

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

IN RE: :
PENELOPE L. ARMS, :
Debtor, :
_____: :
PENELOPE L. ARMS, : File No. 2:00cv182
Plaintiff, :
v. :
KEYBANK, N.A. :
Defendant. :

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

The Plaintiff in this case is Penelope Arms.

The Defendant in this case is KeyBank, N.A.

Ms. Arms' claims in this case are (1) that KeyBank breached a contract with her, (2) that it acted in bad faith in performing its contract with her, and (3) that it was negligent.

KeyBank denies these claims and also contends that it is not liable to Ms. Arms on certain claims because she did not bring her lawsuit within the applicable time period, and because she waived her right to sue on claims that predated the December 1993 restructuring.

There are several distinct elements to each of the three

claims, which the Plaintiff must prove. To determine whether the Plaintiff has proven her case, you must consider all of the evidence in light of the explanations of the law that I am about to provide.

Role of the Court, the Jury and Counsel

Now that you have listened carefully to the testimony that has been presented to you, you must consider and decide the fact issues of this case. You are the sole and exclusive judge of the facts. You weigh the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. Shortly, I will define "evidence" for you and tell you how to weigh it, including how to evaluate the credibility, or the believability, of the witnesses.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions I am about to give you, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions should be taken as an

indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

In carrying out your duty to determine the facts, you must consider only the evidence I have admitted in the case. Statements and arguments of counsel are not evidence. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation and regard that fact as proved.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and to call your attention to certain facts or inferences that might otherwise escape your notice. But it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Sympathy

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should evaluate the evidence deliberately and without the slightest trace of sympathy, bias or prejudice for or against any party. If you let sympathy interfere with your clear thinking there is a risk that you will not arrive at a just verdict. You should be guided solely by the evidence presented during the trial. You have been chosen to try the issues of fact and reach a verdict based on the

evidence or lack of evidence. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Corporations and Corporate Responsibility

KeyBank is a corporation, and as such is entitled to the same fair consideration that you would give any individual party. Of course, when a corporation is involved in a case, it may act only through persons such as its officers, agents, or employees. Thus, you should consider the acts or omissions of the officers or employees of KeyBank to be the acts or omissions of KeyBank itself.

Burden of Proof

Because this is a civil case, the burden of proof is by "a preponderance of the evidence." To prove something by a preponderance of the evidence means to prove that something is more likely true than not true. A preponderance of the evidence means the greater weight or persuasive force of the evidence. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity.

In determining whether a given issue has been proved by a preponderance of the evidence, you may consider the testimony of all witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have

produced them.

If after considering all of the evidence you are satisfied that the plaintiff has carried her burden of proof on each element of her case, then you must find for the plaintiff on her claims. If after such consideration you find the evidence to be equally balanced, then the plaintiff has failed to sustain her burden of proof and you must find for the defendant.

Affirmative Defenses

KeyBank has raised "affirmative defenses" to Penelope Arms' claims. A defendant has the burden to prove the essential elements of its affirmative defenses by a preponderance of the evidence. Only if you conclude that the plaintiff has proven the elements of her case should you go on to consider whether the defendant has proven the elements of an affirmative defense.

Evidence in the Case

The evidence includes the sworn testimony of the witnesses, and the exhibits received in evidence. Testimony or exhibits that have been excluded or stricken are not evidence and may not be considered by you in rendering your verdict.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw

from the facts which have been established by the testimony and evidence in the case.

Witness Credibility

You have had the opportunity to observe the witnesses. It is your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of the witnesses and the importance of their testimony. In making these judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you decide the truth and the importance of each witness's testimony.

