

J.P. Morgan Sec. Inc. v Ader

2014 NY Slip Op 31017(U)

April 15, 2014

Supreme Court, New York County

Docket Number: 650005/09

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X	
J.P. MORGAN SECURITIES INC.,	:
	:
Plaintiff/Counterclaim Defendant,	:
	:
-against-	:
	:
JASON ADER, ET AL.,	:
	:
Defendants/Counterclaimants.	:
-----X	

Index No. 650005/09
DECISION AND ORDER
Motion Sequence No. 005

MELVIN L. SCHWEITZER, J.:

This is a motion to strike defendants' jury demand.

The present dispute concerns whether the Hayground Cove entities and Jason Ader (collectively, Hayground) are entitled to a jury trial on its counterclaim for fraudulent inducement. J.P. Morgan Securities Inc. (J.P. Morgan) has moved to strike Hayground's jury demand on the grounds that Hayground has waived its right to a jury trial. For the reasons discussed herein, the court GRANTS the motion to strike the jury demand.

Background

Hayground contends that it entered into a Revenue Sharing Agreement (RSA) with Bear Stearns & Co. Inc. (Bear Stearns) in 2003 in which Bear Stearns would provide an initial investment and marketing assistance in exchange for a share of Hayground's revenue. By late March or early April of 2004, Hayground discovered that Bear Stearns would be unable to provide marketing assistance. In December 2004, the parties allegedly orally agreed to modify the RSA, and in February 2005, the parties executed a written amendment.

J.P. Morgan acquired Bear Stearns in 2008 and filed suit against Hayground the following year for breach of contract for failing to make the appropriate payments to

J.P. Morgan under the RSA. Hayground has counterclaimed for fraudulent inducement and reformation of the RSA. Hayground asserts Bear Stearns is liable for fraudulent inducement for falsely representing that Bear Stearns could and would provide marketing assistance.¹

On July 18, 2012, J.P. Morgan filed a Note of Issue, which noticed the action for a bench trial. In response, on August 2, 2012, defendants filed a demand for a jury trial on its counterclaim for fraudulent inducement. J.P. Morgan now moves to strike Hayground's jury demand.

Discussion

J.P. Morgan moves to strike the jury demand on the grounds that Hayground waived its right to a jury trial in the RSA, or alternatively, by joining legal and equitable counterclaims arising out of the same transaction. The court finds that the jury waiver in the RSA is valid and enforceable, and that, as a result, there is no need to address J.P. Morgan's additional waiver-by-joinder argument.

In both the RSA and an Investment Agreement, the parties expressly agreed to "waive all right to trial by jury in any action or proceeding to enforce or defend any rights under this Agreement." RSA § 8.1. J.P. Morgan argues that this contractual waiver bars a jury trial with respect to Hayground's counterclaim. In response, Hayground argues that a contractual jury waiver is inapplicable to a claim for fraudulent inducement as a matter of law. Not so.

A contractual jury waiver will be deemed inapplicable to a fraudulent inducement claim *only where the validity of the transaction is challenged*. See e.g. *China Dev. Indus. Bank v*

¹ On May 30, 2013, the court granted J.P. Morgan's motion for summary judgment as to all three of Hayground's counterclaims: (1) fraudulent inducement; (2) negligent misrepresentation; and (3) reformation. See Dkt. #91. On November 13, 2013, the court granted Hayground's motion to reargue, and restored Hayground's counterclaims for fraudulent inducement and reformation. See Dkt. #122. The May 30 order was vacated only with respect to these two counterclaims.

Morgan Stanley & Co., 86 AD3d 435, 436-37 (1st Dept 2011); *Wells Fargo Bank, N.A. v Stargate Films Inc.*, 18 AD3d 264 (1st Dept 2005). Under New York law, a party alleging fraudulent inducement 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.” *Big Apple Car, Inc. v City of New York*, 204 AD2d 109, 110-11 (1st Dept 1994). “A party who has signed an agreement may not simultaneously rely upon it as the foundation of the claim for damages and repudiate a provision contained therein to the effect that the right to a trial by jury is waived.” *Sherry Assoc. v Sherry-Netherland, Inc.*, 273 AD2d 14, 15 (1st Dept 2000); *Leav v Weitzner*, 268 AD 466, 468 (1st Dept 1944) (“In asserting a claim for damages resulting from the execution of the [contract], 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.”).

