



COMMERCIAL DIVISION UPDATE

Expert Analysis

Deciding Enforceability of Jury Waivers In Disputed Contracts

New York courts routinely allow parties to waive by contract¹ what the New York Constitution terms an “inviolable” right to a trial by jury.² Courts have acknowledged, however, the anomaly of enforcing a jury waiver where the validity of the contract containing the jury waiver is in dispute.³ Over several decades, New York courts have outlined a general rule that a party challenging the validity or applicability of a contract should not be bound to a jury waiver provision therein where there is an unresolved issue over the contract’s application. A recent decision by Justice Bernard Fried of the New York County Commercial Division in *D.B. Zwirn Special Opportunities Fund, L.P. v. Brin Investment, Corp.*, reaffirms this reasoning in leaving it to the jury to decide the disputed issue of whether the contract containing a jury trial waiver was binding.⁴ In addition, this decision appears to have added some clarity to the analysis of two 2007 commercial division decisions, in which the court, not a jury, decided the threshold issue of contract enforceability.⁵

Longstanding Precedent

In *Federal Housecraft Inc. v. Faria*,⁶ the Appellate Term, Second Department declined to enforce a jury waiver provision in the face of an affirmative defense that the contract containing that provision had been fraudulently induced. Rather than enforce the jury waiver provision as was the trend at that time,⁷ the *Faria* court held that, where a defendant challenges the validity of the instrument containing the jury waiver, “the party resisting the contract should be afforded the privilege of a preliminary trial by jury on the defense of fraud.”⁸ The court rejected the alternative of imposing a bench trial “by virtue of the waiver provision in an agreement which may be void in its entirety for want of legal consent.”⁹

Subsequent New York decisions have indicated widespread support for the reasoning in *Faria*, with courts applying



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it to a variety of contractual disputes,¹⁰ including commercial leases¹¹ and service contracts.¹² For example, in 2005 the First Department applied the *Faria* reasoning in holding that a party was entitled to a jury where the issues to be decided included fraud and the enforceability of a contract in a rent recovery action.¹³ Where courts have chosen to enforce jury waivers despite the rule in *Faria*, they usually have done so by distinguishing the nature of the contractual disputes at issue. As an example, the Second Department found the *Faria* rule

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inapplicable to avoid a jury waiver where the party seeking a jury had conceded to signing the contract at issue and had failed to assert a fraudulent inducement defense.¹⁴

Recent Distinctions

Despite the general acceptance of *Faria* and its progeny, two 2007 Commercial Division decisions were viewed as possibly reflecting a trend away from its holding. *U.S. East Co. of New York, Ltd. v. JP Morgan Chase Bank, N.A.*,¹⁵ *Technical Support Services Inc. v. International Business Machines Corp.*¹⁶ In *U.S. East Co.*, Justice Richard Lowe of the New York County Commercial Division granted a motion to strike the jury demand,¹⁷ with the court finding that the consulting agreement between the parties was valid and the jury waiver provision contained therein consequently

effective, even though plaintiff contended that the agreement did not control as of the time the cause of action arose.¹⁸ Before the court was the issue of which of the parties’ operating agreements applied at the time of the wrongdoing,¹⁹ a 1998 agreement which did not contain a jury waiver provision, or a 2003 agreement which did contain a jury waiver provision.²⁰

Rather than ordering a preliminary jury trial on the question of which agreement controlled, the court ruled on the merits of that dispute.²¹ Considering plaintiff’s argument that the 2003 agreement was ineffective because of defendant’s failure to fulfill a purported delivery requirement, which was allegedly needed to manifest its assent and effectuate a contract,²² the court determined that plaintiff failed to show that delivery was a condition precedent to the effectiveness of the contract.²³ Additionally, in response to plaintiff’s argument that the later agreement was not applicable, the court referred to its decision on a motion to dismiss in that case in which it held that the 2003 agreement was effective at the relevant time.²⁴ Finally, in analyzing whether the 2003 agreement remained in effect,²⁵ the court applied the law of superseding agreements and found that the 2003 agreement controlled.²⁶ Accordingly, the court determined that plaintiff had “failed to provide an adequate basis to deny enforcement of a valid and enforceable waiver to a jury trial” and granted defendant’s motion to strike the jury demand.²⁷

Shortly after the *U.S. East Co.* decision, in *Technical Support Services*, Justice Alan Scheinkman of the Westchester County Commercial Division granted a motion to strike a jury demand following a similar inquiry over the applicability of an agreement containing the jury waiver.²⁸ This dispute between International Business Machines Inc. (IBM) and Technical Support Services Inc. (TSSI) arose from an agreement by which TSSI was to provide computer support services to IBM.²⁹ IBM relied on a jury waiver in a “customer solutions agreement” (CSA), whereas TSSI contended the CSA did not control the services at issue.

