

ORIGINAL



THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF
THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

HOME VEST CAPITAL, LLC,)

Plaintiff,)

vs.)

RETIREMENT APPLICATION)

SERVICES, INC. and JOHN)

DOUGLAS HALVE, individually,)

Defendants,)

and)

MICHAEL MARES, individually,)

Defendant,)

and)

DEANA MARES, an individual,)

GM4US, LLC, and RAS, INC.,)

Plaintiffs/Appellants,)

vs.)

BANK OF AMERICA, N.A.,)

Defendant/Appellee,)

and)

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
AUG 10 2018
JOHN D. HADDEN
CLERK

Rec'd (date)	8-10-18
Posted	RE
Mailed	RE
Distrib	RE
Publish	X yes ___ no

Case No. 115,897

BANK OF AMERICA, N.A., f/k/a Nations Bank,)
)
Plaintiff/Counter-)
Defendant/Appellee,)
)
vs.)
)
MICHAEL MARES,)
)
Defendant/Counter-)
Claimant/Appellant.)

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

HONORABLE MARY F. FITZGERALD, JUDGE

REVERSED AND REMANDED FOR JURY TRIAL

Joseph L. Hull, III,
Joseph Norwood,
Tulsa, Oklahoma,

For Michael Mares, Deanna Mares,
GM4US, LLC, and RAS, Inc.,

Joe E. Edwards,
Melanie Wilson Rughani,
CROWE & DUNLEVY,
Oklahoma City, Oklahoma,
and
Elliot P. Anderson,
CROWE & DUNLEVY,
Tulsa, Oklahoma,
and
Justin Nichols,
Brian Fries,
LATHROP & GAGE, LLP,
Kansas City, Missouri,

For Bank of America.

Opinion by Kenneth L. Buettner, Judge:

¶1 Plaintiffs/Appellants Deana Mares, GM4US, LLC, and RAS, Inc. and Defendant/Counter-Claimant/Appellant Michael Mares (collectively, Appellants) appeal from the trial court's February 2017 Decision in favor of Bank of America (Bank) following a bench trial. The dispute between Appellants and Bank arose out of Bank's refusal to honor checks it found Michael Mares negotiated without authority. The trial court erred in enforcing a waiver of jury trial included in the deposit agreement Michael Mares signed when opening accounts with Bank because the Oklahoma Constitution plainly commands that a contractual waiver of a constitutional right, one of which is the right to a jury trial, is void. We reverse and remand for jury trial.

¶2 The trial court consolidated three cases filed in 2007.¹ The dispute between Bank and Appellants arose when Michael Mares negotiated four checks from Wycliffe USA, Ltd., an entity he was previously associated with, at Bank and had the funds converted to cashiers checks which he gave to himself, his wife, Deana Mares, GM4US, and RAS. Wycliffe then reported Mares did not have authority to negotiate the checks and Bank recalled the cashiers checks. In their claims or counterclaims, Appellants argued that Bank wrongfully dishonored the checks, totaling \$144,500,

¹ Plaintiff Home Vest Capital, LLC, dismissed its claims without prejudice in 2009.

which caused Appellants harm. Appellants asserted claims for liability under Articles 3 and 4 of the Uniform Commercial Code (UCC), as well as claims for negligence, libel, slander, libel per se, slander per se, intentional infliction of emotional distress, breach of contract, violation of the Oklahoma Consumer Protection Act, abuse of process, bad faith, negligent supervision/ratification, conversion, negligence per se, and wrongful dishonor.

¶3 Appellants demanded a jury trial, which Bank opposed based on a waiver of jury trial included in the Deposit Agreement Michael Mares entered with Bank. In an order filed September 30, 2014, the trial court granted Bank's motion to enforce jury trial waiver and found Appellants had waived their right to a jury trial by executing the Deposit Agreement. In its judgment following the bench trial, the trial court expressly found the waiver of jury trial was valid and enforceable.

