UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EXPERI-METAL INC.,
a Michigan corporation,

Plaintiff,

vs.

Case No. 2:09-cv-14890
Hon. Patrick J. Duggan

COMERICA BANK,

Defendant.

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PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION TO STRIKE PLAINTIFF'S JURY DEMAND

ISSUE PRESENTED

Whether the issue as to whether Defendant accepted the wire transfer orders in Experi-Metal's name on January 22, 2009 in good faith is an issue within the scope of the jury trial waiver contained in the Master Agreement.

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ARGUMENT

The Issue as to Whether Defendant Accepted the Wire Transfer Orders in Experi-Metal's Name on January 22, 2009 in Good Faith Is Not an Issue Within the Scope of the Jury Trial Waiver Contained in the Master Agreement

The Seventh Amendment guarantees the right of a jury trial in civil cases. U.S. Const. amend. VII; *Simler v. Conner*, 372 U.S. 221, 222, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963). Courts narrowly construe any attempted waiver of this right and indulge in every reasonable presumption against waiver. *J.P. Morgan Chase Bank v. Winget*, 639 F. Supp. 2d 830, 834 (E.D. Mich. 2009) [citation omitted]; *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1378 (9th Cir. 1997) (holding that courts "must indulge every reasonable presumption against the waiver of the jury trial").

Fed. R. Civ. P. 39(a) provides in pertinent part:

> When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all ***issues*** so demanded must be by jury unless:
>
> * * *
>
> (2) the court, on motion or on its own, finds that on some or all of those ***issues*** there is no federal right to a jury trial. [Emphasis added.]

Courts will deny a motion to strike a jury trial demand when issues in the case are not within the scope of the jury trial waiver. *Riverside Portable Storage, Inc. v. PODS, Inc.*, 2009 WL 804666 (M.D. Fla. Mar. 27, 2009) (**Exhibit 1**). In *Riverside Portable Storage*, plaintiff entered into a franchise agreement with defendant-franchisor. The franchise agreement gave plaintiff exclusive right to operate a PODS franchise in a seventeen-zip-code area located in California. The franchise agreement contained a provision whereby the parties agreed that "any legal action in connection with this Agreement shall be tried to the court sitting without a jury,

and all parties hereto waive any right to have any action tried by jury." After entering into the franchise agreement, plaintiff operated PODS businesses within the seventeen-zip-code protected area, as well as in adjacent areas that had not been sold to other PODS franchisees. When the adjacent areas became more profitable than plaintiff's original area, plaintiff contacted the franchisor, and the franchisor orally agreed to sell an adjacent eight-zip-code area to plaintiff. Additionally, plaintiff was led to believe that defendant would offer plaintiff the option of purchasing other adjacent service areas before defendant offered them to third parties. After the oral agreement between plaintiff and defendant, however, defendant sold the adjacent area covering the eight zip codes, as well as the other adjacent service areas, to another party in violation of the oral agreement. Plaintiff sued defendant for, among other things, breach of the oral agreement regarding the eight-zip-code area. Plaintiff also asserted claims for promissory estoppel as to the area covered by the eight zip codes and the other areas adjacent to plaintiff's original area. *Id.* at 1.

Defendants moved to strike plaintiff's demand for a jury trial as to all counts, arguing that plaintiff waived the right to a jury when it executed the franchise agreement. While plaintiff did not challenge that it waived its right to a jury trial regarding claims arising out of the franchise agreement, plaintiff argued that the remaining claims do not constitute "legal action in connection with" the franchise agreement, and as such, were not affected by the waiver. *Id.* at 2.

The *Riverside Portable Storage* court held that the claims relating to the breach of the alleged oral contract and for promissory estoppel were not sufficiently connected to the franchise agreement to fall within the scope of the jury trial waiver provision. The claims "could exist regardless of whether plaintiff and defendants ever entered into the [franchise] agreement, and are not in any way governed by that agreement or its legal limitations." *Id.* at 2.