Hayground contends that it challenges the validity of the RSA because it alleges the entire agreement itself was procured through fraud. But contrary to this assertion, Hayground seeks monetary damages and reformation of the RSA, not rescission. In fact, Hayground explicitly acknowledges that it has “no reason to seek rescission.” While it may be true that the RSA was fraudulently induced, the form of relief sought by Hayground – reformation – clearly confirms that Hayground has since elected to stand on the contract and not challenge its validity. Hayground’s decision not to assert fraud as a defense to J.P. Morgan’s breach of contract claims further indicates that Hayground has not challenged the validity of the RSA, but instead has elected to “stand on the contract and thereafter maintain an action at law for damages.” *Big Apple Car*, 204 AD2d at 110-11; see *Leav v Weitzner*, 268 AD at 468.

Hayground's argument that it has challenged the validity of RSA is also belied by its own allegations. Hayground alleges that the parties "agreed to modify the RSA's approach to marketing-fee deductions" after Hayground discovered Bear Stearns purported failure to "provide the promised fundraising support." If this contractual modification in fact took place after the discovery of the misrepresentations underlying its fraud claims, Hayground may have ratified the RSA and explicitly affirmed its validity. See e.g. *Scharf v Idaho Farmers Market, Inc.*, 2014 WL 959096, at *1 (1st Dept Mar 13, 2014); *Braddock v Braddock*, 60 AD3d 84, 94-95 (1st Dept 2009) (citing *Agristor Leasing-II v Pangburn*, 162 AD2d 960, 961 (1st Dept 1990)). The 2005 amendment to the RSA demonstrates that Hayground does not challenge the validity of the RSA and that the jury waiver provision contained in the RSA is still applicable.

The First Department's recent ruling in *Ambac* reinstated a jury demand holding that "The complaint alleges repeatedly that the insurance agreement was obtained through various types of fraud, making it clear that fraudulent inducement is plaintiff's primary claim." *Ambac Assurance Corp. v DLJ Mortg. Cap., Inc.*, 102 AD3d 487 (1st Dept 2013).² The IAS court had struck the jury demand, finding that Ambac could not sustain its fraudulent inducement claim without *a fortiori* affirming the validity of warranties contained alongside the jury waiver in the agreement. *Ambac Assurance Corp. v DLJ Mortg. Cap., Inc.*, 2011 WL 4861862, at *13-*15 (NY Sup Ct 2011), *rev'd*, 102 AD3d 487. The First Department reversed, holding that "it is of no consequence that the complaint does not contain the word 'rescission' or expressly state that it challenges the validity of the insurance agreement." (Citation omitted). *Ambac*, 102 AD3d at 487-88. This was so because there was nothing at all to suggest that Ambac elected to stand on the contract at any point after discovering and asserting its fraud claims.

² Decided simultaneously with *MBIA Ins. Co. v Credit Suisse Secs. (USA), LLC*, 102 AD3d 488 (1st Dept 2013).

Ambac can be distinguished from the present case because Hayground's actions – seeking damages and, in particular, reformation instead of rescission, declining to assert fraud as a defense to the breach of contract claim, and ratifying the RSA through the 2005 amendment – unequivocally demonstrate that it has elected to affirm the RSA and not challenge its validity.

Conclusion

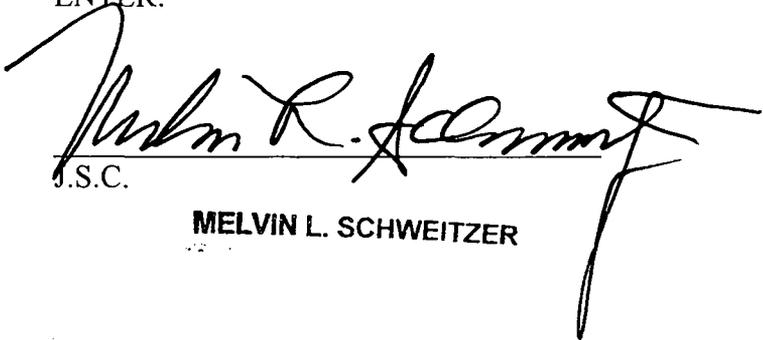
Asserting a claim for fraudulent inducement is insufficient to strike a contractual jury waiver unless the agreement containing the waiver is challenged as invalid. Hayground has not challenged the validity of the RSA but has instead elected to stand on the contract, seeking first an amendment in 2005, and now damages and reformation. For the foregoing reasons, the court finds that Hayground has waived its right to a jury trial with respect to its counterclaim for fraudulent inducement.

Accordingly, it is

ORDERED that J.P. Morgan's motion to strike the jury demand is granted.

Dated: April 15, 2014

ENTER:


J.S.C.
MELVIN L. SCHWEITZER