



Caution

As of: Dec 05, 2012

**Anthony Sapp et al., Appellants, v. The Propeller Company LLC et al., Respondents.
(And a Third-Party Action.)**

4098N

**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST
DEPARTMENT**

12 A.D.3d 218; 784 N.Y.S.2d 532; 2004 N.Y. App. Div. LEXIS 13423

November 16, 2004, Decided

November 16, 2004, Entered

SUBSEQUENT HISTORY: [***1]

Later proceeding at *Sapp v Propeller Co., LLC, 2005 N.Y. App. Div. LEXIS 10449 (N.Y. App. Div. 1st Dep't, Sept. 27, 2005)*

PRIOR HISTORY: *Sapp v Propeller Co., LLC, 2004 N.Y. App. Div. LEXIS 6807 (N.Y. App. Div. 1st Dep't, May 11, 2004)*

CORE TERMS: jury trial, jury selection, withdraw, leave to withdraw, right to withdraw, prejudicial, precluding, scheduled, unduly, lease's

HEADNOTES

Jury--Right to Jury Trial--Withdrawal of Demand.--Under *CPLR 4102 (a)*, defendants had no right to withdraw their jury demand without plaintiffs' consent, and defendants' delay of motion to withdraw jury demand until scheduled date of jury selection was unduly prejudicial to plaintiffs, thereby precluding relief under *CPLR 4102 (e)*.

COUNSEL: Lambert & Shackman, PLLC, New York (Thomas C. Lambert and Steven Shackman of counsel), for appellants.

Brill & Associates, P.C., New York (Haydn J. Brill of counsel), for respondents.

JUDGES: Concur--Buckley, P.J., Lerner, Friedman, Sweeny and Catterson, JJ.

OPINION

[*218] [**533] Order, Supreme Court, New York County (Edward H. Lehner, [*219] J.), entered March 10, 2004, which granted defendants' motion for leave to withdraw their jury demand, unanimously reversed, on the law, with costs, and the motion denied.

Although the lease between the parties contains a waiver of the right to a jury trial, defendants served and filed a jury demand on or about May 2, 2003. On or about January 21, 2004, the parties were advised that jury selection would begin on February 11, 2004. On the latter

date, however, defendants made an oral application for leave to withdraw their jury demand, whereupon the court, sua sponte, adjourned the trial in order to afford defendants time to move on papers for such relief. On defendants' subsequent written motion, and over plaintiffs' opposition, the court granted defendants leave [***2] to withdraw their jury demand.

We reverse. Under *CPLR 4102 (a)*, defendants had no right to withdraw their jury demand without plaintiffs' consent (*see Muhl v Vesta Fire Ins. Corp.*, 297 A.D.2d 213, 214, 745 N.Y.S.2d 691 [2002]; *Chase Manhattan Bank v Kalikow*, 143 A.D.2d 557, 559, 532 N.Y.S.2d 764 [1988]). Defendants' delay of the motion to withdraw the jury demand until the scheduled date of jury selection was unduly prejudicial to plaintiffs, thereby precluding relief under *CPLR 4102 (e)*, in that, by the time of the motion, the jury demand had led plaintiffs to prepare for a jury trial. In addition, defendants' filing of the jury demand presumably resulted in a lengthier delay of the trial than otherwise would have occurred (*see Arkin v Sig Heller Co.*, 197 Misc. 1084, 99 N.Y.S.2d 175 [App Term,

1st Dept 1950]). As to the lease's jury-waiver clause, it is no longer determinative of the mode of trial. Defendants waived the protection of that clause by affirmatively demanding a jury trial and then failing to seek to withdraw the demand until nine months later (*see General Motors Acceptance Corp. v Clifton-Fine Cent. School Dist.*, 85 N.Y.2d 232, 236, 647 N.E.2d 1329, 623 N.Y.S.2d 821 [1995] [***3] [waiver is "the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable"]). In this regard, we note that even delay in moving to strike an adversary's jury demand may preclude a party from relying on a contractual waiver of the right to trial by jury (*see Arkin v Sig Heller Co.*, 197 Misc. at 1085; *see also Livelastic Suspender & Garter Co. v Walker*, 99 N.Y.S.2d 174 [Sup Ct, NY County 1950]; *Moskowitz v Keith Sales Corp.*, 99 N.Y.S.2d 173, 174 [Sup Ct, NY County 1948]).

Concur--Buckley, P.J., Lerner, Friedman, Sweeny and Catterson, JJ.