

**International Bus. Machs. Corp. v GlobalFoundries
U.S. Inc.**

2024 NY Slip Op 31655(U)

May 9, 2024

Supreme Court, New York County

Docket Number: Index No. 653625/2021

Judge: Joel M. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 NEW YORK: COMMERCIAL DIVISION PART 03M

-----X	
INTERNATIONAL BUSINESS MACHINES CORPORATION,	INDEX NO. <u>653625/2021</u>
Plaintiff,	MOTION DATE <u>07/26/2023</u>
- v -	MOTION SEQ. NO. <u>040</u>
GLOBALFOUNDRIES U.S. INC.,	
Defendant.	DECISION + ORDER ON MOTION

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 040) 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 1322, 1324, 1346, 1347, 1538 were read on this motion to STRIKE JURY DEMAND.

Upon the foregoing documents, including supplemental briefing (NYSCEF 1346, 1347), and after considering the oral arguments of counsel before and after the supplemental briefing (NYSCEF 1324, 1538), Defendant GlobalFoundries U.S. Inc.’s (“GF”) motion to strike Plaintiff International Business Machines Corporation’s (“IBM”) jury demand is **granted**.

For the reasons discussed below, the broad waiver of jury trial rights contained in the parties’ multiple contracts – which extends to “any legal proceeding directly or indirectly arising out of, under or in connection with [the agreements] or any of the Transactions, in each case whether now existing or hereafter arising, and whether in contract, tort, equity or otherwise” – forecloses IBM’s demand for a jury. IBM’s contention that its claims for fraudulent concealment (First Cause of Action) and promissory estoppel (Ninth Cause of Action) are outside the scope of the jury waiver, or that application of the jury waiver to those claims is barred by binding precedent, is unavailing.

Although contractual jury waivers may be inapplicable to fraudulent inducement claims that challenge the validity of the underlying contract, that is not the type of claim IBM asserts here. IBM affirmatively alleges in its Complaint that the agreements are “valid and binding contract[s] governed by New York law” (NYSCEF 2 at ¶¶ 195, 206, 213, 220, 227). Moreover, it acknowledged at oral argument that even if it succeeds on its fraudulent inducement claim, it will still seek to enforce the contracts as valid agreements between the parties (NYSCEF 1538, 3:2-22). In those circumstances, IBM cannot evade the broad jury waiver provisions that are an integral part of those valid agreements.

Relevant Background

Beginning in 2013, plaintiff IBM and defendant GF negotiated an agreement under which GF would provide semiconductor chips satisfying certain technical specifications to IBM (NYSCEF 1, ¶38). On October 18, 2014, the parties signed a Master Transaction Agreement (“MTA”) which provided the framework of the relationship (NYSCEF 3). Between July 2015 and March 2016, the parties entered into and amended various related agreements in connection with the MTA (*see* NYSCEF 4-7; *see also* NYSCEF 687, 697; 699).

Each agreement contained or was subject to a jury waiver provision. The MTA’s version of the provision reads in full:

WAIVER OF JURY TRIAL. EACH PARTY HERETO HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OF THE TRANSACTIONS, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER IN CONTRACT, TORT, EQUITY, OR OTHERWISE.

(NYSCEF 3, ¶ 12.4). The Foundry Supply Agreement (“FSA”) and the Albany Cooperation Agreement (“ACA”) contained nearly identical provisions (NYSCEF 5, § 18.0[b]; NYSCEF 6, ¶ 13.3; *see also* NYSCEF 697, ¶ 13.3). The FSA specifically incorporated “any [Statement of Work] hereunder” into its jury waiver provision, which includes the 10HP Statement of Work (“10HPSOW”) (NYSCEF 5, § 18.0[b]; *see also* NYSCEF 7; NYSCEF 699). The Technology Cooperation Agreement (“TCA”) noted, “Each party hereby waives any right to a jury trial” (NYSCEF 4, ¶ 11.3; NYSCEF 687, ¶ 11.3).

