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

PRESENT: _____ PART 56

Justice

Index Number : 600983/2007

SORBARA CONSTRUCTION

VS.

THATCH RIPLEY & CO.,LLC,

SEQUENCE NUMBER : 004

STRIKE JURY DEMAND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 [X] No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 30 2009

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/24/09

J.S.C.

Check one: FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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SORBARA CONSTRUCTION CORPORATION,

Plaintiff,

- against - Index No. 600983/2007

THATCH RIPLEY & CO., LLC, GREY LINE DEVELOPMENT CO., LLC, GOTHAM GREENWICH CONSTRUCTION COMPANY, LLC, GOTHAM CONSTRUCTION COMPANY, McGRAW HUDSON CONSTRUCTION COMPANY, INTERNATIONAL FIDELITY INSURANCE COMPANY,

Defendants.

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HON. RICHARD B. LOWE III:

Defendants Thatch Ripley & Co., LLC, Gray Line Development Co., LLC (named herein as Grey Line Development Co., LLC), McGraw Hudson Construction Company, and International Fidelity Insurance Company move to strike plaintiff Sorbara Construction Corporation's demand for trial by jury.[1]

The proceedings herein arise from the construction of luxury condominiums located at 310 East 53rd Street, New York, New York. According to the complaint, plaintiff brings this action to collect money due on the construction contract and to foreclose on its mechanic's lien filed after plaintiff made a demand for the alleged unpaid funds. Defendants filed an answer containing various defenses and counterclaims seeking not only the dismissal of the complaint,

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[1] The additional named defendants, Gotham Greenwich Construction Company, LLC and Gotham Construction Company (either defendant individually, or both defendants collectively, Gotham), submitted affirmations regarding the motion to strike the jury demand. Pursuant to a decision issued on March 9, 2009, Gotham was dismissed from the action. Therefore, Gotham's submissions on this motion will not be considered.

but a substantial money judgment in its favor based upon plaintiff's breach of the construction contract.[2] Plaintiff, in its note of issue filed on February 10, 2009, seeks a jury trial on all claims and counterclaims other than the claim for lien foreclosure.

Defendants argue that plaintiff waived its right to a jury trial by joining equitable and legal claims per CPLR § 4102, and more specifically under Lien Law § 45 that applies to statutory claims for foreclosure of a mechanic's lien.

Plaintiff argues that it is entitled to a jury trial on its legal causes of action because the gravamen of its claims are legal in nature. Additionally, plaintiff argues that it has a constitutional right to a jury trial on defendants' legal counterclaims, which are entirely intertwined with plaintiff's affirmative claims. Plaintiff argues that in order to minimize the risk of inconsistent judgments, the jury can issue an advisory opinion as to the equitable claims.

Generally, a plaintiff waives its "right to a jury trial by joining claims for legal and equitable relief arising out of the same transactions and occurrences" [*Chichilnisky v Trustees of Columbia Univ. in the City of New York*, 52 AD3d 206 [1st Dept 2008] [*citation omitted*]; *Hudson View II Assocs. v Gooden*, 222 AD2d 163, 166-167 [1st Dept 1996], *citing* CPLR 4102[c]). Foreclosure on a mechanic's lien is an equitable claim for the court to decide (*John W. Cowper Co. v Buffalo Hotel Dev. Venture*, 99 AD2d 19, 21 [4th Dept 1984], citing Lien Law §

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[2] While defendants characterize their first affirmative defense and counterclaim as plaintiff's deficiencies and chargebacks, for all intents and purposes defendants' first affirmative defense is a counterclaim for breach of contract (*compare* Verified Answer to Amended Complaint ¶ 75 ["summary identifying deficiencies in Sorbara's work, the work needed to remediate such deficiencies, and an estimate of the cost of each remediation item"], *with* Reply Affirmation at 14, n. 20 ["to affirmatively recover the excess of the chargeback costs over the amounts that Owner withheld from the contract, the Owner bears the burden of showing the excess"]).

45). Section 45 of the Lien Law provides as follows:

> The court may adjust and determine the equities of all the parties to the action and the order of priority of different liens, and determine all issues raised by any defense or counterclaim in the action. But in no case shall the court determine any issue between the state and the contractor where a claim has been or can be submitted to the court of claims for adjudication and in case a counterclaim is set forth by any defendant in his answer, such defendant shall be deemed to have waived a trial by jury of the issues raised thereby.

