

Agora Gourmet Foods Inc. v Edge
2020 NY Slip Op 34564(U)
October 20, 2020
Supreme Court, Westchester County
Docket Number: 60365/2018
Judge: Gretchen Walsh
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To commence the statutory time period of appeals as of right pursuant to (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION

-----X
AGORA GOURMET FOODS INC.,

Plaintiff,

- against -
KALLIE EDGE, DIMITRIOUS VITALIOTIS,
and VASILIOS GARGEROS,

Defendants.
-----X

Index No. 60365/2018
Motion Seq. No. 7
Motion Date: 10/16/2020
DECISION & ORDER

WALSH, J.

The following e-filed documents, listed in NYSCEF by Document Numbers 283-287 were read on this motion by Plaintiff Agora Gourmet Foods Inc. (“Plaintiff” or “Agora”) for an order pursuant to CPLR 4102 granting it the right to withdraw its jury demand. Defendants Kallie Edge (“Edge”), Dimitrious Vitaliotis (“Dimitrious”) and Vasilios Gargeros (“Gargeros”) (collectively “Defendants”) oppose Plaintiff’s motion. Upon the foregoing papers, and for the reasons set forth herein, the motion is granted.

FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history of this case is set forth in this Court’s Decision and Order dated August 28, 2020 (the “Summary Judgment Decision”), which is incorporated herein by reference. In this Court’s Summary Judgment Decision, the Court granted Defendants’ motion for summary judgment to the extent that Plaintiff’s claim for partial constructive eviction predicated on the second floor of the Property was dismissed as time barred, but the Court denied Defendants’ motion seeking to dismiss Plaintiff’s remaining claims for fraud, fraudulent concealment, private nuisance and partial constructive eviction regarding the basement.

Following this Court’s Summary Judgment Decision, the Court held a conference via Skype for Business on September 4, 2020 to set the trial date. At that conference, this Court was advised by Plaintiff’s counsel, Kate Roberts, Esq., that although Plaintiff had made a demand for a jury trial in its Note of Issue, Plaintiff was withdrawing that demand and was requesting a bench trial. Plaintiff’s counsel further advised the Court that all parties had waived their right to a jury

trial pursuant to jury waiver provisions found in the parties' agreements. Based on these representations, the Court set a trial date for November 9, 2020 with the assumption, given the jury waiver provisions, that it would be a bench trial, but granted leave to file whatever motions were necessary with regard to this issue given Defendants' objection to a bench trial. Thereafter, by email dated September 9, 2020, the Court was advised by Ms. Roberts that the trial counsel from Zarin & Steinmetz (Jody Cross, Esq.) had child care issues and was requesting that the trial be adjourned to November 12, 2020 starting at 10:30 a.m. The Court held a follow up virtual conference call on September 11, 2020 and was advised by Defendants' counsel that the burden is on Plaintiff to move to withdraw the jury demand. The Court then granted Plaintiff two weeks to make its motion. Plaintiff timely filed its motion on September 25, 2020.

A. Plaintiff's Contentions in Support of its Motion

In support of its motion, Plaintiff submits an Affirmation of Kate Roberts, Esq. ("Roberts Aff."), together with various exhibits including: (1) the Lease Agreement dated July 5, 2007 (the "Lease"); (2) the Contract of Sale dated May 3, 2006 ("the Contract"); and (3) the Note of Issue filed on December 20, 2019 (the "Note of Issue").

In her affirmation, Ms. Roberts argues that this Court's grant of Plaintiff's motion "is supported by the binding terms of the Lease and Contract of Sale, would be in the interest of judicial economy and safety, and would in no way be prejudicial to any of the Defendants" (Roberts Aff. at ¶ 4). According to Plaintiff, the protections of CPLR 4102(a) to the effect that a jury trial demand may not "be withdrawn without the consent of the other parties was designed to protect a party who, in reliance on such a demand by another party, does not make its own demand" but "[w]here a party never had the right to demand a trial by jury in the first instance, a demand for a jury trial does not subsequently confer any such right" (*id.* at ¶¶ 5-6). It is Plaintiff's contention that pursuant to Section 23.05 of the Lease and Section 26.01 of the Contract, the parties waived their right to a trial by jury, and, therefore, no party to this action has a right to assert or demand a jury trial (*id.* at ¶¶ 7, 11). In further support of the validity of the jury waiver clause on all of the claims and counterclaims in this action, Plaintiff points out that while there is a line of cases which hold that a claim of fraud precludes the enforceability of a jury waiver clause, "this preclusion is only applicable where the claims of fraud are determinative of 'the validity of disputed instrument'" and here, Plaintiff's fraudulent concealment and fraudulent inducement causes of action "do not dispute the validity of the Lease or Contract of Sale. Plaintiff has not sought to invalidate either the Lease or Contract of Sale based on fraud. Rather, the fraud causes of action support Plaintiff's claims for damages" (*id.* at ¶¶ 14-15).

