

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

EGW PARTNERS, L.P.,
Plaintiff

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA
and PRUDENTIAL SECURITIES, INC.
Defendants

: March Term, 2001

: No. 336

: Commerce Case Program

: Control No. 110398

O R D E R

AND NOW, this 20th day of December 2001, upon consideration of the Motion to Strike Jury Demand of defendants, Prudential Insurance Company of America and Prudential Securities Incorporated, and the response in opposition of plaintiff, EGW Partners, L.P., the respective memoranda, all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and **DECREED** that the Motion is **Granted**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. December 20, 2001

Defendants, Prudential Insurance Company of America (“Insurance”) and Prudential Securities Incorporated (“Securities”), have filed a Motion (“Motion”) to Strike the Jury Demand of plaintiff, EGW Partners, L.P. (“EGW”). For the reasons set forth, this court is issuing a contemporaneous Order granting the Motion.

BACKGROUND

The background in this matter is set forth more fully in this court's Opinion dated June 22, 2001.¹ The "Letter Agreement" between Securities and EGW is governed by New York law and includes the following provision in which EGW waived the right to demand a jury trial ("Waiver Provision"):

Each of Prudential Securities and the Company (on its own behalf and, to the extent permitted by applicable law, on behalf of its affiliates and stockholders) waives all right to trial by jury in any action, claim, suit, proceeding or counterclaim (whether based upon contract, tort, or otherwise) relating to or arising out of the engagement of Prudential Securities pursuant to, or the performance by Prudential Securities of the services contemplated by, this agreement.

In the Motion, the defendants argue that the Waiver Provision precludes EGW from demanding a jury trial. EGW concedes that this dispute is covered by the Waiver Provision, but counters that Insurance is not a party to the Letter Agreement. Therefore, the Waiver Provision does not apply to Insurance.

DISCUSSION

Under New York law, the right to a jury trial may be waived by express agreement. Barclays Bank of N.Y., N.A. v. Heady Elec. Co., 571 N.Y.S.2d 650, 652-53 (N.Y. App. Div. 1991) (citations omitted). Nevertheless, a waiver of the right to a jury trial is to be strictly construed. Shapiro v. Marsone Distribs., Inc., 337 N.Y.S.2d 928, 930 (N.Y. App. Div. 1972); Barrow v. Bloomfield, 293 N.Y.S.2d 1007 (N.Y. App. Div. 1968).

Here, the jury waiver provision in the Engagement Letter applies to all claims, whether based on contract, tort or otherwise, that relate to or arise out of the engagement of or performance by

¹ Opinion available at <http://courts.phila.gov/cptcvcomp.htm>.

Securities. Under New York law, a broadly worded jury waiver like the Waiver Provision may be invoked by a non-party to the contract setting forth the waiver. Gunn v. Palmieri, 589 N.Y.S.2d 577, 577 (N.Y. App. Div. 1992); Leav v. Weitzner, 51 N.Y.S.2d 775, 777 (N.Y. App. Div. 1944). Tilden Fin. Corp. v. Malerba, Abruzzo, Downes & Frankel, 393 N.Y.S.2d 499 (Suffolk Cty. 1977), cited by EGW, is inapposite, as the waiver in that case applied only to a “counterclaim and set off” and not all claims arising from the relevant contract. 393 N.Y.S.2d at 499-500.

Admittedly, the remaining cases relied on by EGW do support its argument, but they reflect the law of jurisdictions other than New York and, thus, are not persuasive. See Paracor Fin., Inc. v. GE Capital Corp., 96 F.3d 1151, 1166 (9th Cir. 1996) “[A] jury waiver is a contractual right and generally may not be invoked by one who is not a party to the contract.”); C & C Wholesale, Inc. v. Fusco Mgmt. Corp., 564 So. 2d 1259, 1261 (Fla. Dist. Ct. App. 1990) (holding that waiver of the right to demand a jury trial bound only the contract’s signatories and did not apply to claims against non-signatories).

Accordingly, both Insurance and Securities may invoke the Waiver Provision to bar EGW from demanding a jury trial.

CONCLUSION

For the reasons discussed the Motion to Strike the Jury Demand is granted. The court will enter the pertinent, contemporaneous Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.