

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shirley Werner Kornreich PART 54  
*Justice*

MBIA Insurance Corporation

Credit Suisse Securities (USA) LLC, DLJ  
Montage Capital, Inc. and Select  
Portfolio Services, Inc.

INDEX NO. 603751109  
MOTION DATE 10/26/10  
MOTION SEQ. NO. 005  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 44, 45, 47, 50 were read on this motion  for reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>44, 45, 50</u>
Answering Affidavits — Exhibits _____	<u>47</u>
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE  
DATED: \_\_\_\_\_ J.S.C.

Dated: 10/26/10 [Signature]  
JUSTICE SHIRLEY WERNER KORNREICH

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION J.S.C.

Scanned to 19 on 1/27/11 [Signature]

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
MBIA INSURANCE CORPORATION,

Plaintiff,

Index No. 603751/2009

-against-

CREDIT SUISSE SECURITIES (USA) LLC,  
DLJ MORTGAGE CAPITAL, INC., and  
SELECT PORTFOLIO SERVICING, INC.,

DECISION and ORDER

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.

This dispute arises out of plaintiff MBIA Insurance Corporation's (MBIA) agreement (Agreement) with Defendant Credit Suisse Securities (USA) LLC (CS Securities) whereby MBIA was to insure payments on \$900 million in securitized residential mortgages. Plaintiff alleges that it was fraudulently induced to enter into the Agreement and that defendant CS Securities and the related entities DLJ Mortgage Capital Inc. (DLJ, and together with CS Securities, Credit Suisse) and Select Portfolio Servicing, Inc. (SPS) (collectively Defendants) have breached various contractual representations and warranties in connection with the underlying loans.

On February 5, 2010, defendants moved this court to dismiss several of plaintiff's causes of action and to strike plaintiff's plea for punitive damages and demand for a jury trial "for all issues so triable as a matter of right." In an order dated July 30, 2010, this court denied the motion in so far as it refused to dismiss the first, second, fifth, seventh and eighth causes of action, and granted it in so far as it severed and dismissed the fourth cause of action and struck

plaintiff's demand for a jury trial. Plaintiff has now moved the court to reargue the previous motion pursuant to CPLR § 2221(d) only as to its ruling on the jury waiver.

*Discussion*

The facts of this case are set forth fully in the prior July 30, 2010 decision of this court and will not be repeated here, except as necessary for clarification. CPLR § 2221(d) provides that,

(d) A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. Shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

The court finds that plaintiff has met all of these criteria.

When defendants moved to strike plaintiff's demand for a jury trial, they did so based on a clause in the Agreement waiving "any right to a trial by jury." In opposing defendants' motion, plaintiff argued that "such a waiver does not apply under New York law to a claim that would deny enforcement of the agreement, such as fraud," and cited supporting case law. (Pl's Opp. Mem. of Law, p. 25). In their motion papers, defendants cited contrary case law.

In its July decision, the court acknowledged plaintiff's argument that a party asserting that a contract was fraudulently induced will not always be bound by a jury waiver clause in that same contract, but may be entitled to a jury trial specifically on the question of fraudulent inducement. *See, e.g., Wells Fargo Bank v Stargate Films, Inc.*, 18 AD3d 264 (1st Dept 2005); *D.B. Zwirn*

*Special Opportunities Fund, L.P. v Brin Investment Corp.*, 26 Misc3d 528, 529 (NYSup 2009) (Fried, JSC). Nonetheless, citing case law where a party brought alternate claims of breach of contract and fraudulent inducement and did not seek rescission on the latter claim, the court ruled plaintiff was bound by the jury waiver and struck the demand for a jury trial. *Leav v Weitzner*, 268 AD 466 (1st Dept 1944). *See also, Sherry Associates v Sherry-Netherland, Inc.*, 273 AD2d 14, 15-16 (1st Dept 2000). Now, upon more extensive briefing of the issues by the parties and further consideration of the case law, the court grants plaintiff's motion to reargue and denies defendants' motion to strike plaintiff's jury demand.

Logically, a party should not be bound by a particular provision in a contract when the party was fraudulently induced into entering the contract. *Wells Fargo Bank, Nat. Ass'n*, 18 AD3d at 265; *Federal Housecraft, Inc. v Faria*, 28 Misc2d 155, 156 (App Term, 2nd Dept 1961) ("The plain implication [of *Leav*] would seem to be that one who disaffirms for fraud a writing which contains a jury waiver clause should not be required to proceed to trial without a jury until there has been a determination as to the validity of the disputed instrument"); *D.B. Zwirn Special Opportunities Fund, L.P.*, 26 Misc3d at 530 (interpreting those two decisions to "stand for the general proposition that, where the effectiveness of the contract containing the jury waiver is at issue at trial, a party is entitled to a jury trial on the question of the effectiveness of that contract"); 4 Weinstein, Korn & Miller, N.Y.Civ.Prac., ¶ 4102.13 ("If the validity of the agreement is challenged, the waiver will not prevent a jury trial on that issue"). *See also, Ferry v Poughkeepsie Galleria Co.*, 197 Ad2d 913 (4th Dept 1993) (plaintiff entitled to jury on claim of fraudulent inducement of contract containing jury waiver clause. though not so entitled as to the accompanying claim for breach of contract). Upon reconsideration, the court finds that both

logic and the majority of the recent case law militate in favor of allowing a party bringing claims of fraudulent inducement and breach of contract to have the former claim put to a jury regardless of the presence of a jury waiver clause in the disputed contract. To the extent that *Leav* and *Sherry Associates* hold otherwise, the court declines to follow them.

