

**Decana Inc. v Contogouris**

2007 NY Slip Op 30577(U)

April 3, 2007

Supreme Court, New York County

Docket Number: 0604247/2002

Judge: Richard B. Lowe

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

PRESENT: LOWE  
Justice

PART 56

Index Number : 604247/2002  
**DECANA INC.**  
vs.  
**CONTOGOURIS, SPYRO C.**  
SEQUENCE NUMBER : 028  
STRIKE JURY DEMAND

INDEX NO. 604247/02  
MOTION DATE 2/27/07  
MOTION SEQ. NO. 2/8  
MOTION CAL. NO. \_\_\_\_\_

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

**FILED**  
APR 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION**

Dated: 4/3/07

RICHARDS B. LOWE III  
J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 56

-----X

DECANA INC, PRESTIGE HOLDINGS INC and  
CHANGOLE INTERNATIONAL B.V,

Index No:604247/02

*Plaintiffs*

*-against-*

**DECISION AND ORDER**

SYRO C CONTOGOURIS, SCHANSON CAPITAL  
MANAGEMENT LLC, PRESTIGE HOLDINGS INC,  
NORTH FORK BANK, NYMC CAPITAL CORP.,  
PETER ASHE REALTY SERVICES, INC., (aka/dba  
PETER ASHE REALTY, and the PETER ASHE  
COMPANY) and EASTSIDE HOLDINGS LLC,

*Defendants*

NORTH FORK BANK and EASTSIDE HOLDINGS, LLC

*Third-Party Plaintiffs*

*- against -*

VASSILIOS S. MANTOS

*Third-Party Defendant*

-----X

**RICHARD B. LOWE III, J:**

In the instant action, Plaintiffs Decana, Inc et al (“the Plaintiffs”) bring claims for unjust enrichment, aiding and abetting breach of fiduciary duty, assisting in fraud and conversion, commercial bad faith, and injunctive relief against the Defendants/Third-Party Plaintiffs North

**FILED**  
APR 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Fork Bank (“NFB”) and Eastside Holdings, Inc (“Eastside”) (collectively, “the Mortgagees”). In the instant motion, the Mortgagees move to strike the jury demand from the Plaintiffs’ Note of Issue, averring that the latter has no right to a jury trial under CPLR 4101 or the New York State Constitution.

### **BACKGROUND**

The general facts of this matter have been previously discussed in this Court’s prior decisions and shall not be repeated here, except to the extent necessary to decide this motion.

The instant action’s crux is the allegation that Defendant Contogouris, a former principal of Plaintiff Decana Inc, placed two mortgages on the latter’s property without authorization. The Plaintiffs named NFB and Schanson Capital Management (“Schanson”), the mortgage-holders, as defendants. NFB subsequently assigned its mortgage to Eastside. Summarily, the claims against the Mortgagees were brought pursuant to NY Business Corporation Law § 720 and the common law.

On December 4, 2006, the Plaintiffs filed a Note of Issue that contained a demand for a jury trial. The Mortgagees object to the jury demand, averring that the Plaintiffs are not entitled to it because their claims involve prayers for equitable as well as legal relief. They now move this Court seeking to strike the jury demand.

### **DISCUSSION**

A plaintiff who only seeks money damages has a right to a jury trial. (*See, CPLR 4101*) In general, claims for equitable relief are to be tried by a court. (*See, CPLR 4101(1)*) “When. . .

the complaint either joins legal and equitable causes of action arising out of the same alleged wrong or seeks both legal and equitable relief, there is no right to a jury.” (*Zimmer-Masiello, Inc v Zimminer, Inc* 164 AD 2d 845 [1<sup>st</sup> Dept 1990].)

Here, the instant action finds its origin in the assertion that Contogouris improperly subjected the 10 East 62<sup>nd</sup> Street property to a mortgage. Indeed, all the claims against the defendants find their genesis in this one, alleged wrongful act.

Relevant to the instant motion, the Plaintiffs

demand a judgment against [NFB] declaring the North Fork loan documents not enforceable against Decana. . .the imposition of a constructive trust as to all sums paid to North Fork Bank by Decana. . .[and] for the return of those monies to Decana. . .

(*Complaint at page 62, ¶ 184*)

demand a judgment against [NFB] for participating and assisting in Contogouris’ breach of fiduciary duties to Decana and Prestige. . .and for damages sustained by [them]

(*Id at page 64, ¶ 188*)

demand a judgment against [NFB] for participating and assisting in Contogouris’ fraud against Decana and Prestige. . .and for damages sustained by [them]

(*Id at page 66, ¶ 191*)

demand judgment against [NFB] for its commercial bad faith in making a loan. . . in the name of Decana as borrower. . .[and the recovery of funds and] the imposition of a constructive trust on NFB’s assets, and for attorney’s fees, costs, and such exemplary damages. . .