Plaintiff's counsel contends that Plaintiff inadvertently made a demand for a jury in its Note of Issue and this Court should permit Plaintiff to withdraw its jury request regardless of Defendants' consent (*id.* at ¶ 8).

In anticipation of Defendants' arguments that the jury waiver "clauses might not apply to one or more of the Defendants because: (a) waiver clauses are only applicable to signatories of the particular instrument, and both Defendants Edge and Vitaliotis were not signatories to the Lease

and Contract of Sale; and (b) Defendant Vitaliotis may not be a proper party to this action, because his interest in the subject property is held in trust” (*id.* at ¶ 17), Plaintiff argues that because Section 28.02 of the Lease bound the parties’ “heirs, executors, administrators, successors, and assigns: and Section 38.01 of the Contract bound the parties’ “heirs, distributees, legal representatives, successors and permitted assigns,” “[t]he jury waiver clause clearly applies to and is binding upon all successors in title, i.e., Defendants Edge and Vitaliotis” (*id.* at ¶¶ 5-6).

Plaintiff points out that Vitaliotis belatedly raises for the first time an argument that he is not a proper party to this action despite the fact that he: (1) made both a motion to dismiss and a motion for summary judgment without raising this issue; and (2) he asserted two counterclaims¹ in his Answer in which he relies on the provisions of the Lease and Contract in support of his counterclaims (*id.* at ¶¶ 22-23). According to Plaintiff, “a party should not be permitted to both rely on a lease as the foundation for a claim of damages, and at the same time repudiate the provision by which it waives its right to a jury trial” and that “Vitaliotis has conceded he is a proper party to this action as a Landlord, and/or waived any argument to the contrary, by his inclusion of these Counterclaims, as well as his failure to move to dismiss the action against himself as an improper party” (*id.* at ¶¶ 24-25). Plaintiff further argues that it is well settled that “[a] trust is not a legal entity. A trust is not an entity distinct from its trustees and capable of legal action on its own behalf” and CPLR 1004 permits a trustee to sue or be sued in its own name (*id.* at ¶¶ 26-27). As such, Plaintiff claims it could not have sued the Dimitrious Vitaliotis Trust in this action (*id.* at ¶ 28). According to Plaintiff, the Trust is sued in this action because under George Vitaliotis’ Last Will and Testament, Kallie Edge is the trustee of the Dimitrious Vitaliotis Trust (NYSCEF Doc. No. 53 at 15) and Kallie Edge is a named Defendant (*id.* at ¶ 29). Plaintiff further points out that under the terms of the Will, when Vitaliotis reaches the age of 35, he obtains one-half of his interest in the Trust and at the age of 40, he obtains the Trust’s balance. Plaintiff alleges, upon information and belief, that Vitaliotis is 37 and, therefore, he may be in partial possession of the Property and, therefore, he is properly named as a Defendant in this action (*id.* at ¶¶ 31-33).

Finally, Plaintiff asserts that pursuant to CPLR 4102(e), the Court may grant a party’s motion to withdraw a jury demand if no prejudice results. According to Plaintiff, Defendants would not be prejudiced by this Court’s grant of Plaintiff’s motion since on September 4, 2020, the Court set the bench trial date for November 9, 2020 and when Defendants raised their objections to the bench trial at the conference on September 11, 2020, Plaintiff made clear that it would be making this motion and then proceeded to make the motion and, therefore, Defendants have not had to prepare for a jury trial. Plaintiff further argues that unlike the circumstances found in *Sapp v Propeller Co., LLC* (12 AD3d 218 [1st Dept 2004]), where the court denied the application to strike a jury demand (which was not made until the scheduled date for jury selection)

