UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Chapter 7
Case Nos. 8:13-bk-06864-CED, et al.

Able Body Temporary Services, Inc., et al.,

Debtors.
_____/

Christine L. Herendeen,
as Chapter 7 Trustee,

Plaintiff,

v. Adv. Pro. No. 8:15-ap-118-CED
Lead Case

Regions Bank,

Defendant.
_____/

ORDER GRANTING PLAINTIFF'S MOTION TO RECONSIDER AND VACATE THE REFERENCE TO A NONJURY TRIAL IN INTERLOCUTORY ORDERS

THIS PROCEEDING came before the Court to consider Plaintiff's *Motion to Reconsider and Vacate the Reference to a Nonjury Trial in Interlocutory Orders at Docket Numbers 130, 163, and 180* (the "Motion").[1] Regions Bank ("Regions") filed a Response in Opposition to the Motion,[2] and Plaintiff filed a Reply to Regions' Response.[3]

The issue before the Court is whether Plaintiff waived her right to a jury trial in this proceeding[4] by the references to a non-jury trial in three Pretrial Orders entered in 2016 and 2018. The Court finds that Plaintiff has not waived her right to demand a jury trial.

A. Background

Plaintiff commenced the proceeding on January 30, 2015, by filing a Complaint and Demand for Jury Trial.[5] The initial Complaint included counts to recover fraudulent transfers and to recover damages for unjust enrichment and for aiding and abetting breach of fiduciary duty. It also included a demand for a jury trial on all issues so triable.

On September 19, 2016, the Court entered an Agreed Order Resetting Trial and Establishing Pretrial Procedures.[6] The Agreed Order set a number of deadlines for discovery and pretrial disclosures, and provided that "trial of the Corporate Adversary Proceedings shall be non-jury."

On January 2, 2018, Plaintiff filed an Amended Complaint that included six counts to recover fraudulent transfers and to recover damages for unjust enrichment, aiding and abetting breach of fiduciary duty, and aiding and abetting fraud.[7] As in the Initial Complaint, the Amended Complaint contained a demand for a jury trial on all issues so triable.

On July 3, 2018, the Court entered a Second Amended Agreed Order Setting Trial and Establishing Pretrial Procedures.[8] The Second Amended Agreed Order provided for a fact discovery cutoff of July 30, 2018, set a final pre-trial conference for March 2019, and provided that "trial of the Corporate Adversary Proceedings shall be non-jury."

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[1] Doc. No. 257.
[2] Doc. No. 265.
[3] Doc. No. 270.
[4] On July 10, 2015, the Court entered an Agreed Order Granting Plaintiff Trustee's *Ore Tenus* Request for Order Jointly Administering Adversary Proceedings. (Doc. No. 32). To the extent applicable, this Order shall apply to all of the proceedings subject to the joint administration.
[5] Doc. No. 1.
[6] Doc. No. 130.
[7] Doc. No. 155.
[8] Doc. No. 163.

On October 4, 2018, the Court entered a Third Amended Agreed Order Setting Trial and Establishing Pretrial Procedures.[9] The Third Amended Agreed Order confirmed the July 30, 2018 discovery cutoff and the March 2019 final pre-trial conference, and again provided that "trial of the Corporate Adversary Proceedings shall be non-jury."

The Court conducted a Status Conference on May 1, 2019. At the Status Conference, Plaintiff's counsel advised the Court that he had confused this adversary proceeding with other adversary proceedings in these bankruptcy cases involving Synovus Bank. Plaintiff's counsel stated he had mistakenly believed that the jury trial issue had been decided in both this proceeding and the Synovus proceedings, and that his mistaken belief had led him to draft the Pretrial Orders in this proceeding as providing for a non-jury trial.[10]

On August 13, 2019, Plaintiff filed the Motion asking the Court to vacate the portion of the Pretrial Orders that provided for a non-jury trial in this proceeding.[11] At a September 19, 2019 hearing on the Motion, Plaintiff's counsel asserted that the language in the Pretrial Orders does not amount to a waiver of Plaintiff's right to a jury trial, in part because the Pretrial Orders are not court rulings on Plaintiff's right to a jury and the mistake in in the Pretrial Orders was his—the attorney's— mistake and not the client's mistake.[12]

In response, Regions argued that Plaintiff had agreed or stipulated to at least three Pretrial Orders providing for a non-jury trial, that all of the discovery has taken place in the proceeding while the Pretrial Orders were in effect, that Plaintiff's actions constitute a waiver of her right to a jury trial, and that Regions' reliance on Plaintiff's agreement that the proceeding would be non-jury was prejudicial to its defense of the proceeding.[13] At the conclusion of the hearing, the Court directed Regions to supplement the record by filing an affidavit or declaration setting out how Regions detrimentally relied on the provision for a non-jury trial in the Pretrial Orders.[14]

To comply with the Court's request to supplement the record, Regions filed the Declaration of Edmund Whitson on October 3, 2019.[15] According to the Declaration, (1) Regions conducted its discovery with a view to presenting evidence to an experienced bankruptcy judge and not to a jury of lay people, (2) Regions did not videotape any depositions, (3) Regions did not hire a jury consultant, and (4) Regions hired expert witnesses based on their ability to present evidence to a bankruptcy judge and not to a jury. Regions contends that it cannot "re-do" its preparation at this time because fact discovery closed in the case on July 30, 2018.

On October 2, 2019, the Court entered a Case Management and Scheduling Order that sets a hearing for January 8, 2020, on the parties' *Daubert* motions and summary judgment motions and a final pretrial conference for February 12, 2020.[16]

B. Discussion

The Court finds that Plaintiff has not waived her right to demand a jury trial in this proceeding by virtue of provisions in the Pretrial Orders for a non-jury trial.

First, in the Eleventh Circuit, there is a presumption against a party's waiver of a right to a jury trial. "Because the right to a trial by jury is a fundamental constitutional right, 'courts must indulge every reasonable presumption against waiver.'"[17] For example, where a party has delayed making a jury demand, the Eleventh Circuit has said that courts should excuse the delay in favor of

[9] Doc. No. 180.
[10] Doc. No. 233, p. 7.
[11] Doc. No. 257.
[12] Doc. No. 278, pp. 66-67.
[13] Doc. No. 278, p. 74.
[14] Doc. No. 278, pp. 76-77.
[15] Doc. No. 280.
[16] Doc. No. 277.
[17] *In re Pearlman*, 493 B.R. 878, 882 (Bankr. M.D. Fla. 2013)(quoting *Burns v. Lawther*, 53 F.3d 1237, 1240 (11th Cir. 1995)).

granting a jury trial "in the absence of strong and compelling reasons to the contrary."[18]

Second, a waiver is "an intentional relinquishment or abandonment of a known right or privilege."[19] Here, Plaintiff did not intentionally relinquish her right to a jury trial. Plaintiff's attorney explained that he had confused the status of the jury demand with another proceeding at the time that the Pretrial Orders were prepared and entered. He further explained that the mistake was his and not Plaintiff's, and that Plaintiff did not intend to waive her right to a jury trial in this proceeding. In fact, Plaintiff included a jury demand in her Amended Complaint in January 2018 *after* entry of the first Pretrial Order in September 2016.[20] Regions does not dispute Plaintiff's explanations, and the Court accepts Plaintiff's assertion that the provision for a non-jury trial in the Pretrial Orders was inadvertent.

Third, the Court has considered the Declaration of Edmund Whitson and finds that any reliance on the Pretrial Orders is not unfairly prejudicial to Regions. In the Declaration, Regions' counsel states that Regions might have asked questions differently during discovery depositions, that it might have videotaped some depositions, that it might have hired a jury consultant, that it had hired expert witnesses "based on their ability to aid a bankruptcy court that is already well-equipped to understand the complex factual information in this case, rather than their ability to distill and explain complex concepts in a manner appropriate for lay jurors," and that a jury trial will be more expensive.[21]

But the Declaration does not include information regarding the identity of the witnesses deposed, whether they are Regions' own current or former employees, or whether the witnesses are otherwise available for trial. There is ample time for Regions to retain a jury consultant and, as set forth below, the District Court could withdraw the reference so that the proceeding may not be tried by a bankruptcy judge, despite Regions' planning. And lastly, while Regions no doubt would like to avoid the time and expense entailed in a jury trial, the fact that the time and expense may be incurred does not demonstrate that Regions relied upon the proceeding being tried by a judge and not before a jury.

Finally, in this adversary proceeding, Plaintiff filed a Motion for Withdrawal of the Reference in March 2015.[22] In April 2015, the District Court entered an order on the motion that provided for the proceeding to remain in the Bankruptcy Court "for the disposition of all pretrial matters, including any dispositive motions."[23]

As shown by the Court's Case Management and Scheduling Order, the pretrial issues are not close to conclusion. No trial has been scheduled, either by this Court or by the District Court—in the event the reference is withdrawn for purposes of trial. This is unlike *Perez v. Cathedral Buffet, Inc.*,[24] in which the court found that plaintiff would be prejudiced by a late jury demand that was made only three months before the scheduled trial. Here, Regions will not be unfairly prejudiced in the development of its case for trial in the ample time that is available.

For these reasons, the Court determines that Plaintiff did not waive her right to a jury trial in this proceeding by virtue of the provisions for a non-jury trial in the Pretrial Orders.

C. Remaining issues

The Case Management and Scheduling Order dated October 1, 2019, provides that "[i]f the Court determines that there was no waiver, the Court will discuss the procedures for ruling on the remaining issues of entitlement to a jury trial on any issues, including the need for further briefing or hearings on these issues."[25] Consequently, the parties are

[18] *In re Pearlman*, 493 B.R. at 883 (quoting *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983)).
[19] *In re RDM Sports Group, Inc.*, 260 B.R. 915, 924 (Bankr. N.D. Ga. 2001)(quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)).
[20] *See* Doc. Nos. 130, 155.
[21] Doc. No. 280.
[22] Doc. No. 7.
[23] Doc. No. 28.
[24] *Perez v. Cathedral Buffet, Inc.*, No. 5:15CV1577, 2016 WL 4468111, at *2 (N.D. Ohio Aug. 24, 2016).
[25] Doc. No. 277, ¶ 6.

directed to confer regarding the issues relating to Plaintiff's entitlement to a jury trial, and to advise the Court in writing whether further briefing or hearing is appropriate, or whether the remaining issues may be resolved on the record without further briefing or hearing.

Accordingly, it is

ORDERED:

1. Plaintiff's Motion to Reconsider and Vacate the Reference to a Nonjury Trial in Interlocutory Orders at Docket Numbers 130, 163, and 180 is granted to the extent that Plaintiff seeks a determination that she has not waived her right to a jury trial in this proceeding, and the references to a non-jury trial in Docket Numbers 130, 163, and 180 are stricken.

2. Plaintiff and Regions are directed to confer regarding all remaining issues surrounding Plaintiff's entitlement to a jury trial and to file a statement no later than **December 6, 2019**, whether further briefing or hearing on the issues is appropriate or whether the remaining issues may be resolved on the record without further briefing or hearing.

DATED: November 5, 2019.

/s/ Caryl E. Delano

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Caryl E. Delano
United States Bankruptcy Judge