According to IBM’s Complaint, by September 2015, GF “began to indicate that it did not intend to develop, manufacture or supply the [10 nanometer [“nm”]] High Performance Chip” (NYSCEF 2, ¶ 124), and IBM “became increasingly concerned that [GF] was preparing to walk away from its [contractual] obligations with respect to” that chip (*id.* ¶ 128). In or around December 2015, according to the Complaint, GF against suggested that “it was backing out of its obligation to develop the 10nm chip” and “wanted to explore the possibility of amending the parties’ agreements to replace the 10nm chip [GF] had promised to develop and supply with a 7nm chip,” but IBM refused at that time to release GF from its contractual obligations (*id.* ¶ 134-35). In March 2016, the parties amended the TCA, FSA, and 10HPSOW (NYSCEF 2, ¶ 136). Notably, those amended agreements, signed after the dispute as to GF’s commitment to the chips envisioned in the 2014 MTA began to emerge, contained the broad jury waivers noted above.

On June 8, 2021, IBM commenced this action, alleging claims against GF for, *inter alia*, fraudulent inducement; breaches of the MTA, TCA, FSA, 10HPSOW, and ACA; and promissory estoppel (NYSCEF 2). This Court dismissed IBM’s fraudulent inducement claim (among others), but that claim was reinstated on appeal (*Int’l Bus. Mach. v GlobalFoundries U.S., Inc.*, 204 AD3d 441, 442 [1st Dept 2022]).

After the close of discovery, on July 6, 2023, IBM filed the Note of Issue with a demand for a jury trial (NYSCEF 653). On July 26, 2023, GF moved to strike the jury demand (NYSCEF 656). On December 18, 2023, the Court heard oral arguments on GF's motion and deferred ruling, ordering supplemental briefing (NYSCEF 1324, at 89:18-90:15). On May 3, 2024, the Court heard supplemental oral argument on GF's motion to strike the jury demand (NYSCEF 1538, at 3:2-23:8).

While GF has consistently argued for the jury demand to be struck in its entirety, IBM initially demanded a jury on all remaining claims for fraudulent inducement, breach of contract, and promissory estoppel (NYSCEF 653), but in opposition to the instant motion suggested entitlement to a jury only on its fraudulent inducement and promissory estoppel claims (NYSCEF 659, at 2-3 ["[T]he jury waiver . . . cannot apply to those two claims"]).

Discussion

The New York Constitution provides for a right of trial by jury (NY Const art I, § 2). In effect, "a jury trial is guaranteed: '(1) in all those cases to which it would have traditionally been afforded under the common law before 1777, and (2) in all cases to which the Legislature by statute extended a right to a jury trial between 1777 and 1894'" (*State v Myron P.*, 20 NY3d 206, 212 [2012] [quoting *In re DES Mkt. Share Litig.*, 79 NY2d 299, 304 [1992]]). The right is also codified in CPLR 4101, which provides in part that a jury trial is available in actions in which a party demands "a judgment for a sum of money only," except when a jury trial has been waived.

It is well settled that contractual "[j]ury waiver provisions are valid and enforceable . . ." (*Uribe v Merchants Bank of N.Y.*, 227 AD2d 141, 141 [1st Dept 1996] [citing *Barclays Bank of N.Y., N.A. v Heady Elec. Co.*, 174 AD2d 963 [3d Dept 1991]; *Chem. Bank v Summers*, 67 AD2d

856 [1st Dept 1979]]; *see also Tiffany at Westbury Condo. v Marelli Dev. Corp.*, 34 AD3d 791, 791-92 [2d Dept 2006] [citing *Gunn v Palmieri*, 187 AD2d 485 [2d Dept 1995]].

As described above, the jury waivers to which these sophisticated parties agreed are broad, encompassing all claims “now existing or hereafter arising” and explicitly applying to all manner of claims, “whether in contract, tort, equity or otherwise.” Resolution of the instant motion turns on whether IBM waived the right to a jury trial with respect to its claims for fraudulent inducement and promissory estoppel. The Court finds that it did.