¹ Defendant Vitaliotis, as well as Defendants Gargeros and Edge, have asserted: (1) a First Counterclaim that the Lease requires that Plaintiff pay the legal fees and costs incurred in any action between the parties and that Defendants have incurred and continue to incur legal fees in the defense of this action for which Plaintiff is liable; and (2) a Second Cause of Action that Plaintiff made material misrepresentations in the Lease for which Plaintiff is liable.

even in the face of a contractual jury waiver because, *inter alia*, the demand for the jury trial delayed the scheduling of the trial date, here, the withdrawal of the jury demand will result in a trial on November 12 whereas if the motion is not granted, it will result in a significant delay to a case that has already experienced delays (*id.* at ¶ 42). Plaintiff concludes by pointing out that a bench trial is the most efficient and safest (from a health perspective) manner to resolve this case because this Court is already fully versed given its decisions on Defendants' motions to dismiss and summary judgment and because "the COVID-19 pandemic should make all persons thoroughly consider whether the benefits of convening a jury when not necessary, particularly in a situation like the instant action where the parties have knowingly agreed to waive a jury trial, is in the interest of the health, safety, and welfare of all those involved, including the parties and the Court" (*id.* at ¶ 48).

B. Defendants' Contentions in Opposition

In opposition, **Defendants submit** three identical affirmations from their respective counsel attaching identical exhibits (Affirmation of David M. Dahan, Esq. in Opposition dated October 9, 2020 ["Dahan Opp. Aff."], Affirmation of Johnathan S. Klein, Esq. in Opposition dated October 9, 2020 ["Klein Opp. Aff."], and Affirmation of Carl L. Finger, Esq. dated October 0, 2020 ["Finger Opp. Aff."] [together "Counsel Affs."]), and three identical memoranda of law ("Defs' Opp. Mem.s.").

In their affirmations, counsel argue that Plaintiff filed its Note of Issue with Jury Demand on December 20, 2019 and, as a result, it "waived any jury waiver provisions in the Lease and Contract of Sale which may have been enforceable" (Counsel Affs. at ¶¶ 6, 9, 10). Defendants contend that they relied on Plaintiff's jury demand and did not file their own jury demands (*id.* at ¶ 7). According to Defendants, they are constitutionally and statutorily entitled to a trial by jury (*id.* at ¶ 8).

In response to Plaintiff's assertions concerning Defendant Vitaliotis, Defendants argue that based on the answers he filed, he denied a claim of ownership in the subject property as asserted by Plaintiff in its original Complaint, its Amended Complaint and its Second Amended Complaint (*id.* at ¶ 12). They further point out that by deed dated July 14, 2012 (a copy of which is attached as Ex. F to Counsel Affs.), "George Vitaliotis and Vasilios Gargeros transferred their interest in the property ... to Kallie Edge and the Dimitrious Vitaliotis Trust. Thus, the Dimitrious Vitaliotis Trust is the record owner of [the property] and has been since 2014" (*id.* at ¶ 13). They assert that this was made clear to Plaintiff in 2017 based on the nonpayment proceeding brought by Kallie Edge and the Dimitrious Vitaliotis Trust against Plaintiff (a copy of which is attached as Ex. G) (*id.* at ¶ 14).

As their legal argument, Defendants contend that pursuant to CPLR 4102, a party may not withdraw a demand for a trial by jury without the consent of the other parties and the other parties to this action have not consented and there are no conditions or exceptions to this rule (Defs' Opp. Mem.s. at 3-4). According to Defendants, Plaintiff's motion is untimely as it is sought

nine months after Plaintiff filed its jury demand on December 20, 2019 (*id.* at 4). Defendants dispute Plaintiff's contention that it inadvertently demanded a jury in its Note of Issue and argue that instead, it was "a change in strategy after the summary judgment motion was decided and trial counsel was brought in. Yet even after trial counsel was brought in, Plaintiff was in no hurry to withdraw its jury demand ... [and] repeatedly delayed not only in bring the motion for relief, but in deciding whether or not to bring the motion at all" (*id.*).