Consider the witnesses' knowledge, motive, state of mind, and demeanor or manner while on the stand. Consider the opportunity the witnesses had to see, hear and know the things about which they testified, the accuracy of their memories, their candor or lack of candor, their intelligence. Consider the reasonableness and probability of the testimony, its consistency or lack of consistency, and its corroboration or lack of corroboration with other credible evidence. Consider any bias or hostility the witness may have shown for or against any party as well as any interest the witness has in the outcome of the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more

persons witnessing an incident or a transaction may see or hear it differently; and people naturally tend to forget some things or remember other things inaccurately. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

The weight of the evidence is not determined by the number of witnesses testifying. It is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witnesses, and which evidence, appeals to your minds as being most credible.

Expert Witnesses

You have heard testimony from an expert witness in this case. An expert is allowed to express his or her opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in a field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing an expert's testimony, you may consider the expert's qualifications, opinions, and reasons for testifying, as well as all of the other considerations that apply when you are deciding whether to believe a witness's testimony. You may give the expert's testimony whatever weight, if any, you find it

deserves in light of all the evidence in this case. You should not, however, accept the expert's testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case, as I have said, rests solely with you.

Count 1: Breach of Contract

Penelope Arms has made a claim that KeyBank breached a contract with her. In order to prevail on this claim, Ms. Arms must prove the following essential elements by a preponderance of the evidence:

1. that a contract or agreement existed between Arms and KeyBank;
2. the terms of the contract;
3. that a breach of the contract occurred;
4. that damages resulted from the breach; and
5. the amount of those damages.

As to the first element, Penelope Arms must establish that a contract existed. To do so, she must prove that there was a "meeting of the minds" between the parties, a showing of mutual agreement to the terms and conditions of the contract. She must also show that there was "consideration" for the agreement, in other words that the parties exchanged something of value in return for what they planned to receive. Consideration does not have to be money; it can be anything of value to the person

receiving it, including real property, or even a promise to do or not to do something. Your job is to determine whether any deal existed; it doesn't matter whether in your opinion the deal favored one side or the other.

In some circumstances, a preliminary agreement can constitute a legally binding contract. Preliminary agreements can range from letters of intent, which presuppose that only a final contract is binding, to firm commitments, which, although lacking some details, can bind the parties to adhere in good faith to the deal that has been agreed. In order to conclude that a preliminary agreement was in fact a binding commitment, you must look to the words and deeds of the parties to determine whether they intended to be bound by their agreement.

If you find that a contract existed between the parties, then you must determine the terms of the contract. Ms. Arms must prove by a preponderance of the evidence any term of the contract on which she relies.

If you determine the terms of the contract, then you must determine whether KeyBank breached any of those terms. A person breaches a contract when his or her conduct does not comply with the terms of the contract as agreed to by the parties.

If you find by a preponderance of the evidence that KeyBank breached their contractual obligations, then you must decide whether Ms. Arms has suffered damages as a proximate result of

the breach. Proximate cause is shown when you can find by a preponderance of the evidence that Ms. Arms' damages were either a direct result or a reasonably probable result of the breach of contract.

Finally, Ms. Arms must prove the amount of her damages by a preponderance of the evidence.

If you find that Ms. Arms has proved each of these elements by a preponderance of the evidence, then you must find KeyBank liable for breach of contract. If you find that Ms. Arms has failed to prove any one of these essential elements, then you should enter a verdict on behalf of KeyBank on this count.

Count 2: Bad Faith

In every contract there is an implied promise from each party not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement. This implied promise is known as the covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing exists to ensure that parties to a contract act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.

Conduct which constitutes "bad faith" violates community standards of decency, fairness or reasonableness. For example, under certain circumstances, evading the spirit of the bargain, willful rendering of imperfect performance of the contract,

interference with the other's performance, rejection of performance for unstated reasons, harassing demands for assurances of performance, abuse of power to determine compliance or to terminate the contract, or taking unfair advantage of a party's dire financial circumstances could be evidence of bad faith.

However, there is no bad faith when a party simply requires performance of a contract in accordance with the agreement's terms. In other words, bad faith cannot be inferred from an expected course of business.

