

**Carroll v Nostra Realty Corporation**

2006 NY Slip Op 30392(U)

August 25, 2006

Supreme Court, New York County

Docket Number: 0109293/2002

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

*Justice*

PART 35

Samantha Carroll

INDEX NO.

109293/02

MOTION DATE

8/15/06

MOTION SEQ. NO.

005

MOTION CAL. NO.

Nostra Realty Corp.

- v -

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

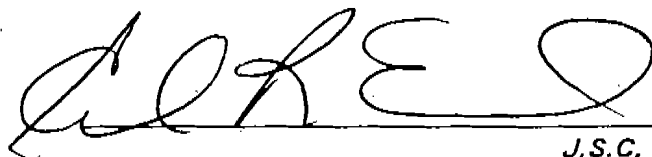
In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the landlord's motion to strike plaintiffs' demand for a trial by jury is denied. It is further

ORDERED that the landlord shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 8/25/06

  
J.S.C.

HON. CAROL EDMEAD

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
SEP 01 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 35

-----X  
SAMANTHA CARROLL, and ZACHARY CARROLL,  
infants under the age of 14 years, by their mother and  
natural guardian, DEBRA CARROLL, and DEBRA  
CARROLL and JAMES CARROLL, individually

Index No. 109293/2002

Plaintiffs,

-against-

**DECISION/ORDER**

NOSTRA REALTY CORPORATION,

Defendant.

-----X  
NOSTRA REALTY CORPORATION, GREATER NEW  
YORK INSURANCE COMPANY, and CENTENNIAL  
INSURANCE COMPANY

Third-Party Plaintiffs

TP Index No. 590007/2006

-against-

FIREMAN'S INSURANCE COMPANY OF  
WASHINGTON, D.C.

Third-Party Defendant.

-----X  
HON. CAROL R. EDMEAD

MEMORANDUM DECISION

In this consolidated personal injury action and summary non-payment of rent proceeding (“consolidated action”), defendant and third-party plaintiff Nostra Realty Corporation (“landlord”) moves for an order, pursuant to CPLR 4101, striking the jury demand of the plaintiffs, Samantha Carroll, Zachary Carroll, Debra Carroll, and James Carroll (“plaintiffs”), regarding the plaintiffs’ personal injury claims. Plaintiffs oppose the motion, contending that they are entitled to exercise their fundamental right to a jury trial on their personal injury claims

in this consolidated action.

### Background

On October 26, 2001, the landlord commenced a summary non-payment of rent proceeding in the Civil Court of the City of New York against the plaintiffs. In their answer to the landlord's petition, plaintiffs counterclaimed for damages based on the landlord's breach of the warranty of habitability, and sought an order directing the landlord to correct the allegedly uninhabitable conditions, and attorneys' fees.

Subsequently, on April 20, 2002, plaintiffs commenced a separate personal injury action against the landlord in Supreme Court, New York County, claiming that the landlord breached the warranty of habitability by permitting mold to grow in plaintiffs' apartment ("subject premises"), forcing them to relocate, and causing property damage, bodily injury, and other damages under their lease ("Lease"). By order of this court dated March 22, 2005, this Court granted the landlord's motion to consolidate pursuant to CPLR 602(b), and consolidated the landlord's summary non-payment of rent proceeding ("rent proceeding") and plaintiffs' personal injury action ("personal injury action").<sup>1</sup>

Thereafter, plaintiffs filed their Note of Issue and Certificate of Readiness, and demanded a jury trial on all issues involved in the consolidated action.<sup>2</sup>

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<sup>1</sup> In the new consolidated action, the landlord brought a third-party action seeking insurance coverage against Fireman's Insurance Company of Washington, D.C., the landlord's liability insurance carrier.

<sup>2</sup> Although plaintiffs' Note of Issue shows plaintiffs' demand for a trial by jury of all issues, which would presumably include any issues involved in the summary non-payment of rent proceeding, plaintiffs opposition to the present motion asserts a right to a jury trial only as to plaintiffs' personal injury claims.

The Landlord's Motion

The landlord contends that plaintiffs' jury demand should be stricken because plaintiff waived a trial by jury in that (1) the consolidated action contains both equitable and monetary claims, (2) the Lease contains a waiver of a trial by jury that is applicable to all matters involving plaintiffs' occupancy of the subject premises, and (3) by seeking an award of attorneys' fees pursuant to the Lease, plaintiff is obligated to comply with the jury waiver provision of the Lease.

Specifically, the landlord contends that CPLR 4101 provides that equitable defenses and counterclaims shall be tried by the court. Further, when a plaintiff has both legal and equitable claims, and the claims arise out of the same wrong, the right to a jury trial is considered waived. The landlord notes that in addition to two equitable affirmative defenses to the rent proceeding, plaintiffs' second counterclaim in the rent proceeding seeks equitable relief against the landlord to "correct all violations of record" on the subject premises. Thus, the landlord asserts, since these equitable counterclaims and affirmative defenses arise out of the allegation that the landlord has permitted mold to grow in the subject premises, and the plaintiff's legal claim arise<sup>s</sup> out of the same alleged transgression, plaintiffs have waived their right to a jury trial. ✓

The landlord also notes that plaintiffs' claim for attorneys' fees is based on Paragraph 34<sup>1</sup> of the Lease. Thus, the landlord argues, plaintiffs cannot seek relief under the attorneys' fees provision of the Lease without being held to their obligation under the jury waiver clause. Therefore, plaintiffs' demand for attorneys' fees under Paragraph 34 constitutes a waiver of their right to a trial by jury. ✓

Furthermore, the landlord points out that Paragraph 27 of the Lease provides, in pertinent

part, that the landlord and plaintiffs

agree to give up the right to a trial by jury in a court action, proceeding or counterclaim on any matters concerning this Lease, the relationship of [plaintiffs] and Owner as Tenant and Landlord or [plaintiffs] use or occupancy of the Apartment. This agreement to give up the right to a jury trial does not include claims for personal injury or property damage.

The landlord contends that since all plaintiffs' claims arise of their occupancy of the subject premises pursuant to the Lease, plaintiffs' claims fall within the scope of the jury waiver provision.

#### Plaintiffs' Opposition

Plaintiffs contend that their right to a trial by jury is a fundamental right, and as such, this court must "indulge every reasonable presumption against finding a waiver." Further, plaintiffs assert that they did not waive their right to a jury trial.

Plaintiffs contend that since their claims are for personal injuries, defendants' motion to strike is barred by Paragraph 27 of the Lease, which specifically excludes claims for personal injuries from the jury trial waiver provision. Further, plaintiffs argue, even if the Lease did not preserve their right to a jury trial on their personal injury claims, Real Property Law § 259-c renders "null and void" any provision in a lease that waives the right to a trial by jury in an action for personal injuries or property damage brought by one party to a lease against the other.

Plaintiffs further contend that consolidation of plaintiff's legal and equitable claims does not strip their right to a jury trial on the legal claim, since consolidation was pursued not by plaintiffs, but instead through a CPLR 602(b) motion by the landlord, which plaintiffs opposed. Thus, argues plaintiffs, they have not taken any action to waive their right to a jury trial with respect to their legal claim. Furthermore, plaintiffs argue that it is permissible to have the jury

serve exclusively in an advisory capacity as to the issues of fact relating to the consolidated action's equitable claims.

Finally, plaintiffs contend that their counterclaim for damages in the rent proceeding does not waive their right to a jury trial on their personal injury claims. Plaintiffs point out that they are not arguing that they have a right to a jury trial with respect to the landlord-tenant portion of the consolidated action. However, that plaintiffs may not have a right to a jury trial on the landlord-tenant part of this consolidated proceeding does not preclude them from exercising their right to a jury trial on the personal injury aspect of this proceeding.

#### The Landlord's Reply

The landlord contends that plaintiffs confuse the concepts of joint trials under CPLR 602(a) and consolidation under CPLR 602(b). The landlord asserts that this Court's consolidated the two actions pursuant to CPLR 602(b) for purposes of "discovery and trial" and did not order "joint trials" as plaintiffs presume. The landlord notes that when two actions are consolidated for a "joint trial," each action maintains its individual identity, whereas consolidating two actions eliminates each action's separate and unique characteristics. The landlord argues that since this court ordered that the rent proceeding and the injury action be consolidated, and plaintiffs neither argued or cross-moved for a joint trial, nor moved to reargue the consolidation order, the two consolidated matters lost their separate identity, and the present consolidated action with both equitable and legal claims may not be heard by a jury.

#### Analysis

CPLR 602(b) states, in pertinent part, that "[w]here an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it

or have it tried together with that in the supreme court....” Additionally, CPLR 4102(c) provides, in pertinent part, that

[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; or if the issues of fact arising upon a counterclaim, cross-claim or third-party claim, by asserting it in an action which there is no right to trial by jury.

These provisions allow for the consolidation of actions originally commenced in separate courts, and if the consolidated claims and counterclaims involve separate and distinct transactions and request both equitable and legal relief, the right to a jury trial on the legal claims remains in tact (*see* Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4102:6). However, it has been held that when the claimant seeks both equitable and legal relief, and all such claims arise from the *same transaction*, and the claimant acquiesces to the consolidation or trial of the equitable and legal claims, the claimant waives her right to a trial by jury on the legal claims (emphasis added) (*see* Siegel, Practice Commentaries, CPLR 4102:6, *supra*; *see also Tanne v Tanne*, 30 AD2d 956, 294 NYS2d 247 [1<sup>st</sup> Dept. 1968] [holding that the plaintiff’s right to a trial by jury on his legal action had been waived since equitable and legal claims had been consolidated, such claims arose from the same transaction, and the plaintiff did not oppose the court’s consolidation]; *Lavisch v Schwartz*, 235 AD 18, 256 NYS 416 [3<sup>rd</sup> Dept. 1932] [reasoning that “when the plaintiff consented to have the action at law and the action in equity tried together in effect as one suit, this constituted a waiver of his right to a trial of the issues involved in the action at law]).