According to Defendants, Plaintiff's counsel limited her conference request on September 9 to a change in the trial date from November 9 to November 12 due to trial counsel's child-care conflict, did not commit to moving to withdraw the jury demand, and she "refused even to commit to a date upon which she intended to disclose if Plaintiff would seek to withdraw its jury demand." It is Defendants' contention that it was only after Defendants' counsel emailed Plaintiff's counsel and asked her if she would be making her motion that Plaintiff's counsel advised on September 16, 2020 that she would be making the motion, but then she waited until the last possible moment (on the eve of trial), a week later, to make the motion (*id.* at 5). Defendants, however, concede that this Court gave Plaintiff until the date it filed its motion to make its motion (*id.* at 6).

It is Defendants' contention that Plaintiff's counsel has failed to establish, as it was her burden to do, that the jury demand was inadvertently made and instead, "[t]he note of issue with jury demand and certificate of readiness (Exhibit 'A') reveals that it was carefully and deliberately crafted" (*id.* at 6). Defendants further point out the NYSCEF system would have alerted Plaintiff to its mistake as the system requires the payment of a jury fee prior to allowing a jury demand to be filed and further, Plaintiff's counsel received an email confirmation of its filing of a NOTE OF ISSUE WITH JURY upon the note of issue's filing (*id.* at 7).

In support of the prejudice that will result if this Court were to grant Plaintiff's motion, Defendants argue that "the parties acted and or performed under the assumption that it would be tried by a jury" and that there was even a discussion of the use of a jury at a court conference to address Plaintiff's principal's inability to understand the words he used in his verified pleading (*id.* at 8).

Defendants further argue that because Plaintiff fails to allege that it attempted to obtain consent before seeking judicial intervention and Plaintiff never sought Defendants' consent, the application should be denied for failure to plead a condition precedent contained in CPLR 4102(a).²

² The Court does not agree with Defendants' argument. Plaintiff made clear both at the September 4 and September 11 conferences that it was seeking to withdraw its jury demand and at both conferences, Defendants' counsel voiced their objection and opposition to any such withdrawal. Accordingly, in essence, Plaintiff sought Defendants' consent which was clearly rejected at both conferences and now in opposition to Plaintiff's motion.

According to Defendants, it is irrelevant that Plaintiff did not demand a jury in its Complaint, Amended Complaint and Second Amended Complaint as there is no statute or rule requiring that a jury demand appear on a complaint and the earliest time that a demand may be made is at the filing of the note of issue, which occurred in this case (*id.* at 9).

Defendants read the *Sapp* decision as supporting their position that Plaintiff “unequivocally waived said jury waivers by demanding a jury” (*id.* at 9-10). Defendants further point out that the *Sapp* court relied heavily on the nine-month delay, which is present in this case (*id.* at 10). Defendants argue that the jury demand “was filed nine months ago and all had prepared for a jury trial”³ and the Complaint in its original and amended forms alleged both legal and equitable causes of action” (*id.* at 12-13).

Defendants contend that Plaintiff erroneously attempts to shift the burden to Defendants but it is Plaintiff’s burden to establish its right to the relief requested and that Plaintiff’s reliance on *Schrank v Rensselaer Assoc., Inc.* (65 Misc 2d 428 [Sup Ct, Rensselaer County 1970]), is misplaced because it was a foreclosure action (a type of case where the parties never had a right a common law to a trial by jury) and it was decided before the 1990 amendment to CPLR 4102(a) (*id.* at 13). Defendants point out that the requirement for consent was imposed in the amendment to prevent “the gamesmanship and mischief by one party requesting a jury, and then withdrawing the jury demand after the time for the other party to request a jury has elapsed,” which is what occurred in this action and why the Court should not allow Plaintiff to withdraw its demand at this late date (*id.* at 14).

Finally, Defendants argue that based on the language of CPLR 4102(e), the relief Plaintiff seeks is not available to it because Plaintiff “does not allege facts to demonstrate it failed to comply with the statute” and Plaintiff complied with CPLR 4102(a) by timely filing its jury demand with its note of issue. Alternatively, Defendants argue that if the Court allows Plaintiff to withdraw its jury demand, then Defendants should be allowed to file a jury demand *nunc pro tunc*, because Plaintiff waived any objection to a jury trial by filing a jury demand (*id.* at 19).