Fraudulent Inducement

There is, initially, little doubt that the contractual jury waivers are broad enough by their terms to cover IBM’s fraud claim. That claim “directly or indirectly aris[es] out of, under or in connection with [the agreements] or any of the Transactions.” Moreover, the fact that some or all of the alleged conduct giving rise to the claim took place prior to the signing of the MTA is no barrier to application of the waivers, because the waivers explicitly apply to claims “now existing or hereafter arising.”

Nevertheless, IBM suggests that New York law precludes application of a contractual jury waiver to a claim for fraudulent inducement. It argues such a rule is sensible “because, as alleged, the contracting party would not have entered into the contract in the first place but for the opposing party’s fraud,” and therefore “it is illogical for a party to be bound by a jury waiver by virtue of a fraud that is the basis for the lawsuit” (NYSCEF 659, at 2). While there is some superficial appeal to this argument, it overstates and oversimplifies how New York courts have applied contractual jury waiver provisions in the context of claims for fraudulent inducement. Specifically, courts have distinguished between fraudulent inducement claims that challenge the validity and enforceability of the contract in its entirety (even if breach of contract claims are

asserted in the alternative) and those that do not challenge the validity of the contract and the plaintiff seeks to *enforce* the contract notwithstanding the alleged fraud.

The cases upon which IBM relies are in the former category (*Ambac Assur. Corp. v Countrywide Home Loans Inc.*, 179 AD3d 518, 520-21 [1st Dept 2020]; *J.P. Morgan Sec. Inc. v Ader*, 127 AD3d 506, 507-08 [1st Dept 2015]; *MBIA Ins. Corp. v Credit Suisse Sec. (USA), LLC*, 102 AD3d 488 [1st Dept 2013]; *Ambac Assur. Corp. v DLJ Mortg. Capital, Inc.*, 102 AD3d 487 [1st Dept 2013]; *China Dev. Indus. Bank v Morgan Stanley & Co.*, 86 AD3d 435, 436-37 [1st Dept 2011]; *Wells Fargo Bank, N.A. v Stargate Films, Inc.*, 18 AD3d 264, 265 [1st Dept 2005]). In *Ader*, which contains the most detailed discussion of the issue, the court explained:

We have previously held that a contractual jury waiver provision is inapplicable to a fraudulent inducement cause of action that *challenges the validity of the underlying agreement* In cases where the fraudulent inducement allegations, if proved, *would void the agreement, including the jury waiver clause*, the party is entitled to a jury trial on the claim.

As our dissenting colleague acknowledges, ‘a defrauded party to a contract may elect to either disaffirm the contract by a prompt rescission or stand on the contract and thereafter maintain an action at law for damages attributable to the fraud’ As a result, a party alleging fraudulent inducement that elects to bring an action for damages, as opposed to opting for rescission may, under certain circumstances, still challenge the validity of the agreement.

Thus, where, as here, a party sufficiently pleads that it was fraudulently induced to enter into a contract, and *only relies on the agreement as a basis for its defense against breach of contract allegations and a claim for reformation to recover overpayments*, it is not precluded from challenging the validity of the contract for purposes of avoiding the jury waiver clause with respect to the adjudication of its fraudulent inducement claim. Although the dissent contends otherwise, we find that the facts of this case fall within *Ambac's* parameters, and thus reinstate defendants' demand for a jury trial.

