

Sheehan v Pantelidis
2003 NY Slip Op 30044(U)
October 6, 2003
Supreme Court, New York County
Docket Number: 0112555/2555
Judge: Rosalyn H. Richter
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Rosalyn Richter
Justice

PART 24

Sheeran J. E.S.R.M

INDEX NO. 112555-00

- v -

MOTION DATE _____

Pantelides Es

MOTION SEQ. NO. 015

MOTION CAL. NO. _____

SCANNED

The following papers, numbered 1 to _____ were read on this motion to/for _____
OCT 17 2003

Notice of Motion/ Order to Show Case — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

Dated: 10/6/03

Rosalyn Richter

Check one: FINAL DISPOSITION

HON. ROSALYN RICHTER
 NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 24

-----X
JOSEPH E. SHEEHAN and ROSA M. SHEEHAN,

Plaintiffs,

-against-

GEORGE PANTELIDIS,

Defendant.

-----X
GEORGE PANTELIDIS,

Third Party Plaintiff,

-against-

JOSEPH I. KRIESEL, d/b/a ABC CHIMNEY &
FIREPLACE COMPANY, et. al,

Third Party Defendants.

-----X
ROSALYN RICHTER, J.:

Decision & Order
Index No. 112555/00
Motion Seq. 16

Third Party
Index No. 01590112/01

In Motion Sequence No. 015, plaintiffs Joseph E. Sheehan and Rosa M. Sheehan move for an order, pursuant to CPLR 4101, striking the demand for a jury trial, filed by defendant George Pantelidis, removing this action from the jury calendar, and permitting the action to advance to the non-jury calendar. Third-party defendant Joseph I. Kreisel, d/b/a ABC Chimney & Fireplace Company (Kreisel) cross-moves for an order, pursuant to CPLR 4102(e), for leave to file a jury demand nunc pro tunc.

In support of their motion, plaintiffs contend that by joining their legal and equitable claims in this action, they have waived their right to a jury trial. They argue that defendant also has waived a jury trial by asserting legal and equitable counterclaims in his amended answer. In opposition,

defendant disputes that plaintiffs have waived a jury trial, and argues that the gravamen of the plaintiffs' claims and defendant's counterclaims involve recovery of money damages and therefore this matter should be tried by a jury.

It is beyond dispute that the determination of whether an action should be tried by a jury is to be determined by the facts alleged in the complaint and not by the prayer for relief. Thus, a jury trial might still be appropriate even though plaintiff and defendant both seek monetary damages and injunctive relief. *See, e.g., Poley v. Rochester Community Sav. Bank*, 184 A.D.2d 1027 (4th Dept. 1992); *Lillianfeld v. Lichtenstein*, 181 Misc. 2d 571 (Sup. Ct. Kings Co. 1999). However, even if the Court agrees with plaintiffs that they waived their right to a jury trial by joining equitable and legal claims arising out of the same transaction, *see Kurzner v. Sutton Owners Corp.*, 245 A.D.2d 101 (1st Dept. 1997), the defendant still would be entitled to a jury trial on the legal claims in the main complaint. *See generally, Cowper v. Buffalo Hotel Development Venture*, 99 A.D.2d 19 (4th Dept. 1984).

Defendant has not waived his right to a jury trial merely because he asserts equitable defenses or equitable counterclaims. *See Wisell v. Indo-Med Commodities, Inc.*, 303 A.D.2d 749 (2d Dept. 2002); *Hudson View II Assocs. v. Gooden*, 222 A.D.2d 163 (1st Dept. 1996). Rather, the trial court may ask the jury to reach an advisory verdict with respect to the equitable claims. *Wisell*, 303 A.D.2d at 750. Finally, plaintiff argues that defendant has waived the right to a jury trial by combining equitable and legal counterclaims and by seeking injunctive relief. First, the equitable and legal counterclaims do not clearly arise from the same transactions and thus do not constitute a waiver to a jury trial. *See Hudson*, 222 A.D.2d at 165. In addition, the heart of defendant's counterclaims involve money damages for nuisance, trespass and other tort claims, such as malicious

prosecution, which are triable by jury. *See, e.g., Dean v. Cross*, 76 A.D.2d 1028 (1st Dept. 1980); *Barrow v. Bloomfield*, 30 A.D.2d 947 (1st Dept. 1968); *Bomptin Realty Co. v. New York*, 275 A.D.2d 843 (2d Dept. 1949); *City Bank Farmers Trust Co. v. Hartshorne*, 264 A.D. 287 (1st Dept. 1942); *Lillianfeld*, 181 Misc.2d at 571. Although defendant, in its prayer for relief on the counterclaims seeks an injunction, this request is incidental since money damages for the expense of removing the nuisances would afford defendants the remedy they seek. Finally, to the extent that some of defendant's counterclaims seek equitable relief, they are so intertwined with the legal claims that one trial is appropriate. *Wisell*, 303 A.D.2d at 749.

In conclusion, the motion to strike defendant's demand for a jury trial is denied. In light of the Court's ruling, the cross-motion by the third party seeking to demand a jury trial is moot. Kriesel can rely on the timely jury demand filed by defendant. *See 11 Park Place Associates v. Barnes*, 204 A.D.2d 170 (1st Dept. 1994).

This constitutes the decision and order of the Court.

Oct. 6, 2003


Justice Rosalyn Richter