

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

IN RE:)	CHAPTER 11
)	
BARBER & ROSS COMPANY,)	Case No. 07-50546
)	
Debtor.)	
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BARBER & ROSS COMPANY,)	
)	
Plaintiff,)	
)	
v.)	Adversary Proceeding No. 09-05083
)	
WACHOVIA BANK)	
NATIONAL ASSOCIATION,)	
)	
Defendant.)	
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MEMORANDUM DECISION ON MOTION TO STRIKE

The matter before the Court is Defendant Wachovia Bank National Association's ("Wachovia") Motion to Strike Jury Demand and Request for an Award of Punitive Damages and Memorandum in Support Thereof docketed on April 29, 2010 (the "Motion"). With the parties having filed memoranda of law addressing the issues raised and counsel having appeared before the Court for oral argument on June 14, 2010, the Court took the Motion under advisement to consider Wachovia's contentions and the Debtor's response thereto. For the reasons set forth in this Memorandum Decision the Court will deny the Motion.

FINDINGS OF FACT

This adversary proceeding, initiated by the Debtor on August 9, 2009, involves a pre-petition commercial lending relationship between Wachovia and the Debtor. The Debtor's

Complaint, as amended, sets forth a number of causes of action specifically provided by the Bankruptcy Code and a number of causes of action asserted under state law. The parties were previously before the Court with respect to a motion to dismiss filed by Wachovia seeking the Court to dismiss certain of the state law causes of actions pled by the Debtor for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), as made applicable in adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012. For ease of discussion the Court incorporates the summary of factual allegations, contentions, and conclusions as set forth in the Memorandum Decision entered April 5, 2010 (the "Decision") at docket number 56 which dealt with that motion to dismiss.

Wachovia has now filed its Motion seeking to strike the Debtor's demand for a jury trial as set forth in the Complaint, as amended, and to strike the Debtor's prayer for punitive damages. The facts relevant to Wachovia's motion are as follows: When initiating this adversary proceeding with the original Complaint, the Debtor specifically provided in that pleading's caption "JURY TRIAL DEMANDED." (Complaint at Docket Entry 1, pg. 1.) In addition, at the end of the Complaint in the Conclusion where the Debtor set forth the specific relief sought it specified in subparagraph (c) that it requested a trial by jury on all issues of fact. (Complaint at pg. 28.) Wachovia did not specifically respond to this request in its Answer to the original Complaint.

Federal Rule of Bankruptcy Procedure 9015 provides that Rule 38 of the Federal Rules of Civil Procedure, relating to the subject of jury trials, is applicable to cases and proceedings in bankruptcy courts, and further provides in subparagraph (b) as follows:

(b) If the right to a jury trial applies, a timely demand has been filed pursuant to Rule 38(b) F.R.Civ.P., and the bankruptcy judge has been

specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) by jointly or separately filing a statement of consent within any applicable time limits specified by local rule.

This Court's Local Rule 9015-1 undertakes to provide a time period to file the consent contemplated by Bankruptcy Rule 9015(b); it provides as follows:

B. Consent: Not later than twenty-one (21) days after the demand for a jury trial, the demanding party shall file with the Court a consent of all parties for trial by jury in this Court. In the event that the requisite consent is not filed, the demanding party shall have an additional fourteen (14) days to file a motion with the United States District Court to withdraw the reference in order to have the jury trial conducted in District Court.

On August 24, 2009 a consent of the kind contemplated by such Rules was docketed with the Court by the Debtor and Wachovia "indicating their consent to a trial by jury in the Bankruptcy Court overseeing . . . the adversary proceeding." (Statement of Consent to Jury Trial Pursuant to Local Rule 9015-1(B) at Docket Entry 5 (the "Consent").) This statement is signed by both counsel for the Debtor and counsel for Wachovia.

The Debtor was subsequently granted, with Wachovia's consent, leave to file an Amended Complaint to supplement its factual allegations. It did so on January 19, 2010 and again made a demand for a jury trial on all issues of fact. After the Court ruled upon and substantially granted Wachovia's motion to dismiss a number of counts in the Amended Complaint, the latter filed its Answer to Amended Complaint on April 26, 2010. Again no specific response was made to the demand for a jury trial until the filing three days later of the Motion now before the Court, more than eight months after the Consent was docketed.