(127 AD3d at 507-08 [citations omitted] [emphasis added].) In sum, the linchpin for vitiating the jury waiver is that the fraudulent inducement claim asserts that the entire agreement (and thus the jury waiver contained therein) is void or invalid.¹

By contrast, *Zohar CDO 2003-1 Ltd. v Xinhua Sports & Entertainment Ltd.*, 158 AD3d 594 [1st Dept 2018], upon which GF relies, is in the latter category. The plaintiffs in that case did not challenge the validity of the underlying agreement, which the court found rendered *Ader* and *Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.* (102 AD3d 487 [1st Dept 2013]) inapposite (*Zohar*, 158 AD3d at 594). Instead, because plaintiffs “merely seek to enforce the underlying agreements by obtaining damages for fraudulent inducement, rather than rescind the agreements, and do not challenge the validity of the agreements in any manner other than by making factual allegations of fraud in the inducement,” the contractual jury waiver was enforceable and the trial court correctly struck the plaintiffs’ jury demand (*id.* at 594-95).

In reaching that conclusion, the *Zohar* court relied upon the First Department’s decision in *Leav v Weitzner* (268 AD 466 [1st Dept 1944]), in which a tenant sought to recover damages

¹ The brief discussions of jury waiver in *Ambac*, 179 AD3d 518, *MBIA*, 102 AD3d 488, and *Ambac*, 102 AD3d 487 refer to fraudulent inducement as plaintiff’s “primary” claim in the case without further explanation, but the sole authorities on which those decisions rely make clear that a claim of contract invalidity has been the key consideration, as stated in the more detailed discussion in *Ader* (*see China Dev. Indus. Bank*, 86 AD3d at 436-37 [“As the validity of the parties’ 2007 investment transaction is challenged by the allegations, the motion court properly concluded that the jury waiver provision in the agreement was inapplicable to the fraudulent inducement cause of action”]; *Wells Fargo*, 18 AD3d at 265 (jury “waiver does not apply to a sufficiently pleaded defense that amounts to a claim of fraudulent inducement challenging the validity of the agreement”]; *see also Bank of New York v Cheng Yu Corp.*, 67 AD2d 961, 961 [2d Dept 1979] [“Appellant’s allegations, if proved, would void the instrument as to him, including the jury waiver clause. In these circumstances, the signer is entitled to a jury trial on the defense of misrepresentation”]).

on the ground that it was fraudulently induced to enter into a lease. The court enforced a jury waiver contained in the subject lease, explaining:

In asserting a claim for damages resulting from the execution of the lease, the plaintiffs necessarily affirm its existence and maintain the action on the theory that the defendants' fraud resulted in a subsisting contract which, on account of the falsity of the representations, is detrimental to them. Under these circumstances, the plaintiffs are not in a position to contend, as they might perhaps contend in an action for rescission, that the stipulation waiving a jury trial perished with all the other rights and obligations under the lease. In pursuing their remedy for damages, they necessarily affirm the existence of the lease from which the damages ensue. They may not at the same time rely upon the lease as the foundation of their claim for damages and repudiate the provisions by which they waived their constitutional right to a jury trial. Accordingly, in its present form, the action is within the broad provisions which waive a jury trial in any action 'arising out of or in any way connected with this lease[.]'

(*Id.* at 468 [citations omitted].)

The facts of the present case fall clearly into the *Zohar/Leav* category rather than the *Aden/Ambac* category. As noted above, IBM does not contend that the agreements are invalid or void. To the contrary, it affirmatively and repeatedly alleges that the agreements are “valid and binding contract[s] governed by New York law” (NYSCEF 2 at ¶¶ 195, 206, 213, 220, 227), and made clear during oral argument on this motion that it will seek to enforce those contracts even if it prevails on its claim for fraudulent inducement (NYSCEF 1538, at 3:2-22), which seeks damages that are “separate and distinct” from its claims for breach of contract (*Int'l Bus. Machs.*, 204 AD3d at 442). In addition, the record shows that IBM and GF repeatedly reaffirmed and amended the “fraudulently induced” underlying agreements – with the broad jury waiver provisions intact – even after IBM claims it suspected that GF did not intend to honor its contractual obligations. Finally, the mere assertion that “but for” the fraudulent inducement IBM

would not have proceeded with the agreement – which is a necessary element of *every* fraudulent inducement claim – is insufficient. The case law discussed above makes clear that IBM cannot selectively embrace the contracts as valid and enforceable while at the same time seeking to evade the broad jury waiver provisions to which it freely agreed many times over.²

Accordingly, the Court finds that IBM has waived its right to a jury trial on its claim for fraudulent inducement. In view of that conclusion, the Court need not address GF's alternative argument that any otherwise viable right to a jury trial IBM might have with respect to that claim was further waived by joining it with purportedly equitable claims for accounting and unjust enrichment.