When a party seeks relief under both equitable and legal claims which arise out of the same transactions, such party will be deemed to have waived the right to a jury trial on the legal

claims if the party was the proponent of having the equitable and legal claims heard side-by-side (*see DiMenna v Cooper & Evans Co.*, 220 NY 391 [1917] [stating that although a party combines with a prayer for equitable relief an alternative claim for a money judgment, such conduct cannot deprive the other party to the action of a jury trial on the legal claim assured to him by the Constitution; *see also Trepuk v Frank*, 104 AD2d 780, 480 NYS2d 889 [1<sup>st</sup> Dept. 1984] [explaining that where a party seeks both equitable and legal relief with respect to the same wrong, said party loses the right to a trial by jury on the legal claims, but that the right to a trial by jury on the legal claims is not lost for the other party]).

In the present case, plaintiffs did not consent to the consolidation of the equitable and legal claims. The instant case obtained its consolidated status by this court's order of March 18, 2005, upon the landlord's motion to consolidate pursuant to CPLR 602(b). As plaintiffs point out in their opposition to the present motion, they opposed the landlord's prior CPLR 602(b) motion to consolidate. Although plaintiffs counterclaimed for equitable relief (to correct allegedly uninhabitable conditions) in the rent proceeding, and then commenced the personal injury action seeking legal relief (damages due to alleged negligence), and both claims arise from the same transaction, plaintiffs opposed consolidation of these claims, and cannot be considered to have waived their right to a jury trial on their legal claims (*see DiMenna*, 220 NY 391, *supra*; *see also Trepuk*, 104 AD2d 780, *supra*).

The landlord's arguments to the contrary are not persuasive. While the landlord correctly notes that plaintiffs assert both legal and equitable claims as part of the consolidated action, the landlord fails to recognize the significance of plaintiffs' opposition to the court ordered consolidation of these claims. None of the cases cited by the landlord in support its motion

mirror the facts of the present case, where plaintiffs opposed consolidation. Instead, the cited cases involve instances where a party chose to assert equitable and legal claims together, and are therefore distinguishable from the present consolidated action.

Further, the landlord offers no authority for its position that plaintiffs' failure to reargue or cross-move for a joint trial, or assert any prejudice by the loss of a jury right as a result of the requested consolidation, constitutes a waiver. In any event, that plaintiff did not reargue or seek a joint trial, or failed to allege prejudice from the consolidation is inconsequential, as it is uncontested that plaintiffs opposed consolidation.

Furthermore, the landlord's contention that plaintiffs' claims fall under the jury waiver provision of the Lease lacks merit. A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

In the present case, Paragraph 27 of the Lease states that the parties' "agreement to give up the right to a jury trial does not include claims for personal injury or property damage." Plaintiffs' claims in the action at law are for damages due to personal injuries. Therefore, contrary to the landlord's contention, all of plaintiffs' claims do not fall within the jury waiver clause. In any event, any written waiver of a jury for personal injury claims would be null and

void (*see* NY CLS Real Prop § 259-c [providing, in pertinent part, that “[a]ny provision in a lease ... that a trial by jury is waived in any action, proceeding or counterclaim brought by either of the parties thereto against the other in any action for personal injury or property damage, is null and void”]).

Finally, the landlord’s contention that plaintiffs’ claim for attorneys’ fees constitutes a waiver of their right to a trial by jury on their personal injury claims cannot be maintained since, as explained above, both the Lease and NY CLS Real Prop § 259-c secure plaintiffs right to a jury trial on their personal injury claims.

Based on the foregoing, it is hereby

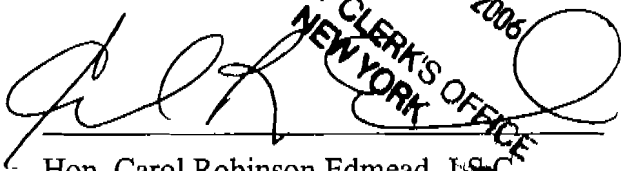
ORDERED that the landlord’s motion to strike plaintiffs’ demand for a trial by jury is denied. It is further

ORDERED that the landlord shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 25, 2006

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 SEP 01 2006  
 COUNTY CLERK'S OFFICE  
 NEW YORK



Hon. Carol Robinson Edmead, J.S.C.  
**HON. CAROL EDMOAD**