³ The Court again does not agree with Defendants’ argument. Prior to this Court’s denial, on August 28, 2020, of most of the branches of Defendants’ motion for summary judgment, and this Court’s setting of the trial date for November 9, 2020 at the conference held on September 4, 2020, Defendants had not started preparing for any jury trial as they fully intended on having Plaintiff’s claims dismissed in their entirety based on their summary judgment motion. At the September 4, 2020 conference, given Plaintiff’s representations that it was seeking to withdraw its jury demand, and given this Court’s knowledge of the jury waiver provisions contained in the parties’ Lease and Contract, the Court advised that it was scheduling what it anticipated would be a bench trial for November 9, 2020. As such, to the extent Defendants have been preparing for trial following this Court’s Summary Judgment Decision, they should have been preparing for a bench rather than a jury trial.

C. Plaintiff's Contentions in Further Support of its Motion

In further support of its motion, Plaintiff submits a reply affirmation from its counsel ("Roberts Reply Aff.").

In her reply affirmation, Ms. Roberts makes clear that the inadvertence referenced in her moving affirmation is that Plaintiff's counsel's mistakenly checking the box for a jury trial where the express terms of the Lease and Contract preclude any such right (Roberts Reply Aff. at ¶ 4).

Counsel distinguishes the *Sapp* decision by arguing that "while the Court did find that the parties waived a contractual waiver provision by filing a Note of Issue demanding a jury trial, the waiver determination hinged on plaintiff's *delay until the scheduled date of jury selection* in bringing its motion to withdraw" (*id.* at ¶ 6 [emphasis in original]) but that in this case, she advised two months in advance of the trial date that Plaintiff would be seeking to withdraw its jury demand (*id.* at ¶ 8). According to Plaintiff, Defendants have known for a month that Plaintiff would be seeking the withdrawal of its jury demand and Plaintiff should not be penalized for its compliance with this Court's briefing schedule.

LEGAL DISCUSSION

The Constitution of New York State, at Article I, §2, provides that "trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever." Indeed, "[t]he right to trial by jury is zealously protected in our jurisprudence and yields only to the most compelling circumstances" (*John W. Cowper Co. v Buffalo Hotel Dev. Venture*, 99 AD2d 19, 21 [4th Dept 1984]; *Matter of Schapira v Grunberg*, 12 Misc 3d 1195[A] (Sup Ct Bronx County 2006)). Nevertheless, under New York law "[t]he right to a jury trial may be waived by contract" (*Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 34 AD3d 791, 791 [2d Dept 2006], citing *Gunn v Palmieri*, 187 AD2d 485 [2d Dept 1995]; *Barclays Bank of New York v Heady Elec. Co.*, 174 AD2d 963 [3d Dept 1991], *lv dismissed* 78 NY2d 1072 [1991]; *Technical Support Services, Inc. v IBM Corp.*, 2007 NY Slip Op. 52438[U] at * 34, 18 Misc 3d 1106[A] [Sup Ct, Westchester County 2007]). Plaintiff is correct that in this case, the parties waived their right to a trial by jury on the claims and counterclaims asserted in this action.⁴

Section 23.05 of the Lease provides that

[t]he parties hereto shall and they hereby do waive trial by jury in any action, proceeding or counterclaim brought by either of the parties hereto against the other on any matters whatsoever arising out of or in any way connected with this

⁴ The fact that neither Kallie Edge nor Dimitrious Vitaliotis are signatories to the Lease and Contract is not controlling given the successor language contained in Section 28.02 of the Lease and Section 38.01 of the Contract. As discussed *infra*, because, based on Vasilios Gargeros' Will (NYSCEF Doc. No. 33, Article Fifth, Section A), Dimitrious Vitaliotis' interest in the Trust has partially vested such that he has an interest in the Property, he too is bound by this successor language.

Lease, the relationship of Landlord and Tenant, Tenant's use or occupancy of the Leased premises and/or any claim of injury or damage (NYSCEF Doc. No. 285 at § 23.05).

Section 26.01 of the Contract provides that "[t]he parties hereto do hereby agree that trial by jury in any action, proceeding or counterclaim arising of or from this agreement is hereby waived" (NYSCEF Doc. No. 286 at § 26.01).