¶4 Appellants' first allegation of error is that the trial court erred in enforcing the contractual jury trial waiver.² The Oklahoma Constitution provides the right of a trial

² The relevant part of the Deposit Agreement provides:

. . . (Y)ou have the right to compel us at your option, and we have the right to compel you at our option, to determine any individual Claim with a value of less than \$1 million by arbitration. All other Claims will be resolved in court without a jury; except those brought in California state court, in which case such Claims will be determined by reference to a referee

* * *

A Claim that is not submitted to arbitration or judicial reference will be decided by a judge without a jury as permitted by law.

by jury in cases such as this: “The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Thousand Five Hundred Dollars (\$1,500.00),” OK Const. Art. II, §19. Under the Oklahoma Constitution, no Oklahoma constitutional right may be waived by contract: “Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.” OK Const. Art. XXIII, §8. Appellants argue the jury waiver was void based on that section. Bank cites cases from other jurisdictions approving contractual jury waivers, but those cases are not helpful because Oklahoma is unique among the states in having a constitutional bar to contractual waivers of constitutional rights. See Amanda R. Szuch, *Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Court*, 79 U. Cin. L. Rev. 435, 439 (2010).³ The Oklahoma cases cited by Bank all involve arbitration agreements, which are distinguishable from jury trial waivers.⁴

³ Noting Montana has a statute barring jury trial waivers and judicial decisions in California and Georgia have barred such waivers.

⁴ Bank also relies on *Massey v. Farmers Ins. Group*, 1992 OK 80, 837 P.2d 880, which addressed whether a statute mandating that fire insurance policies require appraisers to determine the amount of damage to the property violated the right to a jury trial. The court noted that the right to a jury trial is inviolate and concluded that to protect that right, the damage appraisal “has no preclusive effect upon the party who did not demand the appraisal process.”

¶5 Bank also contends that the contractual waiver in its deposit agreement is valid in Oklahoma based on 12 O.S.2011 §591. That section provides:

The trial by jury may be waived by the parties, in actions arising on contract, and with the assent of the court in other actions, in the following manner: By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney. By written consent, in person or by attorney, filed with the clerk. By oral consent, in open court, entered on the journal.

Bank urges that it filed the deposit agreement as an attachment and that it therefore showed Appellants' written consent, filed with the clerk. Bank's argument that §591 allows a contractual waiver of the right to a jury trial is unpersuasive for two reasons. First, it ignores the fact that §591 is part of the Oklahoma civil procedure statutes devoted to jury trials and cannot supercede the constitution. See 12 O.S.2011 §571-§591. Second, and more important, §591 does not address contractual waiver of the right to a jury trial, but rather how to waive the right to a jury trial after an action on a contract has been commenced in court. Bank's reading of §591 would make article XXIII, section 8 superfluous as far as the constitutional right to a jury trial because any contractual waiver of that constitutional right would not be void so long as the waiver were filed with the clerk. Section 591 provides the ways in which parties to a current action may waive their right to a jury trial in that action; it does not allow

a blanket contractual waiver of a jury trial in any future case between the contracting parties.

¶6 No published Oklahoma decision has addressed the validity of a contractual waiver of a jury trial in light of article XXIII, section 8.⁵ We apply the plain language of that section to find that the contractual waiver in this case was void and therefore the trial court erred in denying Appellants' demand for a jury trial.⁶

¶7 Because we reverse and remand for jury trial, we do not consider Appellants' remaining claims of errors in the bench trial.

¶8 REVERSED AND REMANDED FOR JURY TRIAL.

BELL, P.J., concurs and JOPLIN, J., dissents.

⁵ The only case we have found discussing this specific issue is an unpublished decision of the Oklahoma Court of Civil Appeals which involved a lease provision waiving the right to have a jury resolve disputes under the lease. Case No. 95,121, mandated Jan. 16, 2003 (*cert. denied*) (withdrawn from publication).

⁶ Because the jury trial waiver here was void under the Oklahoma Constitution, we need not consider Bank's arguments that Michael Mares knowingly consented to the waiver or that Michael Mares bound the other Appellants as their agent.