However, there is extensive First Department authority holding that when "money damages alone afford a full and complete remedy, the action sounds in law and may be tried by a jury" (*Cadwalader Wickersham & Taft v Spinale*, 177 AD2d 315, 316 [1st Dept 1991]; *see also Hudson View*, 222 AD2d at 168 ["Generally, the determinant as to whether a claim is at law or at equity is the nature of the relief which, under the facts alleged, could fairly compensate the party bringing the claim. If money damages alone could achieve that end, the action is generally at law."] [*citation omitted*]; *Murphy v American Home Products Corp.*, 136 AD2d 229, 232 [1st Dept 1988] ["If, in fact, a sum of money alone can provide full relief to the plaintiff under the facts alleged, then there is a right to a jury trial."] [*citation omitted*]). Case law suggests that such analysis is appropriate for actions joining claims for a foreclosure on a mechanic's lien and breach of contract (*Stokes v Johnston*, 138 AD2d 481, 482 [2d Dept 1988] [responding to a defendant's request for a jury trial, holding that an action joining claims for a foreclosure on a mechanic's lien and breach of contract is properly before a jury], *citing Cowper*, 99 AD2d at 21-23).

Regarding plaintiff's right to a jury trial on defendants' counterclaims, defendants' concede that a counterclaim is generally "treated as if the [defendant] was serving a separate complaint therefor, giving the [plaintiff] all the usual rights of any defendant to seek a jury trial

on legal issues thereby raised" (Defendants' Affirmation in Support at 6). Defendants argue, without any supporting case law, that the second sentence in Lien Law 45 should apply because the plaintiff chose to invoke the statute by bringing the foreclosure claim and that the legal counterclaims in this case were entirely foreseeable.

When read in context, the second sentence of Lien Law 45 only applies to matters brought against the State and not generically to all defendants who may assert a legal counterclaim in a lien foreclosure action. Additionally, defendants' foreseeability argument to extend the waiver to apply in this case is an insufficient basis to deprive a party of their constitutional right to defend a legal counterclaim by way of a jury trial (*Herb v Metropolitan Hospital & Dispensary*, 80 AD 145, 151 [1st Dept 1903] ["the appellant was entitled to a jury trial of these issues as matter of right, even though they arise on a legal counterclaim in a suit in equity"]; *Di Menna v Cooper & Evans Co.*, 220 NY 391, 396 [1917] ["A different question arises when we come to the counterclaim. . . . It was an independent cause of action, which, if sustained, would have given the defendant a judgment for upwards of $ 11,000. It was, therefore, triable by jury as of right."]).

It is clear that the gravamen of the entire dispute is for a breach of a construction contract. All of plaintiff's claims essentially seek the same money damages. As the First Department stated in *Hudson View*, 222 AD2d at 168, "[i]f money damages alone could achieve that end, the action is generally at law." Furthermore, the issues that need to be resolved in defendants' and plaintiff's legal claims are sufficiently "intertwined and related that one trial of all the causes of action is both desirable and necessary" (*Cowper*, 99 AD2d at 23, *citing Vinlis Constr. Co. v Roreck*, 23 AD2d 895, 896 [2d Dept 1965]; *see also Chichilnisky*, 52 AD3d 206;

Hudson View, 222 AD2d at 169). Therefore, the legal claims, including plaintiff's and defendants' claims for breach of contract, are to be tried by a jury.

Lien Law § 45 precludes a jury trial only with respect to the Lien Law claims, including plaintiff's cause of action for foreclosure of its lien and defendants' counterclaim for exaggeration of the lien. In order to minimize the danger of conflicting verdicts by permitting the jury to hear testimony on both the legal issues and the Lien Law claims, the Court will treat the jury's determination on the latter as advisory (*Cowper*, 99 AD2d at 23-24; *see also Hudson View*, 222 AD2d at 169; *Wisell*, 303 AD2d at 750).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion to strike the jury demand is denied and that a jury trial will be held for all legal claims and that the jury will provide the Court with an advisory opinion as to the equitable claims.

Dated: March 24, 2009

ENTER:

J.S.C.