; (3) the parties had an opportunity to negotiate the contract terms; and (4) the waiver provision was conspicuous. See Hydramar v. General Dynamics Corp., Civ. A. No. 85-1788, 1989 WL 159267, *2 (E.D. Pa. Dec. 29, 1989).

pretrial motion based on any of the defenses set out in Rule 12(b) to include in such motion any other defense or objection then available which Rule 12 permits to be raised by motion. In this regard, Plaintiffs note that even though the instant motion has been brought pursuant to Rule 39(a), the fact that Defendants seek to strike a portion of Plaintiffs' Complaint demonstrates that the motion is really based on Rule 12(f).

Defendants correctly reply, however, that its motion to strike does not fall within the ambit of Rule 12 but is squarely within the scope of Rule 39(a)(2) which has no time limit. See Baker v. Universal Die Casting, 725 F. Supp. 416, 421 (W.D. Ark. 1989) ("A motion to strike a jury demand is a motion under Rule 39(a)(2), which obviously is not a motion under Rule 12, and does not extend the time period in which an answer must be served or filed."); Majer v. Metropolitan Transp. Auth., No. 90 Civ. 4608, 1992 WL 110995, *3 (S.D.N.Y. May 7, 1992) ("Fed. R. Civ. P. 39(a)(2) does not set a time limit within which a party must move to strike a jury demand."). Moreover, the issue here is not one of waiver because this Court can deny an inappropriate request for a jury without a party's motion. South Port Marine v. Gulf Oil Limited Partnership, 56 F. Supp.2d 104, 107 (D. Maine 1999).

Plaintiffs also argue that the jury trial waiver provision does not apply to all of Plaintiffs' claims. In addition to Plaintiffs' claims based on allegations that

Defendants' breached the Amended Credit Agreement, Plaintiffs have asserted claims for intentional and negligent misrepresentation.⁷ Plaintiffs contend that even if section 11.11 of the Agreement applies to all claims arising out of any party's breach of the Agreement, this waiver does not extend to claims brought against Defendants for fraudulently inducing Plaintiffs to enter into the Amended Credit Agreement in the first instance.

Other federal courts that have considered whether allegations of fraud in the inducement of a contract affect a jury waiver provision have determined that such allegations did not suggest that the complaining party's agreement to waive the right to a jury trial was involuntary. See, e.g., Gurfein v. Sovereign Group, 826 F. Supp. 890, 921 (E.D. Pa. 1993); AAMCO Transmissions, Inc. v. Harris, Civ. A. No. 89-5533, 1990 WL 83336, *5 (E.D. Pa. June 18, 1990). Moreover, given the sweeping language of the provision at issue, it is clear that all of the claims asserted by Plaintiffs are properly characterized as

⁷ Plaintiffs' misrepresentation claims allege that Defendants had no intention of abiding by the terms of the Amended Credit Agreement, but, rather, entered into the Agreement to induce Plaintiffs to make the requested paydowns of the outstanding debt in an expedited manner. Plaintiffs further allege that once these paydowns were made, Defendants ceased funding under the Agreement, as planned. Thus, Plaintiffs allege that "Defendants falsely promised to fund up to \$50 million of Plaintiffs' borrowing requests solely to induce Plaintiffs to make the paydowns quickly without ever intending to honor their end of the bargain." (Pls.' Resp. at 5.)

"arising out of or relating to this agreement or the transactions contemplated hereby." Based on the above, Defendants' Motion to Strike Plaintiffs' Jury Demand shall be granted.

An appropriate Order follows.

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NATIONSBANK, N.A.,	:	
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THE BANK OF NEW YORK,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 22nd day of June, 2000, upon consideration of Defendants' Motion to Strike Plaintiffs' Jury Demand and Defendants' Motion for Leave to File a Joint Amended Answer and Counterclaim, and all responses thereto, it is hereby ORDERED that Defendants' Motion to Strike Plaintiffs' Jury Demand is GRANTED and Defendants' Motion for Leave to File a Joint Amended Answer and Counterclaim is GRANTED.

BY THE COURT:

ROBERT F. KELLY, J.