New York Law Journal

TUESDAY, JULY 26, 2005

LITIGATION REVIEW

Jury or Non-Jury? That is the Question

BY KEVIN SCHLOSSER

Few would disagree that whether a case is decided by a judge or a jury is an important and, often, critical determination. In the New York metropolitan area, the composition of a jury and, therefore, the type of verdict that is likely to be rendered, vary dramatically depending upon the county where the trial is venued.

In a graphic example of how certain practitioners view the propensities of juries on Long Island, a plaintiff's personal injury firm recently opposed a defense motion to file a late jury demand by asserting, in remarkably blunt terms, that it would be prejudiced by the late filing because jurors in this area are notoriously unkind to such plaintiffs:

If we thought it was in the plaintiff's best interest to request a jury on a personal injury case we would have requested same. Our firm handles many personal injury cases year in and year out in the Counties of Nassau and Suffolk. It is our position that Nassau and Suffolk County Jurors are incredibly indifferent to the plight of plaintiffs. Rarely, if ever, do we request a jury trial in Nassau or Suffolk for our personal injury plaintiffs. It has been our experience that jurors are not sympathetic to the plight of those plaintiffs' cases who wind up going to trial.[1]

Not surprisingly, the court rejected this argument, noting "that whether the case is tried before the Court or a Jury, it is to be determined on the facts and law and not on sympathy."[2]

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Notwithstanding the court's observation that cases should be determined on the facts and law and not on sympathy, counsel would do a grave disservice to their clients if they did not carefully analyze the real, practical implications of whether the trier of fact will be a judge or a jury.

In New York state practice, since a party designates its choice for jury or non-jury at the end of all pretrial proceedings with the filing of a note of issue, one might assume that counsel has the luxury of waiting until the end of the case to determine its choice of the trier of fact.[3] As discussed below, however, irrevocable action at the outset of a case could drastically impact the availability of a jury.

To avoid inadvertent or unknowing waiver of the right to a trial by jury, plaintiff's counsel should carefully consider whether a judge or jury is desirable when formulating the legal theories, the actual allegations of the complaint and the relief sought. Similarly, defense counsel must also be vigilant at the outset of a case because the allegations in an answer and/or counterclaims can also impact directly on the availability of a jury. And, of course, counsel on both sides must be careful to designate the choice of jury trial in a timely manner at the end of pretrial proceedings in strict conformance with the applicable deadlines.

Article 41 of the CPLR contains the basic rules governing the right to a trial by jury, waiver of that right and the applicable time deadlines for making appropriate designations. Following historical rules on the availability of juries in an action "at law" and not in equity, CPLR 4101 provides that there is a right to trial by jury in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only"[4] as well as in certain specific identified types of actions.[5]

In order to preserve the right to trial by jury, the party filing the note of issue must make such a demand in the note of issue.[6] If a jury is not demanded, any other party desiring a trial by jury must file such demand within 15 days after service of the note of issue.[7]

The right to a trial by jury may be waived in a number of ways, including explicitly, implicitly and, in the least desirable manner — inadvertently. For example, if none of the parties designates a trial by jury, the presumption is that "the right to trial by jury shall be deemed waived by all parties."[8]

However, the CPLR does authorize the court to "relieve a party from the effect of failing to comply with [the deadlines on requesting a jury] if no undue prejudice to the rights of another party would result."[9]

Review of Decisions

A review of the recent online decisions in Nassau and Suffolk counties reveals that the courts have been flooded with motions to file late jury demands, virtually all of which have been made by defendants.

"[A] motion pursuant to CPLR 4102(e) for an extension of time to file a demand for a jury trial must be based upon a factual showing that the earlier waiver of that right was the result of either inadvertence or other excusable conduct indicating a lack of intention to waive such right."[10]

"The decision to relieve a party from failing to comply with [the time deadlines] lies within the sound discretion of the trial court."[11]

Further, the courts note that "[t]he only limitation on the court's discretion appears to be that any decision to forgive such a waiver should not unduly prejudice the other party or parties."[12]

The recent Nassau and Suffolk trial decisions reflect a fair amount of leniency in granting defendants' motions to file late jury demands. For example, the courts have accepted claims that the demand was simply overlooked during the course of defense counsel's moving their office; that the note of issue had not been received (even though proof of proper mailing was substantiated); or simply that the omission was merely inadvertent and unintended, so long as plaintiff is not able to substantiate real prejudice from the delay in filing the demand.[13]

Notwithstanding the leniency of most judges, however, defense counsel should be careful in monitoring the filing of notes of issue and to serve the appropriate demand for a jury in a timely manner because there are, indeed, decisions refusing to relieve counsel from late demands where the subsequent motion was not made in a timely manner (nine month delay deemed untimely)[14] or where defense counsel merely stated in conclusory fashion, without any factual support, that they "did not intend to waive a trial by jury" and that failure to file the notice on time "was inadvertent and not intentional."[15]

Contractual Waivers

The right to trial by jury may also be waived by virtue of the explicit terms of a contract. As Nassau Supreme Court Justice Leonard B. Austin recently noted: "Jury waiver clauses are recognized as valid and enforceable."[16]

Contractual jury waivers do give way, however, to explicit statutory prohibitions, such as Real Property Law §259-c, which renders "null and void" any lease provision by which a trial by jury is waived in an action for "personal injury or property damage."[17]

Another frequent form of implicit, and possibly inadvertent, waiver of the right to trial by jury occurs when a party requests only equitable relief or combines legal and equitable claims for relief arising out of the same facts or circumstances or transaction.[18] Further, even where plaintiff's counsel avoids an explicit request for equitable relief, and demands only money damages, courts will look past the claim for relief actually pled to determine whether the underlying theories or causes of action are "equitable" in nature or would require equitable remedies, in deciding whether to allow a trial by jury.[19] In fact, CPLR 4101(1) explicitly states that the party desiring a jury must demand "and set forth facts which would permit a judgment for a sum of money only."