If you find that contracts existed between Penelope Arms and KeyBank, you must decide whether KeyBank breached its duty to treat her fairly and in good faith. You must consider the context within which the alleged offensive conduct occurred. If you find by a preponderance of the evidence that KeyBank simply required performance of the contract, then you should find for the Defendant KeyBank. If you find by a preponderance of the evidence that KeyBank acted beyond merely observing the terms of its agreements in such a way as to violate community standards of decency, fairness or reasonableness, then you should find for Ms. Arms and against KeyBank.

Of course, you must also be able to find that KeyBank's conduct was the proximate cause of Ms. Arms' injury. Proximate cause is shown when you can find by a preponderance of the

evidence that Ms. Arms' damages were either a direct result or a reasonably probable result of KeyBank's conduct.

Count 3: Negligence

Penelope Arms has also made a negligence claim against KeyBank. To prevail on this claim, Ms. Arms must prove by a preponderance of the evidence that KeyBank was in fact negligent and that this negligence was the proximate cause of her injury. Negligence means the failure to use ordinary care under the circumstances. Ordinary care in this case means that care which a reasonably prudent financial institution exercises in the management of its affairs, including processing and administering loans, and obtaining and communicating information about the lending relationship.

In order to prove that KeyBank was negligent, Ms. Arms must establish three things:

1. the proper standard of skill and care for financial institutions;
2. that KeyBank's conduct departed from that standard of care; and
3. that this conduct was the proximate cause of her harm.

These three elements must be proven by a preponderance of the evidence. If Ms. Arms has met her burden of showing the proper standard of care, that KeyBank departed from this standard, that this conduct played a substantial part in causing

her injury, and that the injury was either a direct result or a reasonably probable result of the conduct, then you should enter a verdict for the Plaintiff on this count. If Ms. Arms has failed to prove any of these elements, then you should enter a verdict for the Defendant on this count.

State of Mind

When a party's state of mind is at issue--as the bank's is in the negligence and bad faith counts--you may consider evidence of various other wrong acts to show motive, intent, preparation, plan, knowledge, or absence of mistake or accident. In this case, any evidence of KeyBank's conduct after the filing of the bankruptcy petition on June 25, 1995 may be considered by you for this purpose, but shall not be considered as a separate basis for damages under any of the counts.

Statute of Limitations Defense

Defendant KeyBank asserts as a defense that the statute of limitations prohibits some of Ms. Arms' claims. A statute of limitations is a law that requires a plaintiff to bring her lawsuit within a specific period of time. The time period within which the suit must be brought begins when the Plaintiff first knew, or reasonably should have known that a contract had been breached or that the Defendant behaved wrongfully. KeyBank has the burden of proving by a preponderance of the evidence that Ms. Arms did not bring the suit within the applicable time period.

The statute of limitations for count 1 (breach of contract and count 2 (bad faith) is six years, and KeyBank claims that this count is barred because Ms. Arms knew, or by the exercise of reasonable care should have known, more than six years before bringing this suit on June 11, 1998 (June 11, 1992), that KeyBank breached a contract with her or conducted itself with bad faith. The statute of limitations for count 3 (negligence) is three years, and KeyBank claims that this count is barred because Ms. Arms knew, or by the exercise of reasonable care should have known, more than three years before bringing this suit on June 11, 1998 (June 11, 1995) that the KeyBank behaved negligently.

Waiver

Defendant KeyBank also asserts as a defense that Ms. Arms waived any claim for breach of contract based upon the bank's failure to "term out" her loans in 1992 when she agreed to the December 1993 restructure. A waiver is the intentional relinquishment or abandonment of a known right and may be proven by express words as well as by conduct. The essential elements of waiver are:

1. knowledge, and
2. intent.

To prove waiver, KeyBank must prove by a preponderance of the evidence that Penelope Arms knew that KeyBank had breached the terms of its contract with her, and that she intended to give up

her right to pursue a breach of contract action against KeyBank. Waiver cannot be inferred from silence.