Under Second Department precedent, this court is required to enforce the parties' jury waiver found in the Lease since this is not an action involving personal injury or property damage where Real Property Law § 259-c would preclude such a waiver (*JIHL Assoc. v Frank*, 107 AD2d 663, 663 [2d Dept 1985]; *Protano v 16 N. Chatsworth Ave. Corp.*, 249 AD2d 288 [2d Dept 1998]). Although Defendants assert that they are entitled to a jury trial on Plaintiff's claims and their counterclaims, Defendants fail to provide the Court with any authority supporting their contentions.⁵ Plaintiff correctly points out that because it is not seeking to rescind the parties' agreements based on its claims of fraudulent inducement and fraudulent concealment, and it is instead affirming the contract and seeking damages based on Defendants' alleged fraud, no party has any right to a jury trial on Plaintiff's fraudulent inducement and fraudulent concealment causes of action (*see O'Brien v Moszynski*, 101 AD2d 811 [2d Dept 1984]; *Pratt v Trustees of the Sailors' Snug Harbor in the City of N.Y.*, 19 Misc 2d 551 [Sup Ct, App T, 1st Dept 1959]). Similarly, although Defendants have asserted a counterclaim for fraud against Plaintiff, they seek damages on their counterclaim and it is well settled that a party "may not at the same time rely on 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" (*Fay's Drug Co. of Riverside, Inc. v P&C Prop. Coop., Inc.*, 51 AD2d 887, 887 [4th Dept 1976], *citing Pratt, supra*).

The controlling statute concerning Plaintiff's right to withdraw its jury demand is CPLR 4102, which provides, in relevant part:

(a) Demand. Any party may demand a trial by jury of any issue of fact triable of right by a jury, by serving upon all other parties and filing a note of issue containing a demand for trial by jury. Any party served with a note of issue not containing such a demand may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand in the office where the note of issue was filed within fifteen days after service of the note of issue. A demand shall not be accepted for filing unless a note of issue is filed in the action. If no party shall demand a trial by jury as provided herein, the right to trial by jury shall be deemed waived by all parties. A party may not withdraw a demand for trial by

⁵ For example, Defendants contend that they are statutorily entitled, without naming a particular statute, to a jury trial on Plaintiff's claim for nuisance. CPLR 4101(2) confers the right to a jury trial on a claim for abatement and damages for a nuisance, that does not trump a parties' agreement to waive the right to a jury trial for all claims arising from a lease and Plaintiff's claim for nuisance is a claim arising under the parties' Lease (*cf. Valmont, Inc. v 171 Madison Assoc.*, 2001 NY Slip Op 40327[U], 2001 WL 1537896 [Sup Ct, NY County 2001]; *Meltzer v Lincoln Square Apts. Section V*, 135 Misc 2d 315 [Civ Ct, NY City 1987]).

jury without the consent of the other parties, regardless of whether another party previously filed a note of issue without a demand for trial by jury.

(c) Waiver. A party who has demanded the trial of an issue of fact by a jury under this section waives his right by failing to appear at the trial, by filing a written waiver with the clerk or by oral waiver in open court. A waiver does not withdraw a demand for trial by jury without the consent of the other parties. A party shall not be deemed to have waived the right to trial by jury of the issues of fact arising upon a claim, by joining it with another claim with respect to which there is no right to trial by jury and which is based upon a separate transaction; or of the issues of fact arising upon a counterclaim, cross-claim or third party claim, by asserting it in an action in which there is no right to trial by jury.

(e) Relief by court. The court may relieve a party from the effect of failing to comply with this section if no undue prejudice to the rights of another party would result.

It is well settled that “a demand cannot be withdrawn without the consent of defendant unless it will cause no ‘undue prejudice’ to defendant” (*Muhl v Vesta Fire Ins. Corp.*, 288 AD2d 108, 109 [1st Dept 2001]).

The Court does not agree with Defendants’ contention that Plaintiff has failed to satisfy the requirements of CPLR 4101. As explained *supra*, Plaintiff satisfied the requirement that it seek Defendants’ consent, which was not forthcoming. The Court does not agree with Defendant’s contention that Plaintiff has not established that **its demand for a jury trial** was the result of inadvertence. Plaintiff’s counsel affirms in her affidavit that the inadvertence was the result of Plaintiff’s failure to appreciate that the parties had waived their right to a jury trial on the claims and counterclaims presented in this action. Plaintiff has further presented case law demonstrating that at least with regard to fraud claims, the law is fairly nuanced over whether parties are bound by a jury waiver clause when it comes to such claims. Accordingly, to the extent Plaintiff was required to establish its inadvertence in filing a jury demand, this requirement has been satisfied.