Defendants-franchisor argued that the claims for breach of the oral agreement and promissory estoppel were connected to the franchise agreement because the claims implicate several provisions in the agreement. The *Riverside Portable Storage* court rejected defendants' argument, ruling that the franchise agreement "has no bearing" on those claims. For the above reasons, the court found that plaintiff did not waive its right to a jury trial with regard to the above claims for breach of the oral contract and promissory estoppel. *Id.* at 3.

In this case, the issue as to whether Defendant accepted the wire transfer orders in Experi-Metal's name on January 22, 2009 in good faith is not within the scope of the jury trial waiver contained in the Master Agreement. Experi-Metal filed a one-count complaint for "violation of MCL 440.4601 *et seq.*," that is, article 4A (Plaintiff's Complaint). Article 4A of the Uniform Commercial Code, specifically Mich. Comp. Laws § 440.4702(2), provides, among other things, that the bank must prove "that it accepted the payment order in good faith."

"Good faith" is defined by Mich. Comp. Laws § 440.4605(1)(A).

Mich. Comp. Laws § 440.4702(6) provides that the obligation of good faith may not be varied by the parties:

> Except as provided in this section and in section 4A203(1)(a) [not applicable to this case], rights and obligations arising under this section or section 4A203 may not be varied by agreement.

Based upon the above provisions of article 4A, the good faith obligation is a constant that originates from article 4A, exists regardless of whether Experi-Metal and Defendant ever entered into the Master Agreement, and is not in any way governed by that agreement.

In its July 8, 2010 opinion and order denying Defendant's motion for summary judgment, the Court ruled that the issue as to whether Defendant exercised good faith must be decided by the fact finder:

> The court therefore finds a genuine issue of material fact with respect to whether Comerica accepted the wire transfer orders in Experi-Metal's name on January 22, 2009 in "good faith." [Opinion and Order at 16.]

Despite the fact that the determination of good faith arises from article 4A and is separate from and independent of the terms of the Master Agreement, Defendant states that Experi-Metal waived its right to a jury trial on the issue of good faith based on the language in the Master Agreement that Experi-Metal:

> [W]aives any right to trial by jury in the event of litigation regarding the performance or enforcement of, or in any way related to, this agreement.

The issue as to whether Defendant acted in good faith in this case is not within the scope of the above provision. It is without question that the determination of good faith is not related to the specific performance of the Master Agreement or the enforceability of that agreement. The issue of good faith exists independent of the agreement. Moreover, the determination of good faith is not "in any way related to" the Master Agreement. Specifically, the determination of good faith: (1) does not arise from the agreement; (2) does not pertain to the terms of the agreement; (3) is not an issue based on the agreement; (4) does not depend on the validity of the agreement; and (5) does not require reference to or an evaluation of the agreement. Defendant's duty of good faith exists regardless of whether the parties entered into the Master Agreement and is separate from and independent of that agreement. *Riverside Portable Storage, Inc. v. PODS, Inc., supra.*

In light of the doctrines of article 4A and strictly construing the jury trial waiver provision, it is manifest that the issue as to whether Defendant accepted the wire transfer orders in Experi-Metal's name on January 22, 2009 in "good faith" is not within the scope of the jury trial waiver.

Conclusion

For the above reasons, Defendant's motion to strike Plaintiff's jury demand should be denied.

CERTIFICATE OF SERVICE

I certify that on August 2, 2010, I filed the foregoing paper with the Clerk of the Court using the ECF system which will electronically send notification to Todd A. Holleman, Esq. and Lara Lenzotti Kapalla, Esq.

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Respectfully submitted,

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EXHIBIT 1

Slip Copy, 2009 WL 804666 (M.D.Fla.)
(Cite as: 2009 WL 804666 (M.D.Fla.))

United States District Court, M.D. Florida,
Tampa Division.
RIVERSIDE PORTABLE STORAGE, INC., f/k/a Desert Portable Storage, Inc., Plaintiff,
v.
PODS, INC. and Pods Enterprises, Inc., Defendants.
No. 8:08-cv-1771-T-24 TGW.

March 27, 2009.

Alice K. Sum, Barry Norman Greenberg, Fowler White Burnett, PA, Miami, FL, for Plaintiff.

Ronald Sturgis Holliday, Steven Douglas Knox, DLA Piper US, LLP, Tampa, FL, for Defendants.

ORDER

SUSAN C. BUCKLEW, District Judge.

***1** This cause comes before the Court on Defendants' motion to strike Plaintiff's demand for jury trial. (Doc. 10). Plaintiff has filed a response in opposition. (Doc. 19).

BACKGROUND

In December of 2003, Plaintiff entered into a franchise agreement with Defendant PODS, Inc., in which Plaintiff purchased a PODS franchise along with the exclusive right to operate a PODS business in a given protected area made up of seventeen zip codes in California. The franchise agreement contained a jury trial waiver provision, stating:

> [T]he parties agree that any legal action in connection with this Agreement shall be tried to the court sitting without a jury, and all parties hereto waive any right to have any action tried by jury.

(Doc. 3-2, ¶ 22.8).

After entering into the franchise agreement, Plaintiff operated PODS businesses within its protected area as well as in the adjacent areas, which were still open to other PODS franchisees. The adjacent open areas became more profitable than Plaintiff's original, protected area, and in August of 2004, Plaintiff contacted Jeanine Blake of PODS, Inc. and advised her of Plaintiff's desire to purchase exclusive rights to operate PODS businesses in eight zip codes adjacent to Plaintiff's protected area. After some discussion, PODS, Inc. orally agreed to sell the adjacent eight-zip-code area to Plaintiff. Additionally, Plaintiff was led to believe that PODS, Inc. would offer Plaintiff the option of purchasing the remainder of the adjacent service areas before PODS, Inc. offered them for sale to third-parties.

Ms. Blake informed Plaintiff that PODS, Inc. would draft an agreement for the purchase and sale of the service area within the eight zip codes. Execution of this agreement was delayed, but Plaintiff contacted Ms. Blake to confirm that there was still an agreement to purchase the service area covering the eight zip codes, and she assured Plaintiff that they had a deal. However, several weeks later, PODS, Inc. sold the service area covering the eight zip codes, along with the remainder of the service area adjacent to Plaintiff's protected zone, to another party in violation of the oral agreement between PODS, Inc. and Plaintiff.

Later, in 2006, PODS, Inc. and/or Defendant PODS Enterprises [FN1] introduced a new initiative called the CPO Program and required all franchisees to participate in it. The CPO Program offered renters of PODS storage units the option to purchase insurance on the unit. PODS, Inc. and/or PODS Enterprises made repeated assurances and explicit promises to its franchisees, including Plaintiffs, that the franchisees would receive a portion of the insurance fee as profit. While Plaintiff was paid under the CPO Program in 2006, PODS, Inc. and/or PODS Enterprises refused to pay Plaintiff under the CPO Program for 2007.

> FN1. In July of 2005, PODS, Inc. assigned all of its rights and interest in its franchise agreements to PODS Enterprises.

As a result of these dealings Plaintiff sued Defendants, asserting seven claims: Count I-breach of oral contract regarding the service area within the eight zip codes,

Count II-promissory estoppel as to the service area covered by the eight zip codes, Count III-promissory estoppel as to the remainder of the service area adjacent to RPS's service area, Count IV-breach of the December 2003 franchise agreement, Count V-breach of the implied duty of good faith and fair dealing with respect to the December 2003 franchise agreement, Count VI-breach of oral contract as to the CPO Program, and Count VII-promissory estoppel as to the CPO Program. In the amended complaint, Plaintiff demands a trial by jury of all issues so triable.

DISCUSSION

***2** "A party may validly waive its Seventh Amendment right to a jury trial so long as the waiver is knowing and voluntary." *Bakrac, Inc. v. Villager Franchise Systems*, 164 Fed. Appx. 820, 823 (11th Cir.2006) (citations omitted). However, "a waiver of a valid jury demand is not to be lightly inferred, and waivers should be scrutinized with the utmost care." *Haynes v. W.C. Caye & Co., Inc.*, 52 F.3d 928, 930 (11th Cir.1995) (quotation marks and citations omitted).

Defendants move to strike Plaintiff's demand for a jury trial as to all counts, arguing that Plaintiff waived the right to a jury when it executed the December 2003 franchise agreement. Plaintiff does not challenge that it knowingly and intentionally waived its right to a jury trial regarding the claims arising out of the original franchise agreement. Specifically, Plaintiff abandons any claim to a jury for Counts IV and V. However, Plaintiff argues that the remaining claims do not constitute "legal action in connection with" the December 2003 franchise agreement, and as such, are not affected by the waiver contained in the agreement.

Counts I, II, and III relate to the alleged oral contract to sell Plaintiff the rights to exclusive sales in the eight-zip-code service area adjacent to Plaintiff's protected zone and to the oral promise that Defendants would provide Plaintiff with the option of purchasing rights to the remaining adjacent service areas before offering them to third-parties. These claims are grounded in business dealings not contemplated by the 2003 franchise agreement, could exist regardless of whether Plaintiff and Defendants ever entered into the original agreement, and are not in any way governed by that agreement or its legal limitations. Thus, the claims are not sufficiently connected to the December 2003 franchise agreement to fall within the scope of its jury trial waiver provision.

This Court rejects Defendants' argument that another district court's order (Doc. 10), conclusively decides that Counts I, II, and III are claims "in connection with" the original franchise agreement. In the case referred to by Defendants, the district court concluded that Plaintiff's claims of oral contract and promissory estoppel fell within the 2003 franchise agreement's provision requiring *mediation* of "any controversy or claim arising out of or relating to [the 2003 franchise] Agreement," because the court noted that the terms "arising out of" and "relating to" must be broadly interpreted when construing an agreement relating to alternative dispute resolution.

This issue is distinguishable. The provision being interpreted in the prior order dealt with a different subject matter and was based on different language. Further, alternative dispute resolution provisions are broadly construed, whereas a waiver of the right to a jury trial "is not to be lightly inferred" and "should be scrutinized with the utmost care." *Haynes*, 52 F.3d at 930 (quotation marks and citations omitted).

***3** Defendants also argue that Counts I, II, and III are connected to the 2003 franchise agreement, because the claims implicate several provisions in the original agreement. Specifically, Defendants argue that the following provisions are implicated: (1) paragraph 2.2(c) provides that Defendants can grant a franchise to anyone outside of Plaintiff's service area; (2) paragraph 2.7 provides that Defendants may grant others the right to operate PODS facilities at such locations as they deem appropriate; and (3) paragraph 22.9 provides that there were no other oral or written agreements, understandings, or representations relating to the subject matter of the franchise agreement other than the franchise offering, and that the agreement could only be modified by written agreement signed by both parties. The Court rejects this argument as well.

These sections of the 2003 franchise agreement merely demonstrate that Defendants did not, at that time, promise Plaintiff any rights to the service area adjacent to its seventeen-zip-code protected zone. However, Plaintiff's claim is based on later promises and agreements. The existence of the 2003 franchise agreement has no bearing on the later agreement and

therefore no connection to Plaintiff's claims relating to the issues raised in Counts I, II, or III. Thus, this Court finds that Plaintiff did not waive its right to a jury trial with respect to Counts I, II, and III.

However, the Court agrees with Defendants that Plaintiff waived its right to a jury trial with respect to Counts VI (breach of oral contract as to the CPO Program) and VII (promissory estoppel as to the CPO Program). As alleged in the amended complaint, all franchisees were required to participate in the CPO Program. Since the events underlying these claims arose as a result of Plaintiff's 2003 franchise agreement, the claims are connected to the that agreement. Therefore, the Court grants the motion to strike the jury trial demand with respect to Counts VI and VII.

CONCLUSION

Accordingly, it is ORDERED AND ADJUDGED that Defendant's motion to strike Plaintiff's demand for a jury trial (Doc. No. 10) is **GRANTED IN PART AND DENIED IN PART.** The Court strikes the jury trial demand with respect to Counts IV, V, VI, and VII and **DENIES** the motion with respect to Counts I, II, and III.

DONE AND ORDERED.

M.D.Fla.,2009.
Riverside Portable Storage, Inc. v. PODS, Inc.
Slip Copy, 2009 WL 804666 (M.D.Fla.)

END OF DOCUMENT