The court finds the remaining arguments set forth in defendants' opposition papers unavailing. First, the issue of whether or not plaintiff is entitled to have the Agreement rescinded as a result of defendants' alleged fraudulent conduct is not before the court on this motion. More importantly, the fact that plaintiff's complaint states that "[t]he Insurance Agreement is a valid and binding agreement between MBIA and DLJ," (Compl. ¶ 87), and that it seeks to enforce various provisions of the contract is not at odds with its demand for a jury trial on the fraudulent inducement claim. It is the nature of pleading in the alternative that a plaintiff may deny the validity of a contract on a fraudulent inducement claim while simultaneously declaring it valid and seeking to enforce it on a breach of contract claim.

Finally, defendants are wrong to assert that by including a claim for "equitable ... damages" in its prayer for relief, or by asserting a claim for damages which may necessitate rescission, plaintiff has waived its right to a jury. Defendants are correct in their assertion that as a general rule, a party who, in regard to the same transaction, brings both legal or equitable claims or seeks legal and equitable relief waives their right to a jury on both claims. *New Jersey Steel Acquisition Corp. v Von Roll, A.G.*, 188 Ad2d 279 (1st Dept 1992). However, this rule is not nearly as monolithic as defendants imply.

"A jury trial is not waived merely by the inclusion of a claim for equitable relief."  
*Lipson v Dime Savings Bank of New York, FSB*, 610 NYS2d 261, 263 (1st Dept 1994) (where

plaintiffs alleged causes of action for, *inter alia*, breach of contract and fraudulent inducement and where complaint sought damages and equitable relief of rescission of all disputed contracts, right to jury trial was not waived by virtue of request for rescission); *see also Ossory Trading, S.A. v Gelderman, Inc.*, 200 AD2d 423 (1st Dept 1994). Instead, when determining whether or not a party is entitled to a jury, the court will look to whether the primary character of the case is legal or equitable. *Chauvin v Keniry*, 216 AD2d 753 (3rd Dept 1995) *leave to appeal dismissed* 87 NY2d 896 (1995) (“In determining whether a plaintiff is entitled to a jury trial, the relevant inquiry is whether the overall nature and character of the action is equitable or legal in nature”); *Schlick v American Business Press, Inc.*, 246 AD2d 450 (1st Dept 1998).

To do so, the court examines the facts of the case as pleaded in the complaint, not merely the prayer for relief. *Kaplan v Long Island University*, 116 AD2d 508 (1st Dept 1986) (“A party’s entitlement to demand a jury trial is dependent on the facts pleaded, not the demand for relief”). 4 Weinstein, Korn & Miller, N.Y.Civ. Prac. ¶ 4101.12. *See Murphy v American Home Products Corp.*, 136 AD2d 229 (1st Dept 1988). This is consistent with the court’s power under CPLR § 3017(a) to grant whatever relief it believes to be justified in light of the facts pled in the complaint, regardless of how plaintiff crafts its prayer for relief. 4 Weinstein, Korn & Miller, N.Y.Civ. Prac. ¶ 4101.12. If, based on the facts pled, relief can be granted by a sum of money only, plaintiff is entitled to a jury. CPLR § 4101(1). *Murphy*, 136 AD2d at 233-234 (“What is critical is whether the facts pleaded in the particular case ‘imperatively require’ equitable relief or whether under those facts the requested relief of money damages only can also provide full redress”) (“If, in fact, a sum of money alone can provide full relief to the plaintiff under the facts alleged, then there is a right to a jury trial”); *Cadwalader Wickersham & Taft v Spinale*, 177

Ad2d 315, 316 (1st Dept 1991); *Ossory Trading, supra*.

Here, the majority of plaintiff's claims, including the claim for fraudulent inducement, sound in contract and so are legal in nature. *See Lipson, supra; Harris v Trustco Bank New York*, 224 AD2d 790 (3rd Dept 1996). Further, the facts pled in plaintiff's complaint suggest that it may be granted full relief through an award of monetary damages. Consequently, it should not be deemed to have waived its right to a jury by virtue of having also sought "equitable ... damages" in its prayer for relief or by having pled facts suggesting that other equitable relief may be available. *Miller v Doniger*, 293 AD2d 282 (1st Dept 2002). Cases cited by defendants do not require a contrary result. Accordingly, it is

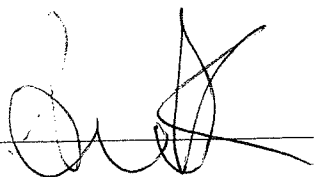
ORDERED that plaintiff's motion for leave to reargue defendants' motion to strike plaintiff's demand for a jury is granted; and it is further

ORDERED that defendants' request for more extensive briefing of the issues in this motion is denied; and it is further

ORDERED that, upon reargument, the Court vacates its prior order, dated July 30, 2010, and denies defendants' motion to strike plaintiff's demand for a jury.

Dated: January 26, 2011

ENTER:

  
\_\_\_\_\_  
J.S.C.