Regarding Defendants’ contention that Plaintiff has not established that it is entitled to its requested relief because Plaintiff, in fact, complied with the statute by timely filing its jury demand with its Note of Issue, the Court again does not agree. CPLR 4102(a) provides that “[a]ny party may demand a trial by jury of **any issue of fact triable of right by a jury**, by serving upon all other parties and filing a note of issue containing a demand for trial by jury.” Here, there is no issue of fact triable by a jury and, therefore, Plaintiff did not comply with the statute and is entitled to seek relief pursuant to CPLR 4102 (e) provided that Defendants are not prejudiced.

Turning to whether Plaintiff has established that no prejudice will result to Defendants based on its withdrawal of its jury demand, the law is well settled that “[o]nce a demand [for a jury trial] has been served by any party ... it may not be withdrawn or waived without the consent of the other parties ... This limitation is designed to protect a party who, in reliance on a demand for a jury trial already made by another party, quite reasonable forbears from making a similar demand

of his own” (*Gonzalez v Concourse Plaza Syndicates, Inc.*, 41 NY2d 414, 416 [1977]). Based on the case law, courts analyze prejudice both in terms of whether the party who was prevented from making its own demand was entitled to a jury trial and when the request to withdraw the demand is made (*i.e.*, Is the party who was prevented from timely demanding a trial by jury based on its reliance on the other party’s jury demand prejudiced either because the trial will be delayed and/or because the party engaged in trial preparation as though it were a jury trial.

Although Defendants argue the case of *Schrank* is distinguishable on the grounds that: (1) it was a foreclosure action for which a jury trial is never applicable; (2) the case has no precedential value as it was decided by a trial court; and (3) it was decided prior to the 1990 amendment to CPLR 4102, the Court disagrees and finds the rationale of that case applicable to this action. In *Schrank*, as in this action, plaintiffs had filed a demand for a jury trial and thereafter, moved to delete the jury demand. In *Schrank* as in this case, defendants argued that plaintiffs elected for a trial by jury and they could not withdraw that demand without defendants’ consent. In granting plaintiffs’ motion, the trial court distinguished the cases on which defendants relied as the courts in those cases

which have considered waiver of a jury trial under subdivision (c) of CPLR 4102, are limited to those cases where a trial by jury is a matter of right to either or both parties. (CPLR 4102, subd. [a].) Indeed, this statute expressly provides that “any party may demand a trial by jury of any issue of fact triable of right by a jury (emphasis supplied). If the complaint herein alleged a cause of action triable by a jury as a matter of right and the defendants filed no demand in reliance on the plaintiffs’ demand for a jury contained in the plaintiffs’ note of issue, there would be no doubt that the plaintiffs would not be permitted to waive a jury without the consent of the defendants according to the statute ... **The plaintiffs’ demand in their note of issue cannot confer a right to trial by jury of causes of action to which there is no right to a trial by jury**⁶ ... [and] the defendants ... cannot obtain such right because of an inadvertence on the part of the plaintiffs in demanding a jury trial in an improper action (which is now sought to be corrected) by refusing to consent to the correction of such demand ... In the exercise of discretion this court has the power to relieve a party from the effect of failing to comply with CLPR 4102 if no undue prejudice to the rights of another party would result ... No prejudice has been shown (*Schrank*, 65 Misc 2d at 430).

As in *Schrank*, Defendants cannot be said to be prejudiced in terms of their right to demand a trial by jury because they waived that right based on the provisions of the Lease and Contract. Furthermore, the timing of Plaintiff’s application distinguishes this case from the cases upon which Defendants rely. For example, unlike the case of *CDC Dev. Prop., Inc. v American Ind. Paper*

⁶ New York Jurisprudence Second (Jury) succinctly explains *Schrank* as “[a] plaintiff’s demand for a jury cannot confer a right to trial by jury of causes of action to which there is no right to trial by jury. Similarly, where the defendants have no right to a trial by jury because of the nature of the action alleged in the complaint, they cannot obtain such right because the plaintiffs improperly demanded a jury trial” (73A NY Jur 2d § 28).