It is critical, therefore, when formulating theories of a complaint, drafting the allegations and deciding upon the form of relief to demand, that counsel carefully consider the effect on the right to a trial by jury. Waiting until the actual deadline to demand a jury in a note of issue or within the 15 days in response thereto could irreparably effect the right to a jury because the courts hold that "[o]nce the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claim(s) will not revive the right to trial by jury."[20]

Similarly, defense counsel can waive the right to a trial by jury by asserting equitable defenses or counterclaims, and in certain jurisdictions, not only with respect to the determination of the defenses or counterclaims, but on plaintiff's claims as well.[21] Thus, defense counsel must also be aware of the effect of their initial pleadings on the ultimate right to a trial by jury.

Conclusion

Given the significance of whether a case is decided by a judge or jury, careful consideration should be given to the desired trier of fact at the earliest stages of any potential case.

Certainly, before pleadings are drafted, the form of relief should be evaluated in the event that it is determined that a particular trier of fact would be preferable.

Further, counsel should be vigilant in adhering to the statutory deadlines for requesting a jury and, in the event the deadline is missed, move expeditiously to request leave.

Endnotes:

1. Kopp v. Lannigan, Index No. 007331/00, Short Form Order by the Joseph Covello, Supreme Court, Nassau Co., Jan. 22, 2003, at 3.
2. Id. at 3.
3. CPLR 4102(a).
4. CPLR 4101(1).
5. CPLR 4101(2) & (3).
6. CPLR 4102(a).
7. Id.
8. CPLR 4102(a).
9. CPLR 4102(e).
10. Skelly v. Sachem Cent. School Dist., 309 A.D.2d 917, 918, 766 N.Y.S.2d 108, 109 (2d Dep't 2003).
11. Grieco v. Boss, Index No. 02-15961, Short Form Order by Thomas F. Whelan, Supreme Court, Suffolk Co., Mar. 31, 2005 at 5.
12. Woytusik v. Lewis, Index No. 9069/00, Short Form Order by Bruce D. Alpert, Supreme Court, Nassau Co., Apr. 18, 2002 at 2.
13. See, e.g., Phelps Lane Development Corp. v. Ditta, Index No. 10753-2002, Short Form Order by Denise F. Molia, Supreme Court, Suffolk Co., Apr. 22, 2005; Grieco v. Boss, Index No. 02-15961, Short Form Order by Thomas F. Whelan, Supreme Court, Suffolk Co., Mar. 31, 2005; Kopp v. Lannigan, Index No. 007331/00, Short Form Order by the Joseph Covello, Supreme Court, Nassau Co., Jan. 22, 2003; Woytusik v. Lewis, Index No. 9069/00, Short Form Order by Bruce D. Alpert, Supreme Court, Nassau Co., Apr. 18, 2002; United Minerals, Inc. v. Sundial Asphalt Co., Inc., Index No. 96-11775, Short Form Order by Robert W. Doyle, Supreme Court, Suffolk Co., Mar. 26, 2002.
14. Stockwell v. Isuzu LT, Index No. 00-12414, Short Form Order by Edward D. Burke, Supreme Court, Suffolk Co., Jan. 5, 2004, at 2.
15. Quintanilla v D'Angelo, Index No. 14054/02, Short Form Order by Ute Wolff Lally, Supreme Court, Nassau Co., July 22, 2004, at 4.
16. Spector v. Gotham Bank of New York, Index No. 19657/00, Order of Leonard B. Austin, Supreme Court, Nassau Co., Nov. 16, 2004, at 2.
17. See Mykonos Import-Export Inc. v. 108-122 New South Road Realty Corp. Index No. 027686/98, Short Form Order by Daniel Martin, Supreme Court, Nassau Co., Feb. 21, 2002, at 2 (Real Property Law Section 259-c applies only to personal injury or property damage claims, and not actions that are contractual in nature).
18. Winterview Inc. v. Karin Models, LLC, 294 A.D.2d 120, 121, 742 N.Y.S.2d 212, 213 (1st Dep't 2002); Montalvo v. Netta Realty Corp., 51 A.D.2d 1005, 1006, 381 N.Y.S.2d 111 (2d Dep't 1976).
19. 8 Weinstein, Korn & Miller, N.Y. Civ. Prac., ¶4101.12 ("when the complaint demands a money judgment but the pleaded facts would sustain an equitable remedy, the plaintiff generally has no right to a jury trial.").
20. Zimmer-Masiello, Inc. v. Zimmer, Inc., 164 A.D.2d 845, 846-47, 559 N.Y.S.2d 888, 889-90 (1st Dep't 1990); Kaplan v. Long Island University, 116 A.D.2d 508, 509, 497 N.Y.S.2d 378 (1st Dep't 1986) (stipulation amending the complaint to delete the equitable prayer for relief did not entitle plaintiff to a jury trial of the remaining causes of action).
21. Seneca v. Novaro, 80 A.D.2d 909, 910, 437 N.Y.S.2d 401, 402 (2d Dep't 1981); see also CPLR 4101 ("issues of fact shall be tried by a jury . . . except that equitable defenses and equitable counterclaims shall be tried by the court").