The court consolidated IBM’s motion to strike TSSI’s jury demand with the parties’ motion and cross-motion for summary judgment. The court agreed with IBM’s contention that the CSA governed, noting that later agreements had incorporated the CSA either explicitly or by reference.³⁰ Moreover, the court accepted IBM’s contention that the wrongdoing TSSI alleged IBM to have committed was

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in violation of the CSA.³¹ As such, the court found that the remaining breach of contract claim was a “dispute[] related to this Agreement” and thereby subject to the jury waiver.³²

Focusing the Rule

In *D.B. Zwirn*,³³ decided last month, Justice Fried denied plaintiff’s motion to strike defendant’s jury demand finding a triable issue, to be determined by a jury, as to whether the party demanding the jury was bound by the contract containing the jury waiver provision. In so doing, the court distinguished the rulings in *U.S. East Co.* and *Technical Support Services* and reaffirmed the reasoning of *Faria*.

Similar to *U.S. East*, *D.B. Zwirn* arose from a failed business relationship and the resulting litigation included a dispute as to the applicability of the contract that contained the jury waiver. The court declined to resolve the question of whether an asset management agreement (AMA) containing a jury waiver governed the relationship between the parties. Plaintiff had claimed that, even though defendant was not a signatory to the AMA, it had been substituted for a signatory through novation or some other means.

New York courts have outlined a general rule that a party challenging the validity of a contract should not be bound to a jury waiver provision therein where there is an unresolved issue over the contract’s application.

The court’s decision relied on a straightforward application of *Faria* and its progeny. The court rejected plaintiff’s contention that the *Faria* line of cases had ordered a jury trial only where the party demanding a jury raised a defense of fraud or misrepresentation. Rather, the court observed that *Faria* advocated the general principle that “where the effectiveness of the contract containing the jury waiver is at issue at trial, a party is entitled to a jury trial on the question of the effectiveness of that contract.”

Unlike *U.S. East Co.* and *Technical Support Services*, in which the courts conducted detailed inquiries into the enforceability of the disputed contract containing the jury waiver, the court in *D.B. Zwirn* deferred on that issue. The court observed that in earlier denying a motion for summary judgment, it had determined that issues of fact existed as to the contract’s applicability that “had to be determined by the trier of fact,” there a jury.

The court noted that *U.S. East Co.* and *Technical Support Services* did not “counsel a different result.” It distinguished both cases, finding that *Technical Support Services* presented “no question that the parties had entered into the contract containing the jury waiver” and that the resolution of *U.S. East Co.* “did not depend on resolution before trial of a disputed issue of material fact.” In so finding, the court reiterated the rule that New York courts will not deprive a party of its right to a trial by jury where there are disputed issues of fact as to the enforceability

or applicability of the contract containing the jury waiver.

Conclusion

The lesson for the practitioner whose client would prefer a jury trial is to determine whether the contract containing the jury waiver can be challenged. If so, in many cases the jury’s threshold determination of whether the contract is enforceable or applicable to the facts at issue will resolve the entire dispute.



1. *Tiffany at Westbury Condo. v. Marelli Dev. Corp.*, 34 A.D.3d 791, 791, 826 N.Y.S.2d 623, 624 (2d Dep’t 2006) (extending this principle to tort claims where there is a dispute whether product liability “arises out of” the contract that contains a jury waiver provision affecting any such actions); see also *Uribe v. Merchants Bank of New York*, 227 A.D.2d 141, 141, 642 N.Y.S.2d 23, 24 (1st Dep’t 1996) (citing *Barclays Bank of New York, N.A. v. Heady Electric*, 174 A.D.2d 963, 571 N.Y.S.2d 650, 652 (3d Dep’t 1991) (“Jury waiver provisions are valid and enforceable as a general principle”).
2. Constitution of New York State, Art. I, §2 (“trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever”).
3. See *Fed. Housecraft Inc. v. Faria*, 28 Misc. 2d 155, 156, 216 N.Y.S.2d 113, 114 (App. Term 2d Dep’t 1961).
4. *D.B. Zwirn Special Opportunities Fund, L.P. v. Brin Investment, Corp.*, 2009 N.Y. slip op. 29453, 2009 N.Y. Misc. LEXIS 3068 (N.Y. Co. Nov. 12, 2009).
5. *Technical Support Servs. Inc. v. Int’l Bus. Machs. Corp.*, 18 Misc. 3d 1106(A), 856 N.Y.S.2d 26 (Westchester Co. Dec. 2, 2007) (Scheinman, J.); *U.S. East Co. of New York, Ltd. v. JPMorgan Chase Bank, N.A.*, 2007 WL 3128241, 2007 slip op. 33374(U) (N.Y. Co. Oct. 11, 2007) (Lowe, J.).
6. 28 Misc. 2d at 157, 216 N.Y.S.2d at 115.
7. *Id.* at 156, 216 N.Y.S.2d at 114 (rejecting precedent that “upheld jury waiver provisions in contracts and leases, even as against affirmative defenses that the writings in question had no valid inception by reason of fraud practiced in the inducement thereof”) (citations omitted).
8. *Id.*
9. *Id.*
10. *Gardner & North Roofing & Siding Corp. v. Champagne*, 55 Misc. 2d 413, 285 N.Y.S.2d 693 (Onondaga Co. 1967) (when contract contained a waiver of trial by jury, defendants were entitled to jury on the issue of fraud alone).
11. *Ferry v. Poughkeepsie Galleria Co.*, 197 A.D.2d 913, 913, 602 N.Y.S.2d 267, 268 (4th Dep’t 1993) (holding that a jury waiver provision contained in a commercial lease did not apply to any causes of action that allege plaintiff was induced to enter the lease by fraudulent misrepresentations).
12. *Int’l Roofing Corp. v. Van Der Veer*, 43 Misc. 2d 93, 94, 250 N.Y. 2d 387, 388 (Monroe Co. 1964) (“If such is not the rule, the party seeking such a trial would be at a disadvantage in having to proceed to trial without a jury by virtue of the waiver provisions in a contract which may be void or which may never have had any binding inception and which may never have blossomed into an actual agreement”).
13. *Wells Fargo Bank, N.A. v. Stargate Films Inc.*, 18 A.D.3d 264, 264, 795 N.Y.S.2d 18, 18 (1st Dep’t 2005).
14. *O’Brien v. Moszynski*, 101 A.D.2d 811, 812, 475 N.Y.S.2d 133, 134 (2d Dep’t 1984) (declining to extend on the basis of a party’s acceptance of a contract); see also *Fay’s Drug Co. of Riverside Inc. v. P&C Property Coop. Inc.*, 51 A.D.2d 887, 887, 380 N.Y.S.2d 398, 400 (4th Dep’t 1976) (defendant’s counterclaim which “alleges the breach of the lease by plaintiff, may not at the same time rely upon the lease as the foundation of the claim for damages, and repudiate the provisions therein by which the right to trial by jury is waived”); compare *Int’l Roofing Corp.*, 43 Misc. 2d at 94, 250 N.Y.S.2d at 388 (“Here, however, there is a firm challenge as to whether or not there ever was a final and binding contract embracing the work to be done and payment therefor”).
15. 2007 WL 3128241, 2007 slip op. 33374(U) (N.Y. Co. Oct. 11, 2007).
16. 18 Misc. 3d 1106(A), 856 N.Y.S.2d 26 (Westchester Co. Dec. 2, 2007).
17. 2007 WL 3128241, 2007 slip op. 33374(U).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* (citing *Schoenfeld v. Masucci*, 205 A.D.2d 749, 749-50, 613 N.Y.S.2d 682, 683 (2d Dep’t 1994) (noting that a binding contract may exist without physical delivery of the instrument)).
24. *Id.*
25. *Id.*
26. *Id.* (citing *Kindler v. Newsweek Inc.*, 277 A.D.2d 159, 160, 717 N.Y.S.2d 56, 57 (1st Dep’t 2000); *Blair & Co. v. Otto V.*, 5 A.D.2d 276, 280, 171 N.Y.S.2d 203, 206 (1st Dep’t 1958); *Goldbard v. Empire State Mut. Life Ins. Co.*, 5 A.D.2d 230, 234, 171 N.Y.S.2d 194, 199 (1st Dep’t 1958)).
27. *Id.*
28. 2007 N.Y. slip op. 52428(U), 18 Misc. 3d 1106(A), 856 N.Y.S.2d 26 (Westchester Co. Dec. 2, 2007).
29. *Id.* at 2.
30. *Id.* at 34.
31. *Id.*
32. *Id.*
33. 2009 N.Y. slip op. 29453, 2009 N.Y. Misc. LEXIS 3068 (N.Y. Co. Nov. 12, 2009).

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