

Born to Build, LLC v Saleh
2011 NY Slip Op 34178(U)
October 13, 2011
Supreme Court, Nassau County
Docket Number: 009558/2011
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

BORN TO BUILD, LLC,

Plaintiff,

INDEX NO.: 009558/2011

- against -

**IBRAHIM SALEH, 44 W. 37 STREET, LLC,
ALAN CHU YU MUMG, ZHANG FUAN WONG,
and JOHN DOES 1 through 10 (the persons intended
being other individuals or entities claiming interest
in 44 W. 37 Street, LLC,**

Defendants.

The Court has reviewed the correspondence of October 11, 2011 of Mr. Sverd, and the response of October 12, 2011 of Mr. Kazlow.

Defendants object to the scheduling of a "fact-finding hearing" for October 25, 2011 as being without basis in the CPLR, and constituting a case of over-reaching on the part of the Court. Plaintiff, on the other hand, asserts that defendants, having moved for dismissal of the complaint based upon documentary evidence, and the Court having concluded in its Decision and Order that the documentary evidence did not conclusively establish that defendant Saleh had no interest in 44 W. 37 Street, LLC, the Court is authorized to undertake to resolve the question of fact which would essentially resolve the action.

CPLR § 3212 (c) provides as follows:

If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditions disposition of the controversy, order an

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immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and jury, whichever may be proper.

The motion by defendant sought relief pursuant to CPLR § 3211 (a)(1), and is therefore covered by the foregoing language of § 3212 (c) . To the extent that the Order of October 4, 2011 describes the procedure as a “fact-finding hearing”, it is hereby amended to provide for a “trial” on the factual issues raised in the pleadings. Those issues are, as indicated in the Order, the ownership interest, if any, of Ibrahim Saleh and the other defendants in 44 W. 37 Street, LLC. A determination of this factual issue, it would appear, would expeditiously resolve the issues in the pending litigation.

Defendant contends that they are entitled to a jury trial on these factual issues. Whether or not a party is entitled to a jury trial is governed by CPLR § 4101. That statute provides for a jury trial of issues of fact in an action which permits a judgment for a sum of money only, in specified actions under subdivision (2), and in “any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury”. It is under the latter circumstance under which the entitlement to a jury trial must be considered. *Strachman v. Palestinian Authority*, 73 A.D.3d 124 (1st Dept. 2010) deals with this issue.

Strachman involved an effort to enforce a default judgment in the amount of \$116,409,123 against the Palestinian Authority (“PA”) and the Palestinian Liberation Organization (“PLO”). The judgment was obtained in the United States District Court for the District of Rhode Island, and was domesticated into a New York judgment. It was based on a claim for the wrongful death of an American citizen, Yaron Ungar, who was murdered along with his pregnant wife, in a June 1996 terrorist attack in Israel. Plaintiffs, survivors and the administrator of the estate of Ungar, claimed that the attack was carried out by members of Hamas acting under the command of the PA and the PLO.

Plaintiff commenced a declaratory judgment action seeking to establish the PA’s ownership of more than \$100,000,000 in securities and debt instruments which had been frozen by Swiss American Securities, Inc (“SASI”). The issue raised on the appeal was whether or not plaintiffs were entitled to a jury in their declaratory judgment action.

Section 2 of Article 1 of the New York State Constitution guaranteed the right to a trial by jury "in all cases in which it has heretofore been guaranteed by constitutional provision". "The effect of this provision was to 'freeze the right to a jury trial to those types of cases in which it was recognized at common law or by statute as of the adoption of the Constitution in 1894". (*Independent Church of Realization of Word of God, Inc. v. Board of Assessors of the County of Nassau*, 72 A.D.2d 554 [2d Dept. 1979])(internal citations omitted). Because the declaratory judgment action was created in New York in 1921 with the adoption of the Civil Practice Act, it was incumbent on the court to examine which of the traditional actions would most likely have been used to present the claim of entitlement to a religious exemption from taxation. Concluding that the proceeding was most analogous to an action to vacate the assessment as a lien on real property as a cloud on title, an equitable claim, the Court determined that there was no entitlement to a jury.

The Court arrived at a different conclusion in *Strachman*. The plaintiffs asserted that the gravamen of their complaint was that the Gaza Fund is a fictitious name used by the judgment debtor PA to shield their assets. They alleged that defendant Insurance and Pension Fund's ("IPF") claim that they owned the assets was false and an attempt to mislead the court and to unlawfully prevent plaintiffs from enforcing their judgment against the PA. Defendants, on the other hand, asserted that this was essentially a "quiet title" claim, equitable in nature, and that plaintiffs were therefore not entitled to a jury trial.

In adopting the position of plaintiffs, the Court noted that a cause of action for unlawful interference with enforcement of a judgment has long been recognized in New York, and that it was always an action triable by jury. (*Strachman*, 73 A.D.3d at 128).

The Court finds *Strachman* to be persuasive authority on the issue of entitlement to a trial by jury. The declaratory judgment action is analogous to the action for unlawful interference with enforcement of a judgment, and either party is entitled to demand a trial by jury on the issues of fact outlined in the Order of October 4, 2011.

Plaintiff is directed to file a Note of Issue within ten (10) days of the date hereof. Defendants are entitled to file a Demand for Trial by Jury not later than October 25, 2011, the date presently scheduled for trial.

This constitutes the Decision and Order of the Court.

Dated: October 13, 2011

J. B. Warkowicz
J.S.C.

ENTERED
OCT 24 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE