

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
22ND JUDICIAL CIRCUIT
STATE OF MISSOURI

KOHNER PROPERTIES, INC.,)	
Plaintiff,)	Cause No.: 1322-AC14084
)	
vs.)	Division No. 29
)	
DANNY EPHRAIM, ET AL.,)	
Defendants.)	

ORDER

The matter is before the Court on Plaintiff's Motion and Objection to the Defendant's Request for a Jury Trial. Plaintiff filed a Petition for Breach of Lease (breach of contract). The Plaintiff's petition has attached as an exhibit the purported apartment lease which is the subject of the cause of action and Plaintiff's objection. On January 23, 2014, defendants requested a jury trial. On March 6, 2014, Judge Peebles sitting in Division 27 granted Defendants' request for a jury trial, transferring the matter to Division 29 and deferring hearing and consideration of Plaintiff's objection with leave granted to Plaintiff to raise and be heard on his objection to Defendants' request for a jury trial before Division 29. Plaintiff has filed a Motion in Opposition to Defendants' Request for Jury Trial and Defendants filed a Memorandum in Support of their Request for a Jury Trial Setting. The objection was called for hearing on March 28, 2014 before this Court. Both parties presented their arguments to the Court and the matter was taken under submission.

Both parties agree that the attached lease to Plaintiff's Petition is true, authentic and the only contractual agreement amongst the parties. The lease is eight (8) pages long and purports to have the signatures of the parties on the first page. On each following

page, the parties have placed their initials. Under paragraph 17, which is captioned “ATTORNEY’S FEES AND OTHER COSTS” appears the following paragraph:

Lessor and Resident hereby waive trial by jury in any action, proceeding or counterclaim brought by any of the parties hereto against other party, or in respect of, any matter whatsoever arising out of or any way connected with this lease or the premises relating to this lease, relationship of Lessor and Resident hereunder, Resident’s use or occupancy of the leased premises (including but not limited to, a lawful detainer) and/or any claim or injury or damage.

Defendant maintains that the contractual provision should not be enforced as that the waiver of jury trial was not signed knowingly because the paragraph containing the waiver was not prominently displayed and was placed under a misleading title, “Attorney’s Fees and Other Costs”. In addition, Defendants maintain that the waiver was not voluntarily entered as the parties had vastly unequal bargaining power when they signed the lease at issue. Both parties agree that the controlling precedent lies within the Supreme Court opinion of Malan Realty Invs., Inc. v. Harris, 953 S.W.2d 624 (Mo. Banc 1997).

In *Malan*, the Supreme Court held that parties may contractually waive their right to a jury trial. *Id* at 627. In so finding, the Supreme Court determined the validity of a contractual waiver of a jury trial requires that a waiver be knowingly and voluntarily made, a requirement designed to protect against overreaching and inequitable bargaining positions. *Id*. To that end, the Supreme Court stated that to effectually waive a jury trial by contract, clear, unambiguous, unmistakable and conspicuous language is required. *Id*.

The waiver of jury trial language contained in the case at bar is exactly the language used in the *Malan Realty Investor’s Inc.* case. The only discrepancy appears to be in the heading which was used in the lease where this language appears. Defendant points out that in the *Malan* case the waiver of jury trial language appeared under a

heading of “Waiver of Jury Trial”; whereas, in the case at bar, the language appears as the last paragraph under the titled paragraph “ATTORNEY’S FEES AND OTHER COSTS.” This argument seems to be that the Defendants did not know they were waiving a jury trial as the paragraph was allegedly buried in a misleading title within the contract. Defendants’ argument fails in that on the particular page where the waiver of jury trial language appears there are two sets of initials indicating that the parties read and understood the language contained on the page where the waiver of jury trial language appeared. The Defendants offer no evidence that Defendants did not know of the existence of the waiver nor that the waiver was not voluntary. To the contrary, the only evidence before this Court is that both parties read the provision and initialed that they had read and understood the provision.

Defendant further argues that the Waiver of Jury Trial provision should not be enforced as it was not voluntary and that the parties were vastly unequal in bargaining power when they signed the lease at issue. Defendant presents no evidence that the parties were in unequal bargaining powers as such, no evidence exists that they did not voluntarily consent to relinquish their rights to a jury trial.

IT IS THE ORDER AND JUDGMENT OF THIS COURT that Plaintiff’s motion to vacate the March 6, 2013 order granting a trial by jury and objection to Defendants’ Request for a Jury Trial is hereby **GRANTED**.

This matter is to be transferred to Division 28 for a setting of a bench trial at a mutually convenient date of both parties.

SO ORDERED,

The Honorable Christopher E. McGraugh
Division 29

Date: _____

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was mailed, postage pre-paid to: Curtis Niewald, Reinker, Hamilton & Piper, LLC, 2016 S. Big Bend Blvd, St. Louis, MO 63117 and Erin Peterson, Tracy, Hunsaker, and Gilroy, 231 South Bemiston, #800, St. Louis, MO 63105 this _____ day of April, 2014.

Clerk of the Circuit Court.