

**Duane Reade v 405 Lexington, L.L.C.**

2002 NY Slip Op 30020(U)

May 11, 2002

Supreme Court, New York County

Docket Number: 0110178/0178

Judge: Louise Gans

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

PRESENT: HON. LOUISE GRUNER GANS  
*Justice*

PART 61

DUANE READE

INDEX NO. 110178/99

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 008

MOTION CAL. NO. \_\_\_\_\_

- v -

405 LEXINGTON LLC.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is determined per annexed decision and order.

**SCANNED**  
SEP 20 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/11/02

[Signature]

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
**HON. LOUISE GRUNER GANS**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

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DUANE READE, a Partnership,

Plaintiff,

-against-

: Index No. 110178/99

405 LEXINGTON, L.L.C., TISHMAN  
SPEYER PROPERTIES L.P. and TURNER  
CONSTRUCTION COMPANY,

Defendants. :

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GANS, LOUISE GRUNER, J.

In this commercial landlord-tenant dispute, defendant 405 Lexington, L.L.P. ("405 Lexington"), and defendants Tishman Speyer Properties L.P. ("Tishman") and Turner Construction Company ("Turner") separately move, pursuant to CPLR § 4102(c) and 22 NYCRR § 202.21(e), to strike plaintiff Duane Reade's jury demand for its fourth and fifth causes of action and to vacate the note of issue for that purpose only. In the alternative, defendants move, pursuant to 22 NYCRR § 202.40, for an order directing that all claims and counterclaims for which a trial by jury has not been demanded be tried first by the court.

This action arises out of two written leases, dated July 6, 1998, entered into by plaintiff and landlord 405 Lexington for portions of the ground floors and basements located at 405 Lexington Avenue and 666 Third Avenue in Manhattan. Plaintiff Duane Reade alleges that 405 Lexington

provided a series of notices of default, the first set dated March 24, 1999, with regard to purported violations of each lease and seeks a declaratory judgment it has not violated such leases as to warrant termination. By a supplemental complaint, plaintiff asserts three additional causes of action. As relevant here, the fourth claim alleges that 405 Lexington and Tishman were negligent in overseeing renovation work at 666 Third Avenue and the fifth claim alleges Turner negligently performed such renovation work, and seeks compensatory and exemplary damages for various forms of property damage.

Defendants contend the jury demand for the fourth and fifth causes of action should be stricken on the grounds the leases contain a jury waiver provision, the claims all arise out of the landlord-tenant relationship and the equity claims predominate in plaintiff's complaint.

Article 25 of each lease reads:

WAIVER OF TRIAL BY JURY

LANDLORD AND TENANT HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER PARTY AGAINST THE OTHER ON ANY MATTERS IN ANY WAY ARISING OUT OF OR CONNECTED WITH THIS LEASE, THE RELATIONSHIP OF LANDLORD AND TENANT, TENANT'S USE OR OCCUPANCY OF THE PREMISES, OR THE ENFORCEMENT OF ANY REMEDY UNDER ANY REQUIREMENT.

It is well settled that joinder of claims for

equitable and legal relief arising out of the same transaction results in a waiver of the right to a jury trial when the equitable claims are not incidental to those for money damages (*Giammalvo v 2170-2178 Broadway LLC*, 293 AD2d 390 [1st Dept 2002]; *Goshen v Mutual Life Insurance Company of NY*, 286 AD2d 229, 230 [1st Dept 2001]; *Sherry Associates v Sherry-Netherland, Inc*, 273 AD2d 14, 15-16 [1st Dept 2000]; *Kurzner v Sutton Owners Corp*, 245 AD2d 101 [1st Dept 1997]; *Phoenix Garden Restaurant, Inc v Chu*, 234 AD2d 233, 234 [1st Dept 1996]).

However, plaintiff argues its jury demand should stand in that the fourth and fifth claims arise out of a separate wrong and, pursuant to Real Property Law § 259-c, the jury waiver provision is not applicable to claims for property damage.

