

**Iken v Bohemian Brethren Presbyt. Church**

2024 NY Slip Op 33951(U)

November 6, 2024

Supreme Court, New York County

Docket Number: Index No. 654614/2017

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MONICA IKEN, ORDINARY FACES LLC	<b>INDEX NO.</b>	<u>654614/2017</u>
Plaintiffs,	<b>MOTION DATE</b>	<u>10/08/2024</u>
- v -	<b>MOTION SEQ. NO.</b>	<u>003</u>
BOHEMIAN BRETHERN PRESBYTERIAN CHURCH,		
Defendant.	<b>DECISION + ORDER ON MOTION</b>	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 114, 115, 116, 117, 118, 121, 122

were read on this motion to STRIKE JURY DEMAND.

Defendant/Counter-Plaintiff Bohemian Brethren Presbyterian Church a/k/a Avenue Church NYC f/k/a Jan Hus Presbyterian Church (“Defendant”) moves for an Order: (i) striking the jury demand included in the Note of Issue filed by Plaintiffs/Counter-Defendants Monica Iken and Ordinary Faces LLC (“Plaintiffs”) on June 4, 2024 (NYSCEF 105); (ii) vacating or modifying any stipulations subsequently entered into by counsel for the parties solely to the extent that they refer to or provide for a jury trial; and (iii) scheduling the action for a bench trial, rather than a jury trial, in January 2025. For the following reasons, Defendant’s motion is denied.

CPLR 4102 states, in relevant part, that “[a]ny party may demand a trial by jury of any issue of fact triable of right by a jury, by serving upon all other parties and filing a note of issue containing a demand for trial by jury” (CPLR 4102 [a]). Nonetheless, parties may expressly

waive their right to a jury trial on any claim by written agreement (*Tiffany at Westbury Condominium by Its Bd. of Mgrs. v Marelli Dev. Corp.*, 34 AD3d 791, 791 [2d Dept 2006]).

“While the motion to strike may be made at any time up to the opening of trial, it is preferable in the interest of orderly procedure that it be made within a reasonable period prior thereto” (*A. J. Fritschy Corp. v Chase Manhattan Bank*, 36 AD2d 600, 600 [1st Dept 1971]). Furthermore, “[i]t is incumbent upon the party challenging a jury demand in a case involving a contractual waiver of the right to a jury trial to do so in a timely manner” (*CDC Dev. Properties, Inc. v Am. Ind. Paper Mills Supply Co., Inc.*, 184 AD3d 625, 626 [2d Dept 2020] [affirming denied of motion to strike jury demand where defendant waited ten months after the note of issue was filed to raise contractual jury waivers]).

Here, while the Lease Agreement and Guaranty entered into by the parties contains a jury waiver provision (*see* NYSCEF 117, Lease §34, Guaranty at 2),<sup>1</sup> Defendant failed to seasonably assert the jury waiver in this action. Indeed, as recently as June 5, 2024, counsel for the parties appeared for an initial pre-trial conference and this Court asked, “I saw that a note of issue was filed yesterday in which the plaintiff demanded trial by jury on all issues. Is there any disagreement about the jury trial? You have a certain number of days to move to strike it.” Defendant’s counsel responded: “No disagreement about the right to a jury trial” (NYSCEF 108

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<sup>1</sup> In relevant part, the Lease expressly provides that “Tenant hereby waives trial by jury of any and all issues arising in any action or proceeding between the parties, upon, under or in connection with this Lease or any of its provisions, directly or indirectly, or any and all negotiations in connection herewith.” (NYSCEF 117, Lease §34).

The Guaranty similarly provides that “Guarantor hereby waives trial by jury of any and all issues arising in any action or proceeding between the parties, upon, under or in connection with this Guaranty or of any of its provisions, directly or indirectly, or any and all negotiations in connection therewith.” (NYSCEF 117, Guaranty at 2).

at 2:12-2:25). On September 13, 2024, the parties further agreed to a stipulation, which was so-ordered by the Court, settling forth the schedule for pre-trial submissions, including dates for jury selection (NYSCEF 112).

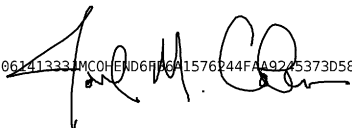
Defendant now submits that its counsel only recently noticed the jury waivers when preparing for mediation, but this is insufficient to justify striking the jury demand at this late stage of the case. Plaintiffs have consistently sought a jury trial in this action by demanding it in their Complaint, filed in 2017, and by demanding a jury trial in the Note of Issue filed by the Plaintiff on June 4, 2024 (NYSCEF 105). And the jury waiver certainly was not hidden from Defendant or its counsel – it is set forth in plain language in the contract that is at the center of this case. Nevertheless, Defendant did not raise this issue with the Court until three months before the scheduled start of the trial.

This action is approximately seven years old, and it involves disputes over specific contractual provisions in the Lease Agreement. The jury waiver is set forth in the contract. Defendant failed to assert that waiver until shortly before trial, after having remained silent and then confirming the jury trial in open court. Under these circumstances, Defendant's belated effort to assert the contractual jury waiver is unavailing (*CDC Dev. Properties, Inc.*, 184 AD3d at 626; *Sapp v Propeller Co. LLC*, 12 AD3d 218, 219 [1st Dept 2004]; *Cantor v 255 W. 15th Holding Corp.*, 28 Misc 2d 503, 504 [App Term, 1st Dept 1960]; *Livelastic Suspender & Garter Co. v Walker*, 99 NYS2d 174, 175 [Sup Ct, NY County 1950]).

Accordingly, it is

**ORDERED** that Defendant's motion to strike the jury demand is **DENIED**.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

11/6/2024  
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DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: