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Don't Waive Your Client's Right To Jury Trial

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The actual trial of an action is often given little consideration during the initial pleading stage of litigation. This can lead to some unfortunate results when, years after commencement of an action, a party discovers that the right to a jury trial has been waived.

One way to inadvertently waive a party's right to a jury trial is to include equitable claims in a pleading, versus limiting the relief to solely legal remedies. Neither federal nor New York State law provides a party with the right to a jury trial on equitable claims — only legal claims will be heard before a jury.

Federal, State Rules

In federal court, a two-step test is used to evaluate whether a party has waived its right to a jury trial by asserting equitable claims, as explained by the U.S. Supreme Court in *Granfinanciera, S.A. v. Nordberg*, 492 US 33, 42 (1989).

First, the court must engage in some time travel and determine whether the action would have been deemed legal or equitable in 18th century England. Second, the court must examine the remedy sought and determine whether it is legal or equitable in nature. The results of the two-step analysis are then balanced, although greater weight is given to the second step.

In comparison, the test set forth by state courts is not as precise. The general rule is that a party will waive its right to a jury trial when legal and equitable claims arising from the same transaction are joined in one lawsuit, or when the party seeks both legal and equitable relief for the same cause of action, *Zimmer-Masiello, Inc. v. Zimmer, Inc.*, 164 AD2d 845, 846-847 (First Dept. 1990). This waiver applies only to the plaintiff — a defendant retains the right to a jury trial on the legal issues, even when those legal issues are joined with equitable claims in the complaint, *John W. Cowper Co. v. Buffalo Hotel Dev. Venture*, 99 AD2d 19, 21 (Fourth Dept. 1984).

However, a defendant must be careful when drafting an answer to any complaint, as the assertion of equitable counterclaims and affirmative defenses can, in some instances,

wave the defendant's right to a jury trial, see CPLR 4102.

It is notable that the Fourth Department appears to have tempered this rule to some degree, repeatedly rejecting the notion that a defendant automatically waives its right to a jury trial by asserting equitable defenses or counterclaims, see *Citizens Central Bank v. Fisher*, 126 AD2d 968 (Fourth Dept. 1987) (defendant asserting equitable defenses did not waive right to jury trial on legal defenses); *International Playtex, Inc. v. CIS Leasing Corp.*, 115 AD2d 271 (Fourth Dept. 1985) (even though defendant raised equitable counterclaims, it was entitled to jury trial on legal issues); *John W. Cowper Co.*, 99 AD2d 19 (Fourth Dept. 1984) (same).

Application

While the rules may be easily stated, they are not always as easily applied. In practice, courts have reached inconsistent results when evaluating whether a party is entitled to a jury trial notwithstanding the assertion of equitable claims. A review of the application of these standards to a breach of fiduciary duty claim demonstrates the difficulty in this area.

State courts have generally held that there is no right to a jury trial where the cause of action seeks damages for breach of fiduciary duty. The reasoning behind this rule is that a breach of fiduciary duty claim was historically characterized as equitable in nature, *Margesson v. Bank of New York*, 291 AD2d 694, 698 (Third Dept. 2002) (plaintiffs waived right to have legal claims tried by a jury where they brought a single action joining legal claims with an inherently equitable claim for breach of a trustee's fiduciary duty); *Zainal v. America-Europe-Asia International Trade and Management Consultants, Ltd.*, 254 AD2d 52, 53 (First Dept. 1998) (plaintiff waived right to jury trial where main thrust of action was breach of fiduciary duty); *Zimmer-Masiello, Inc. v. Zimmer, Inc.*, 164 AD2d 845, 847 (First Dept. 1990) (plaintiff waived right to jury trial when it joined claim for breach of fiduciary duty with legal claims); *In re Rappaport*, 150 AD2d 779, 780 (Second Dept. 1989) ("There is no right to a jury trial where the cause of action is to recover damages for a breach of fiduciary duty,

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which sounds in equity.”).

But see *Abrams v. Rogers*, 195 AD2d 349 (First Dept. 1993) (in action for breach of fiduciary duties owed by general partners to limited partners, defendant entitled to jury trial).

Second Circuit Interpretation

In contrast, the Second Circuit Court of Appeals just recently, in *Pereira v. Farace*, 413 F3d 330 (Second Cir. 2005), reversed a multi-million dollar verdict issued after a bench trial before Southern District Court Judge Robert W. Sweet, in an action involving claims of breach of fiduciary duty against former directors and officers of a bankrupt privately held corporation. The Second Circuit held that the district court erred in denying the defendants a jury trial on the breach of fiduciary duty claims.

Utilizing the two-part test set forth by the Supreme Court, the Second Circuit determined that the claim for breach of fiduciary duty would have, indeed, been considered equitable in 18th century England. As noted by the Second Circuit, breach of fiduciary duty claims were historically within the jurisdiction of the equity courts. The Second Circuit rejected the defendants’ argument that, as a negligence-based claim, the breach of fiduciary duty allegations were legal in nature.

However, analyzing the breach of fiduciary duty claims under the more important second step, the Second Circuit determined the nature of the relief sought by the plaintiff was monetary relief because the defendants did not actually possess the money in question.

In other words, according to the Second Circuit’s analysis, the plaintiff was not seeking restitution (which is equitable in

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nature) since the defendants never personally possessed any of the funds. Therefore, the damages sought were purely legal in nature.

The Second Circuit concluded that the defendants were entitled to a jury trial on the breach of fiduciary duty claims. In reaching this holding, the Court expressly rejected its prior holding in *Strom v. Goldman, Sachs & Co.*, 202 F3d 138 (Second Cir. 1999), and relied upon a subsequent decision by the Supreme Court in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 US 204 (2002).

Did the Second Circuit reach its conclusion in *Pereira* because it was the defendants (as opposed to the plaintiff who had drafted the complaint) who were seeking a jury trial? No such distinction is referenced in the court’s decision. Yet, one cannot help but question whether that fact influenced the result.

Conclusion

These and other decisions underscore the difficulty in applying the tests and determining whether a party is entitled to a jury trial under particular circumstances. Given the state of the law, it will not be without difficulty that a practitioner will attempt to anticipate whether his or her pleading is entitled to be tried by a jury.

Nonetheless, at the very least, consideration should be given to these issues, so as not to unintentionally waive your client’s right to a jury trial. They must be considered long before one ever steps foot in the courtroom for trial.

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