

Reinhard v Connaught Tower Corp.

2011 NY Slip Op 32075(U)

July 26, 2011

Supreme Court, New York County

Docket Number: 602503/2008

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE
J.S.C.

PRESENT: _____

PART 10

Index Number : 602503/2008
REINHARD, SUSAN
VS.
CONNAUGHT TOWER
SEQUENCE NUMBER : 005
STRIKE JURY DEMAND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 005

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

JUL 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

*Pre-trial conference scheduled for
November 17, 2011 at 2:15pm.*

Dated: 7/26/11

HON. JUDITH J. GISCHE
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Supreme Court of the State of New York
Country of New York: Part 10

-----X
SUSAN REINHARD,

Plaintiff,

-against-

CONNAUGHT TOWER CORPORATION and
ARTHUR S. OLICK,

Defendants.
-----X

DECISION/ORDER
Index No.: 602503/2008
Seq. No.:005

Present:
Hon. Judith J. Gische

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Recitation, as required by CPLR 2219 [a], of the papers considered in the (these) motion(s):

Papers	Numbered
Def's n/m [strike jury] w/APX affirm, PH affid, exhs	1,2
Pltf's opp. w/GKP affirm, exhs	3
Def's reply w/APX affirm, exhs	4

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Presently before the court is defendants Connaught Tower Corporation ("Tower") and Arthur Olick ("Olick") motion to strike plaintiff Susan Reinhard's ("Reinhard") jury demand. Plaintiff opposes the motion.

Facts Alleged and Background

Reinhard seeks monetary relief based upon the alleged bad faith refusal by defendants to remediate the permeating smoke odor and poor air quality condition in Reinhard's cooperative apartment. Since August 2007, Reinhard has complained to

defendants on numerous occasions about the conditions in her unit. Defendants have allegedly refused to remediate, or pay for the conditions to be remediated. As a result, on September 27, 2008, Reinhard commenced this action against defendants asserting nine causes of action seeking money damages for breach of contract; breach of duty, negligence, breach of the warranty of habitability; constructive eviction; breach of covenant of good faith and fair dealing; breach of lease; injunctive relief and attorneys' fees.

Reinhard concedes that she has voluntarily asserted equitable claims (injunction) with non-equitable claims (money damages). However, Reinhard argues that her demand for equitable relief does not constitute a waiver of her right to a jury trial because her equitable claim is merely incidental to her legal claims. Defendants argue that Reinhard's equitable demands are central to her complaint, and they seek an order from the court striking Reinhard's jury demand.

Discussion

This issue is governed by CPLR 4101, which states that "equitable defenses and equitable counterclaims shall be tried by the court". It is well established that issues of law are entitled to be tried before a jury while issues in equity are not. Phoenix Mut. Life Ins. Co. v. Conway, 11 NY2d 367 (1962). Thus, the deliberate joinder of claims for legal and equitable relief arising out of the same transaction amounts to a waiver of the right to demand a jury trial. CPLR 4102(c). A. J. Fritschy Corp. v Chase Manhattan Bank 36 App Div 2d 600, (1st Dept 1971).

The question, however, is not whether an equitable claim exists, but whether, when viewed in its entirety, the primary character of the case is legal or equitable.

Murphy v American Home Prods. Corp., 136 A.D.2d 229. Hebranko v. Bioline Laboratories, Inc. 149 A.D.2d 567 (2nd Dept. 1989). In certain circumstances, joinder of equitable and legal issues is not grounds to strike a jury demand. Hebranko v. Boiline laboratories, Inc. (2nd Dept. 1989) 149 A.D.2d 567. For instance, when an equitable demand for an accounting is combined with a legal demand for damages, courts have refused to grant a motion to strike the jury demand, because the equitable relief sought was only incidental to plaintiff's claims. See e.g., Poley v. Rochester Community Sav. Bank 184 A.D.2d 1027 (4th Dept. 1992).

In this case, Reinhard correctly states that where monetary damages *alone* will afford full relief, the inclusion of a demand for equitable relief in the complaint will not constitute a waiver of a jury demand. Although Reinhard is requesting relief in the form of monetary damages, such money damages alone, if awarded, will not resolve the underlying claim that smoke is on an ongoing basis entering Reinhard's unit and affecting her health. Thus, if awarded, the money damages will only compensate Reinhard for her hardships to date. It is inaccurate to characterize Reinhard's request for injunctive relief as being merely "incidental to her legal claim." The permanent injunction demand, which is the future prevention of smoke entering her unit, is central to plaintiff's complaint and, by her own admission, she "has no adequate remedy at law." (Paragraph 93 of the Complaint).

Reinhard's *ad damnum* clause includes a separate and specific demand for purely equitable relief. Reinhard also disclosed an expert witness pursuant to CPLIR 3101(d) who will testify that a remediation involving the building systems and interstitial

[* 5]
spaces is necessary for the apartment to be restored. Both issues, at the very least, prove that equitable relief sought is not merely incidental to Reinhard's case.

Under these circumstances, Reinhard has waived her right to a jury trial by asserting a claim for equitable relief, which is not merely incidental to her claims at law but actually at the core of the parties' dispute. (see, Cadwalader Wickersham & Taft v Spinale, 177 A.D.2d 315; Zimmer-Masiello, Inc. v Zimmer, Inc., 164 A.D.2d 845).

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant's motion for an order striking plaintiff's jury demand is granted; it is further

ORDERED that the demand for a jury trial is hereby stricken; and it is further

ORDERED that the parties shall appear for a pre-trial conference on **November 17, 2011 at 2:15pm**, that this case can be scheduled for trail; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order and Judgment of the court.

Dated;


New York, New York
July 26, 2011

FILED

JUL 27 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

So Ordered:



Hon. Judith J. Gische, JSC