

Itzkowitz v Ginsburg
2022 NY Slip Op 30487(U)
February 14, 2022
Supreme Court, Kings County
Docket Number: Index No. 509504/2016
Judge: Larry D. Martin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
MORDECHAI ITZKOWITZ, et al.,

Plaintiffs,

Index No. 509504/2016

-against-

DECISION & ORDER
Hon. Larry D. Martin

ALAN J. GINSBURG, et al.,

Defendants.

-----X

Several individual and derivative Plaintiff-investors,¹ brought this action in 2016 against Defendants Alan J. Ginsburg, Mega Funding LLC (“Mega”), Green Apple Cab Company, a/k/a Green Apple Cabs, LLC (“Green Apple”), and GLS Transit Inc. (“GLS”), charging racketeering, breach of contract, unjust enrichment, rescission, and fraud (*see* Amend. Compl., NYSCEF 127). Defendants now move to strike Plaintiffs’ jury demand arguing that Plaintiffs waived that right in writing and by filing legal and equitable claims in a single action (Seq. No. 14, NYSCEF 323).

I. Background

Plaintiffs maintain that after the NYC Taxi & Limousine Commission began its Boro Taxi program to license Boro Taxis to serve NYC areas not commonly served by yellow medallion cabs, Defendants A.J. Ginsburg and Judah Langer embarked on a scheme to defraud investors, under the guise of investing in Boro Taxi permits. The Complaint alleges that Ginsburg, and Langer intentionally misrepresented material facts to Plaintiffs and other investors about the permit scheme, and then made additional, material misrepresentations in furtherance of what amounts to

1 Mordechai Itzkowitz; Remmi, Inc., individually and derivatively on behalf of Remmi Services, LLC; LLC; Eli Segel; BALR Enterprises, LLC; All Boro Transit, LLC; Asher Fried; AFW Fleet I, LLC; RSAAC Fleet, LLC; Jeffrey Edelman, individually and derivatively on behalf of RJ Capital, LLC; Amarpreet Singh, individually and derivatively on behalf of Sahaili, LLC; Chaim Neger, individually and derivatively on behalf of Green Medallion One, LLC.

a Ponzi Scheme, as they collected salaries, and took undisclosed fees, including kickbacks from third-party contracts.

Defendants filed separate motions and, by June 12, 2017 Order, this Court (Sylvia G. Ash, J.) declined to: (1) dismiss Plaintiffs' racketeering, racketeering conspiracy, fraud, fraudulent inducement, breach of contract, and unjust enrichment claims; (2) dismiss the complaint insofar as asserted by Plaintiffs Chaim Neger, individually and derivatively on behalf of Green Medallion One, LLC ("Green Medallion"); or (3) sever Plaintiffs' claims. Said Order granted Plaintiffs' application for leave to amend the complaint (Order, NYSCEF 401).²

In now moving to strike Plaintiffs' jury demand, Defendants argue that Plaintiffs expressly waived their right to a jury trial in a series of operating agreements ("Agreements") and that, since Plaintiffs' derivative claims are equitable in nature, they should be deemed to have constructively waived their jury rights. Plaintiffs submit that, because said Agreements were fraudulently induced, the jury waivers therein should be deemed ineffective, and that, where, as here, monetary damages alone could afford a plaintiff full relief, merely adding an equitable claim does not constitute waiver of the jury right with respect to the latter.

II. Discussion

The right to a jury trial in civil cases is firmly grounded in the federal Bill of Rights (*see* U.S. Const. amend. VII,³ and New York State adopted an analogous provision nearly a century ago (*see* NY Const. art. 1, § 2.⁴ Because the right of jury trial is so fundamental, "courts indulge

² On appeal, the Second Department held, *inter alia*, that whether Neger's and Green Medallion's claims are barred by the release could not be resolved at the motion to dismiss stage because of factual disputes as to whether it was signed under duress and that this Court had properly declined to sever Plaintiffs' claims in the interest of judicial economy and consistency of verdicts (*see Itzkowitz v Ginsburg*, 186 AD3d 579, 581-82, 129 NYS3d 117, 120 [2d Dept 2020]).

³ "In Suits at common law . . . the right of trial by jury shall be preserved[.]"

⁴ "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever[.]"

every reasonable presumption against waiver" (*Aetna Ins. Co. v Kennedy to Use of Bogash*, 301 US 389, 393, 57 S Ct 809, 812 [1937]).

As codified, "[a]ny party may demand a trial by jury of any issue of fact triable of right" unless waived, and trial courts have broad discretion to preserve the right where "no undue prejudice" would result (CPLR § 4102[a][e]). Moreover, a contractual waiver, may be "invalidated . . . for any of 'the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake'" (*Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 276, 929 NYS2d 3, 8 [2011] (quoting *Mangini v McClurg*, 24 NY2d 556, 563, 301 NYS2d 508, 513 [1969])). Where plaintiffs seeking to invalidate such waivers on fraudulent inducement grounds, they, rather than the defendants, bear the burden of establishing the basic elements of fraud. To wit, "a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Centro Empresarial Cempresa S.A., supra* (citing *Glob. Minerals and Metals Corp. v Holme*, 35 AD3d 93, 98, 824 NYS2d 210, 214 [1st Dept 2006])).

Furthermore, Plaintiffs correctly argue that mere joinder of legal and equitable claims, does not automatically deprive them of the right to a trial as to their legal claims (*see KNET, Inc. v Ruocco*, 145 AD3d 989, 992, 45 NYS3d 126, 129 [2d Dept 2016]). This Court is free to decide the equitable claims while submitting the legal claims to a jury, or, submit all claims to the jury and simply treat the jury's determination on the equitable claims as "advisory." (*Le Bel v Donovan*, 96 AD3d 415, 417, 945 NYS2d 669, 671 [1st Dept 2012] (citing *John W. Cowper Co. v Buffalo Hotel Dev. Venture*, 99 AD2d 19, 23, 471 NYS2d 913 [1984])).

Accordingly, it is hereby

ORDERED, Defendants' motion to strike Plaintiffs' jury demand (Seq. No. 14) is **denied**.

Dated: February 14, 2022
Brooklyn, New York



Hon. Larry D. Martin
New York State Supreme Court