Mills Supply Co., (184 AD3d 623 [2d Dept 2020]),⁷ where defendant delayed moving to strike plaintiff's improper jury demand until the day of the jury selection, here, Plaintiff's counsel advised Defendants' counsel and this Court at the first conference (September 4, 2020) held following this Court's denial of most of Defendants' motion for summary judgment that Plaintiff intended to withdraw its jury demand. At the September 4, 2020 conference, given Plaintiff's stated intent to withdraw its jury demand and the Court's understanding of the jury waiver clauses in the parties' agreements, the Court scheduled the bench trial. Defendants voiced their objection to a bench trial and the Court granted leave for motion practice over the issue. At a follow up conference held on September 11, 2020, the Court set a briefing schedule for Plaintiff's motion to withdraw its jury demand. Accordingly, Plaintiff did not unduly delay its motion to withdraw its jury demand and a motion prior to that time was superfluous since during the interim period between Plaintiff's filing of its jury demand in December 2019 and July 2, 2020, when Defendants filed their replies in further support of their motions for summary judgment, the parties were actively engaged in motion practice and not trial preparation. Defendants' motion was largely denied in this Court's August 28, 2020 Summary Judgment Decision and at the first conference held after that decision on September 4, 2020, Defendants knew that Plaintiff intended to withdraw its jury demand. Prior to this Court's Summary Judgment Decision, Defendants were not preparing for a trial since it was their intent to have the action dismissed.

Regarding Defendant Dimitrious Vitaliotis' contention that he cannot be bound by the jury waiver provisions found in the Lease and Contract because he was not a signatory to either and because the deed to the Property reflects that it was transferred by George Vitaliotis and Gargeros Vasilios to Kallie Edge and the Dimitrious Vitaliotis Trust on June 20, 2014 (NYSCEF Doc. No. 305), Plaintiff has established that upon attaining the age of 35,⁸ one half of the Dimitrious Vitaliotis Trust⁹ vested in Mr. Vitaliotis, and, accordingly, because Mr. Vitaliotis holds at least

⁷ Defendants' reliance on *CDC Dev. Prop., Inc.* is misplaced because in that case, prejudice to plaintiff was established by defendant waiting until the day of jury selection to make its motion to strike plaintiff's jury demand. As such, the Second Department affirmed the trial court's denial of defendant's motion finding it "incumbent upon the party challenging a jury demand in a case involving a contractual waiver of the right to a jury trial to do so in a timely manner" (*CDC Dev. Prop., Inc.*, 184 AD3d at 625; see also *Sapp, supra* [First Department affirms trial court's denial of defendants' motion to withdraw their jury demand in an action involving a lease provision waiving the right to a jury trial made on the day jury selection was to begin]; *Import Alley of Mid-Island, Inc. v Mid-Island Shopping Plaza, Inc.*, 103 AD2d 797 [2d Dept 1984] [same]). The Court does not agree that Plaintiff waived its right to assert protection from the jury waiver clauses based on the holding in *Sapp* as the case is factually distinguishable. Here, Defendants were aware of Plaintiff's intent to withdraw its jury demand more than two months prior to the scheduled trial date at the September 4 and 11 conferences.

⁸ At a conference held on October 20, 2020, the Court was advised by Dimitrious Vitaliotis' counsel (David M. Dahan, Esq.), that his client is 37 years old.

⁹ At a conference held on October 20, 2020, Mr. Dahan agreed that it was undisputed that the Property was an asset of the Trust.

partial interest in the Property, he is bound by the jury waiver provisions in the Lease and Contract.

Finally, Defendants' request that this Court permit them to file a jury demand *nunc pro tunc* is denied because Defendants waived their right to a trial by jury. As a result of the COVID-19 pandemic, jury trials are being held on a very limited basis and it is likely that it would take months to schedule a jury trial, to which Defendants are not entitled in the first place. Moreover, counsel for Defendant Vasilios Gargeros has advised this Court that not only will Mr. Gargeros need a Greek interpreter, but he will not be able to appear in person because of his age and his Florida residence. The Court has also learned that Defendant Dimitrious Vitaliotis is incarcerated and accommodations will need to be made with his appearance at trial (*i.e.*, he too will need to appear virtually).

For all the foregoing reasons, Plaintiff's motion shall be granted.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion by Plaintiff Agora Gourmet Foods Inc. for an order granting it the right to withdraw its demand for a trial by jury contained in its Note of Issue is granted and said demand is hereby withdrawn.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
October 20, 2020

ENTER:


HON. GRETCHEN WALSH, J.S.C.

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