Real Property Law § 259-c reads:

Any provision in a lease, executed after the **effective date** of this act [July 2, 1965], that a trial by jury is waived in any action, proceeding or counterclaim brought by either of the parties hereto against the other in any action for personal injury or property damage, is null and void.

Since the leases were executed on or about July 6, 1998, the jury waiver provision is "null and void" with regard to claims for property damage, which have been held to include lost profits and damage to business (*81 Franklin*

*Co v Ginaccini, 149 Misc2d 124, 126 [Civ Ct, New York County 1991).*

Plaintiff further asserts that CPLR § 4102(c), upon which defendants rely, permits trial by jury of issues that arise out of a separate transaction. CPLR § 4102(c) states, in relevant part: "A party shall not be deemed to have waived the right to trial by jury of the issues of fact arising upon a claim, by joining it with another claim with respect to which there is no right to trial by jury and which is based upon a separate transaction."

The issue, therefore, is whether the claims arise from the same transaction. Defendants argue that the claims all arise from the relationships established under the 666 Third Avenue lease, under which Tishman and Turner are 405 Lexington's agents and plaintiff is a tenant. Defendants further submit a written agreement executed in October 1998 by 405 Lexington and Turner purportedly to demonstrate that as construction manager, Turner performed no construction work, as alleged in the fifth cause of action.' Defendants contend the fifth cause of action is a "fallacy" in that

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Although Tishman and Turner also submit the "Affirmation of Tom J. Ferber in Opposition to Motion for Order to Compel Disclosure and in Support of Cross-Motion for a Protective Order," they do not explain their reasons for doing so and the court is unable to discern the relevance of this document to the instant motion.

subcontractors performed the construction work.

Defendants' contention that plaintiff's claims arise out of the same transaction is unpersuasive.<sup>2</sup>

Notwithstanding the landlord-tenant relationship of plaintiff and one defendant, the negligence claims asserted against the landlord, managing agent and construction company do not encompass the lease or a breach thereof. Rather, they allege torts and related property damage (81 *Franklin Co v Ginaccini, supra, 149 Misc2d at 126*) arising out of a renovation project at 666 Third Avenue, during which 405 Lexington and Tishman owed plaintiff and its invitees a duty of care.

Accordingly, the fourth and fifth causes of action for negligence seeking damages for property damage is covered under the proscriptions of RPL § 259-c as property damage and CPLR § 4102(c) as a separate transaction. In that the jury waiver provisions are not applicable to the fourth and fifth causes of action, plaintiff is entitled to a jury trial as to these claims.

Defendants' move, in the alternative, for an order directing that all claims and counterclaims for which a

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The court notes that Turner's role in the construction project is unclear since the agreement requires Turner both to "provide all direct labor and/or subcontractors" and to review subcontractors' work for defects and deficiencies.

trial by jury has not been demanded be tried first by the court. In that no party has specifically addressed why the order of trial prescribed in 22 NYCRR § 202.40 should or should not be followed in this instance, the issue will be explored more fully at a pretrial conference on September 25, 2002 at 2:15 p.m.

Accordingly, it is

ORDERED that defendant 405 Lexington, L.L.P.'s motion to strike the jury demand as to the fourth and fifth causes of action and vacate the note of issue for that purpose is denied; and it is further

ORDERED that defendants Tishman Speyer Properties L.P. and Turner Construction Company's motion to strike the jury demand as to the fourth and fifth causes of action and vacate the note of issue for that purpose is denied as moot; and it further

ORDERED that counsel for all parties appear for a pretrial conference on September 25, 2002 at 2:15 p.m.

This constitutes the decision and order of the court.

DATED: \_\_\_\_\_

9/11/02

ENTER: \_\_\_\_\_

J.S.C.

HON. LOUISE GRUNER GANS