With respect to the second portion of Wachovia's Motion, the issue of punitive damages, the pertinent facts are as follows: the Debtor in its Amended Complaint set forth both

a separately denoted cause of action for punitive damages in count eighteen and a request for punitive damages in its prayer for relief. Pursuant to the Decision the separate cause of action seeking punitive damages was dismissed, but the Court specifically ruled that the prayer for punitive damages would be allowed to go forward as it related to the Debtor's eleventh cause of action for Wachovia's alleged tortious interference with a business relationship or expectancy regarding the proposed Hoffer Group transaction.

CONTENTIONS OF THE PARTIES

Wachovia contends that the Court should strike the Debtor's demand for a jury trial and prayer for punitive damages based on language contained within the Mebane Loan¹ and the Financing and Security Agreement.² As to its contention concerning waiver of a jury trial, Wachovia points to pages 5 and 6 of the Mebane Loan, which states:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH

¹ The "Mebane Loan," as referred to by the parties and as will be referred to in this Memorandum Decision, is a document entitled "Promissory Note," dated March 19, 2007. This document was previously considered with respect to Wachovia's motion to dismiss and it was re-docketed with the Court as Exhibit A to the present Motion.

² The "Financing and Security Agreement," as referred to herein, is a document entitled "Financing and Security Agreement Dated April 7, 2004 By and Between Barber & Ross Company and Wachovia Bank National Association." This document was also previously considered with respect to Wachovia's motion to dismiss and it was re-docketed as Exhibit B to the present Motion.

THIS NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE. EACH OF THE PARTIES AGREES THAT THE TERMS HEREOF SHALL SUPERSEDE AND REPLACE ANY PRIOR AGREEMENT RELATED TO ARBITRATION OF DISPUTES BETWEEN THE PARTIES CONTAINED IN ANY LOAN DOCUMENT OR ANY OTHER DOCUMENT OR AGREEMENT HERETOFORE EXECUTED IN CONNECTION WITH, RELATED TO OR BEING REPLACED, SUPPLEMENTED, EXTENDED OR MODIFIED BY, THIS NOTE.

Wachovia further points to section 8.17 of the Financing and Security Agreement, which states:

THE BORROWER AND THE LENDER HEREBY JOINTLY AND SEVERALLY WAIVE TRIAL BY JURY IN ANY ACTION OR PROCEEDING TO WHICH THE BORROWER AND THE LENDER MAY BE PARTIES, ARISING OUT OF OR IN ANY WAY PERTAINING TO (A) THIS AGREEMENT, (B) ANY OF THE FINANCING DOCUMENTS, OR (C) THE COLLATERAL. THIS WAIVER CONSTITUTES A WAIVER OF TRIAL BY JURY OF ALL CLAIMS AGAINST ALL PARTIES TO SUCH ACTIONS OR PROCEEDINGS, INCLUDING CLAIMS AGAINST PARTIES WHO ARE NOT PARTIES TO THIS AGREEMENT.

THIS WAIVER IS KNOWINGLY, WILLINGLY AND VOLUNTARILY MADE BY THE BORROWER AND THE LENDER, AND THE BORROWER AND THE LENDER HEREBY REPRESENT THAT NO REPRESENTATIONS OF FACT OR OPINION HAVE BEEN MADE BY ANY INDIVIDUAL TO INDUCE THIS WAIVER OF TRIAL BY JURY OR TO IN ANY WAY MODIFY OR NULLIFY ITS EFFECT. THE BORROWER AND THE LENDER FURTHER REPRESENT THAT THEY HAVE BEEN REPRESENTED IN THE SIGNING OF THIS AGREEMENT AND IN THE MAKING OF THIS WAIVER BY INDEPENDENT LEGAL COUNSEL, SELECTED OF THEIR OWN FREE WILL, AND THAT THEY HAVE HAD THE OPPORTUNITY TO DISCUSS THIS WAIVER WITH COUNSEL.

Accordingly, based on this language, Wachovia asserts that the Court ought to strike the Debtor's demand for a jury trial.

With respect to its contention that the Debtor has waived its right to seek punitive damages in this adversary proceeding, Wachovia points to section 8.18 of the Financing and Security Agreement, which states:

EACH OF THE PARTIES HERETO, AGREES THAT IN ANY JUDICIAL MEDIATION OR ARBITRATION PROCEEDING OR ANY CLAIM OR CONTROVERSY BETWEEN OR AMONG THEM THAT MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE OTHER FINANCING DOCUMENTS OR ANY OTHER AGREEMENT OR DOCUMENT BETWEEN OR AMONG THEM OR THE OBLIGATIONS EVIDENCED HEREBY OR RELATED HERETO, IN NO EVENT SHALL ANY PARTY HAVE A REMEDY OF, OR BE LIABLE TO THE OTHER FOR, (1) INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES OR (2) PUNITIVE OR EXEMPLARY DAMAGES. EACH OF THE PARTIES HEREBY EXPRESSLY WAIVES ANY RIGHT OR CLAIM TO PUNITIVE OR EXEMPLARY DAMAGES THEY MAY HAVE OR WHICH MAY ARISE IN THE FUTURE IN CONNECTION WITH ANY SUCH PROCEEDING, CLAIM OR CONTROVERSY, WHETHER THE SAME IS RESOLVED BY ARBITRATION, MEDIATION, JUDICIALLY OR OTHERWISE.

Wachovia therefore argues that even if the Debtor is allowed to proceed with its tortious interference claim concerning the proposed Hoffer Group transaction, an award of punitive damages has been specifically excluded by both parties as a possible remedy.

In response to Wachovia's Motion the Debtor advances four arguments. First, the Debtor contends that Wachovia's Motion is untimely in that under Rule 12(f)(2) of the Federal Rules of Civil Procedure, such a motion should be made either prior to a response to a pleading or, if a response is not allowed, within twenty-one days after service of the pleading. The Debtor argues that because Wachovia's Motion has been filed approximately nine months after service of the original complaint demanding a jury trial and three days after filing its Answer to the Amended Complaint, it is untimely. The Debtor's second argument is that Wachovia

specifically consented to a trial by jury in this case and it points to the Consent. Third, the Debtor contends that punitive damages are allowed with respect to the tortious interference claim as such conduct “falls outside the scope of the parties’ contractual waiver of punitive damages.” (Barber & Ross Company’s Response in Opposition to Wachovia Bank’s Motion to Strike Jury Demand and Request for an Award of Punitive Damages (“Response”) at pg. 4.) The Debtor contends that the tortious interference claim relates to “extra-contractual conduct” which is distinct from any rights, obligations, or agreements under the parties’ financing documents. Finally, the Debtor’s last argument is one based in policy. The Debtor contends that the Virginia Supreme Court would find the punitive damages waiver to be unenforceable because it violates public policy.

In its reply Wachovia specifically contends the following: First, Wachovia asserts that Rule 12(f) has no application to its Motion. Second, Wachovia argues that the Consent merely provides the Court with jurisdiction to conduct a jury trial, but does not create a right to a jury trial where one does not otherwise exist. Third, Wachovia cites language from the waiver of punitive damages in the Financing and Security Agreement for the proposition that the waiver bars the Debtor’s claim for punitive damages for the tortious interference claim. That language cited is “*may arise out of or be in any way connected with* this Agreement, the other financing documents or any other agreement or document between or among [the Company and Wachovia] or the obligations evidenced hereby or related hereto” (Wachovia Bank, National Association’s Reply Memorandum in Further Support of its Motion to Strike Jury Demand and Request for an Award of Punitive Damages at pg. 4 (alterations in original).) Finally, Wachovia cites Virginia case law for the proposition that a party can waive by contract a

legal right. Although Wachovia notes that the Virginia Supreme Court hasn't considered the particular issue of a contractual waiver of punitive damages, it notes that federal courts in Virginia routinely have enforced such contractual waivers. Accordingly, Wachovia contends that the Debtor's public policy argument is belied by case law and not applicable to this business dispute.

CONCLUSIONS OF LAW

The Court has jurisdiction over this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. Bankruptcy judges may hear and determine all core proceedings arising under title 11, including "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims." 28 U.S.C. § 157(b)(2)(O). The parties have agreed that this adversary proceeding is a "core" bankruptcy proceeding.