(*Id at page 67, ¶ 194*)

demand a judgment against [NFB] enjoining [them] from foreclosing on the Decana property or taking any other action to encumber, transfer, or otherwise dispose of the property; enjoining [them] from. . .collecting. . . the penalty rate of interest. . .ordering the bank to establish and maintain an

escrow fund that will preserve the status quo. . .enjoining the Bank from taking any other action to disturb the status quo concerning the Loan and Mortgage prior to this Court's resolution of the claims asserted by [the Plaintiffs] against the [NFB]. . .  
(*Id* at page 71, ¶ 205)

Here, the Plaintiffs request both equitable *and* legal relief in the instant action. A declaration that the mortgage is void, the imposition of a constructive trust, and enjoining the Mortgagees from taking action pending the outcome are equitable remedies because these seek to direct the Mortgagees to do, and refrain from, certain activities. The prayer for damages is a legal remedy because the Plaintiffs pursue monetary compensation for the alleged wrong committed against them. Clearly, both forms of relief are sought.

However, if the majority of the claims are legal in nature, the inclusion of incidental equitable relief does not waive the plaintiff's right to a jury trial. (*See, Cadwalader, Wickersham, & Taft v Spinale*, 177 AD 2d 315 [1<sup>st</sup> Dept 1991].) "When money damages alone afford a full and complete remedy, the action sounds in law and may be tried by a jury." (*Id.*)

Here, the Plaintiffs' request to have the mortgage voided cannot be deemed "incidental equitable relief" to their sought-after legal remedy. Quite simply, if they were solely awarded damages but were denied the mortgage's rescission, this hypothetical remedy would not be complete. In such a scenario, the Plaintiffs would receive back the monies already paid on the mortgage note plus damages for their fraud and fiduciary duty-breach claims, but the property would remain encumbered with a mortgage and they would remain liable for future payments. Money damages alone would not make the Plaintiffs whole.

In the twenty-eight motion of a case that began in 2002, the Plaintiffs aver for the first time in their opposition that their claims fall under Article 15 of the Real Property Actions. They argue that they are entitled to a jury trial because one is available “for the determination of a claim to real property under article fifteen of the real property actions and proceedings at law. . .” (*CPLR 4101(2)*) Indeed, “where a person claims an estate or interest in real property. . .such person may maintain an action against any other person. . .(*RPAPL 1501(1)*) Moreover, “the interest held by a mortgagee. . .is an interest in real property.” (*Id, 1501(5)*) The Court of Appeals has held that an action to rescind a “mortgage, bond or related document” for fraud is a claim under Article 15 of the Real Property Actions. (*Howard v Murray*, 38 NY 2d 695 [1976].) However, the complaint fails to allege that the Plaintiffs are seeking relief under this article.

“The complaint must state that the action is brought pursuant to this article. . .” (*RPAPL 1515(1)*) However, “the fact that the plaintiffs did not refer to the article or use the language of the statute is not a fatal defect.” (*Howard, supra.*) While the complaint does not identify the New York Real Property Actions as a statute pursuant to which the instant claims are brought, the action does sound in it. To be sure, the Plaintiffs seek, *inter alia*, the rescission of a mortgage that they contend was incurred improperly. Such a claim falls under said statute. (*See, Howard, supra; 39 College Point Corp v Transapac Capital Corp*, 22 AD 3d 664 [2<sup>nd</sup> Dept 2005]; *Foss v Riordan*, 273 AD 982 [2<sup>nd</sup> Dept 1948].)

Here, the Plaintiffs request the voiding of the mortgage, a form of equitable relief that may be tried by a jury. (*See, CPLR 4101(2)*). However, the Plaintiffs cannot escape the fact that when there are requests for equitable relief in addition to the real property interest , “the plaintiff

has waived [the] right to a jury trial.” (*Noto v Headley*, 21 AD 2d 686 [2<sup>nd</sup> Dept 1968].) The plaintiffs also seek other forms of equitable relief in addition to the mortgage’s rescission: enjoining the Defendants from foreclosing on the property and the imposition of constructive trusts.

Accordingly, the Plaintiffs waived their right to a jury trial. The Mortgagees’ motion to strike the jury demand is hereby granted.

**CONCLUSION**

For the foregoing reasons, it is hereby

ORDERED that the motion is granted.

This shall constitute this Court’s decision and order.

**Dated:** April 3, 2007

ENTER

  
RICHARD B. LOWE, III  
RICHARD B. LOWE, III, J.S.C.

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