² It is worth noting that our courts have similarly eschewed a rigid approach to shielding fraudulent inducement claims from other types of contractual dispute resolution provisions. In particular, arbitration and forum selection provisions are commonly severed from the rest of the contract and enforced over a party's objection that it was fraudulently induced to enter into the agreement (*see, e.g., In re Weinrott (Carp)*, 32 NY2d 190, 197-99 [1973] [arbitration]; *Braverman v Yelp, Inc.*, 128 AD3d 568 [1st Dept 2015] [forum selection]). A party seeking to evade such provisions generally must show that the alleged fraud “permeates the entire agreement so as to invalidate the arbitration clause as well” *O'Neill v Krebs Communications Corp.*, 16 AD3d 144, 144-45 [1st Dept 2005]; *see also Weinrott*, 32 NY2d at 197 [“Of course, if the alleged fraud was part of a grand scheme that permeated the entire contract, including the arbitration provision, the arbitration provision should fall with the rest of the contract”]; *DeSola Grp., Inc. v Coors Brewing Co.*, 199 AD2d 141, 141 [1st Dept 1993] [“Since plaintiff's allegations of fraud pervading the Agreement would render the entire Agreement void, the forum selection clause contained therein is unenforceable”]. Courts have also looked to whether the fraud extended to the arbitration provision itself (*Nat'l Union Fire Ins. Co. of Pittsburgh v St. Barnabas Comm'y Enters. Inc.*, 48 AD3d 248, 249 [1st Dept 2008] [“Inasmuch as St. Barnabas makes no specific allegations of being fraudulently induced into agreeing to arbitration, its claim of fraudulent inducement with regard to the 1995 through 1998 policy periods must be determined by the arbitrators”]). There is, of course, no claim in the instant case that the alleged fraud related in any way to the jury waiver provision itself. Nor does IBM allege a pervasive fraud that permeates the parties' entire agreement.

Promissory Estoppel

The analysis of IBM’s demand for a jury on its promissory estoppel claim is more straightforward. The case law described above regarding fraudulent inducement (which can in some instances challenge the validity of the agreement containing the jury waiver) has no application to such claims. The only issue is whether the claim falls within the scope of the jury waivers contained in the underlying agreements.

In its promissory estoppel claim, IBM alleges that “[a]fter abandoning development of a 10nm High Performance chip, [GF] promised IBM it would develop, manufacture, and supply to IBM a 7nm chip” (NYSCEF 2, ¶242). Even assuming GF’s 7nm development work was not covered by the parties’ contracts (which GF disputes), the alleged promise to develop 7nm chips as an alternative to providing the chips specified *in the agreements* plainly falls within the broad scope of a claim “directly or indirectly arising out of, under or in connection with this Agreement or any of the Transactions, in each case whether now existing or hereafter arising.”

Accordingly, it is

ORDERED that GF’s motion to strike the jury demand is **granted**, and IBM’s jury demand is struck.

This constitutes the Decision and Order of the Court.

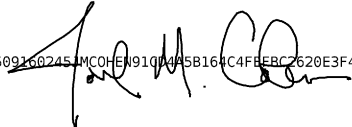
20240509160245 JMC0HEH910045B164C4FE8BC7620E3F4BE11A0

5/9/2024
DATE

CHECK ONE: CASE DISPOSED GRANTED DENIED

APPLICATION: SETTLE ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN



JOEL M. COHEN, J.S.C.

NON-FINAL DISPOSITION OTHER

GRANTED IN PART REFERENCE

SUBMIT ORDER

FIDUCIARY APPOINTMENT