JURY TRIAL

The Court agrees with Wachovia that F.R.C.P. Rule 12(f), which authorizes the court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter[.]" is not applicable to the Motion. While the Court also agrees with Wachovia that the Consent it entered into was for the principal purpose of providing jurisdiction to this Court to hear this adversary proceeding demanding a trial by jury as to issues of fact and that it did not operate to create a right to trial by jury which did not otherwise exist, it

concludes that its effect is broader than Wachovia argues. Bankruptcy Rule 9015(b) sets forth several pre-conditions for the filing of such a consent. The first of those is “[i]f the right to a jury trial applies” By entering into such a Consent, it appears that Wachovia conceded that a right to trial by jury did exist as to the factual issues presented in this controversy. The basis upon which Wachovia now seeks to avoid a jury trial is not a contention that no such right exists as to some particular count of the Amended Complaint, but rather on the ground of a contractual waiver by the parties of such right, even if otherwise available under law. Federal Rule of Civil Procedure 8, which is made applicable to adversary proceedings in bankruptcy by Bankruptcy Rule 7008, provides in subsection (c)(1) that “[i]n responding to a pleading, a party must affirmatively state any avoidance of affirmative defense, including . . . waiver.” In neither of its answers to the original Complaint and the Amended Complaint did Wachovia specifically respond to the Debtor’s request for a jury trial as to issues of fact. In contrast, in its tenth affirmative defense contained in its Answer to the Amended Complaint, Wachovia expressly disputed the Debtor’s claim to any punitive damages on the ground that it had “waived the right to seek punitive damages.” In the Consent that it filed Wachovia did not require any language which conditioned its consent on a reservation of right to contend that no right to a jury trial existed by reason of a contractual waiver entered into by the parties. Wachovia has not cited to the Court any case or treatise authority supporting its position upon facts similar to those presented here. Accordingly, the Court concludes that Wachovia is bound by the earlier pleadings filed in this proceeding and that this portion of the Motion should be denied.

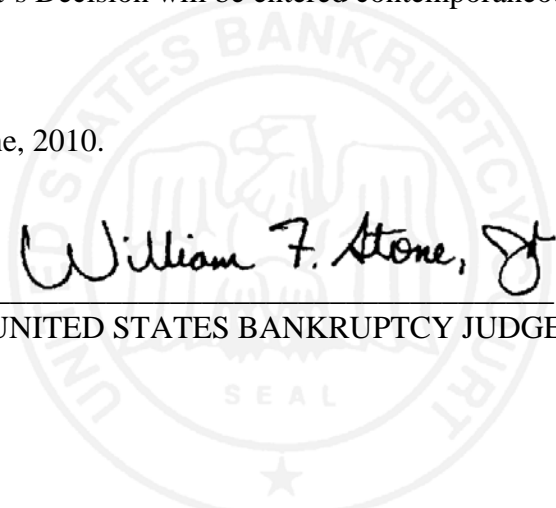
PUNITIVE DAMAGES

The Decision has already noted the Debtor's concession that it has no valid claim to punitive damages with respect to its contention that Wachovia breached the contractual provisions of the Mebane Loan. The only count as to which punitive damages may be an issue is the one which asserts that Wachovia tortiously interfered in the proposed Hoffer transaction. Wachovia contends essentially that its involvement in that proposed aborted Hoffer transaction was a direct result of its contract with the Debtor, which required the former's consent to any transaction involving a sale of all or substantially all of the Debtor's assets. At this point the Court doesn't know what facts will ultimately be proven at a trial of this proceeding and whether the contractual mutual waiver of punitive damages might have any possible application to such facts. For example, it might make a significant difference whether the proposed Hoffer transaction would have resulted in payment in full to Wachovia or conversely would have required the bank's consent to releasing a substantial part of its collateral for less than full payment of the outstanding debt. Such evidence is critical in drawing a distinction between Wachovia's claimed tortious interference with its customer's contract with a third party, which is the contention made by the Debtor, and its legitimate protection of its own interests as a secured lender to that customer, as the bank asserts. Until the Court has before it all of the relevant evidence upon such issue, it concludes that this portion of the Motion is premature. Because the Court is not persuaded by the Debtor's contention that the punitive damages waiver is void as contrary to Virginia public policy, especially in a situation involving a mutual waiver by two substantial corporations with respect to loan transactions involving millions of dollars, it will not finally deny the Motion based upon that argument. Therefore, it will deny the Motion insofar as it relates to the question of punitive damages without prejudice to Wachovia's right to renew it at

trial at the conclusion of all the evidence.

An Order embodying the Court's Decision will be entered contemporaneously herewith.

DECIDED this 29th day of June, 2010.


William F. Stone, Jr.

UNITED STATES BANKRUPTCY JUDGE