Duress

If you conclude that KeyBank has proven waiver, then you must go on to consider whether Ms. Arms entered into the December 1993 restructuring agreement under economic duress. If you conclude that KeyBank has not proven waiver, you need not consider the issue of economic duress. To prove economic duress Ms. Arms must establish by a preponderance of the evidence:

1. coercion that was directed toward economic interests;
2. Ms. Arms involuntarily accepted KeyBank's terms;
3. the coercive circumstances were caused by KeyBank's acts or omissions;
4. there was some threat to do something harmful that the threatening party had no legal right to do.

Compensatory Damages

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, which has resulted from a defendant's wrongful conduct. If you find that KeyBank is liable on Ms. Arms' claims as I have explained them, then you must award her sufficient damages to compensate her for any injury proximately caused by its conduct. This is known as "compensatory damages." Compensatory damages seek to make a plaintiff whole--that is, to compensate her for the damage

she has suffered.

The damages that you award must be fair and reasonable, neither inadequate nor excessive. You should not award compensatory damages for speculative injuries, but only for those injuries that Ms. Arms has actually suffered.

In awarding compensatory damages, if you decide to award them, you must be guided by common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. A plaintiff need not prove the amount of her losses with mathematical precision, however, but only with as much definiteness and accuracy as the circumstances permit.

Punitive Damages

Ms. Arms is also seeking punitive damages from KeyBank. Punitive damages are awarded not to compensate a plaintiff for any injury she may have suffered, but instead to punish a defendant and send a message to other businesses in the industry. But you may award punitive damages only if you have found a defendant liable for actual damages.

In order to recover an award for punitive damages, Ms. Arms must persuade you by a preponderance of the evidence that KeyBank's conduct was motivated by personal ill will toward her, or that its conduct showed a reckless or wanton disregard for her rights. Before you may make an award of punitive damages against

a corporation, you must find that the act or acts constituting the misconduct were committed by officers of the corporation or by persons lawfully exercising their authority. If the act or acts relied on are that of an employee or agent of the corporation, Ms. Arms must prove by a preponderance of the evidence that the corporation's governing officers either directed the act, participated in it, or subsequently ratified it.

If you determine that an award of punitive damages is appropriate, your award need not bear any relationship to the underlying compensatory damage award.

Unanimous Verdict

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Your verdict must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Each of you must decide the case for yourself, but only after a consideration of the evidence in the case with your other jurors, and you should not hesitate to change your opinion if you become convinced that you were wrong. Discuss and weigh your respective opinions and adopt that conclusion which appears to be in accordance with the truth.

Remember at all times that you are not partisans. You are

judges -- the judges of the facts. Your sole interest is to find the truth from the evidence in the case.

Closing Instructions

I have selected _____ to act as your foreperson. The foreperson will preside over your deliberations, and will speak for you here in Court.

Communications with the Court

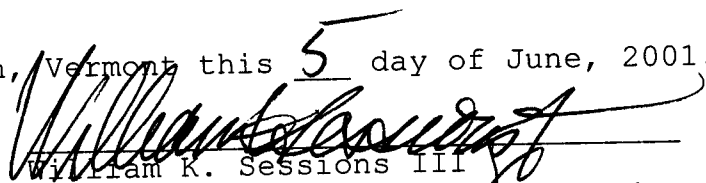
If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer, signed by your foreperson. No member of the jury should attempt to communicate with the Court by any means other than a signed writing, and the Court will only communicate with the jury concerning the merits of the case in writing or orally here in open Court.

You will note that all other persons are also forbidden to communicate with any member of the jury concerning the case.

Bear in mind also that you are not to tell me or anyone else how the jury stands on any issue until after you have reached a unanimous verdict.

A copy of this charge will go with you into the jury room for your use.

Dated at Burlington, Vermont this 5 day of June, 2001.


William K. Sessions III
United States District Court Judge