

Benn v Benn

2012 NY Slip Op 32481(U)

April 16, 2012

Supreme Court, New York County

Docket Number: 102344/2007

Judge: Doris Ling-Cohan

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART 36**

ERIC BENN,

Plaintiff,

-against-

STEFAN BENN, BENNCO PROPERTIES, INC.,
BOARD OF MANAGERS OF LE TOULOUSE
CONDOMINIUM,

Defendants.

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) Index No. 102344/2007
)
) Motion Seq. No.: 008
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DORIS LING-COHAN, J.:

The following papers, numbered 1 - 5 were considered on the motion to strike plaintiff's jury demand:

FILED

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PAPERS

NUMBERED

Notice of Motion/Order to Show Cause, --- Affidavits --- Exhibits _____
Answering Affidavits --- Exhibits _____
Replying Memo _____

1, 2
3, 4
5

Cross-Motion: [] Yes [X] No

This case involves a family dispute between two (2) brothers, regarding a renovation project to a building located at 79-81 East 2nd Street, New York, New York, and the ownership of an apartment in such building. The action is based upon the alleged breach of an oral agreement in which plaintiff maintains that he is entitled to title to one of the apartments, specifically, Unit R-3.

Before the court is defendant's motion to strike plaintiff's jury demand pursuant to CPLR §4102, based upon plaintiff's joining of both legal and equitable claims in his complaint.

It is well established that issues of law are entitled to be tried before a jury, while matters of equity are to be decided by the court. *See Phoenix Mut. Life Ins. Co. v. Conway*, 11 NY2d 367, 370 (1962). The intentional joinder of claims for legal and equitable relief arising out of the same transaction, generally results in the waiver of the right to demand a jury. CPLR §4102(c); *O'Rorke v. Carpenter*, 125 AD2d 223, 224 (1st Dept 1986); *Kaplan v. Long Island Univ.*, 116 AD2d 508, 509 (1st Dept 1986); *New Jersey Steel Acquisition Corp. v. Von Roll, A.G.*, 188 AD2d 279 (1st Dept 1992). However, in determining whether a right to a jury trial has been waived, the complaint must be viewed in its entirety, as to whether the primary character of the case is legal or equitable. *See Murphy v. American*

Home Prods. Corp., 136 AD2d 229, 232-233 (1st Dept 1988); *Cadwalader Wickersham & Taft v. Spinale*, 177 AD2d 315, 316 (1st Dept 1991); *Schlick v. Am. Bus. Press*, 246 AD2d 450 (1st Dept 1998). The inclusion of both equitable and legal claims will not necessarily deprive a party of a right to a jury trial, where the equitable relief is merely incidental to the monetary relief sought.. *Id.* at 450 (stating that the “case [was] legal and not equitable and . . . [plaintiff’s] prayer for relief was simply incidental to the money damages sought.” *See also Lipson v Dime Sav. Bank*, 203 AD2d 161, 163 (1st Dept 1994). The Appellate Division, First Department, has held that “[w]here . . . 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 at 316; *see also Fox v. Skolnick*, 294 AD2d 225 (1st Dept 2002); *Hebranko v. Bioline Laboratories, Inc.*, 149 AD2d 567, 568 (2d Dept 1989)(“[w]here a plaintiff alleged facts upon which monetary damages alone will afford full relief, inclusion of a demand for equitable relief in the complaint’s prayer for relief will not constitute a waiver of the right to a jury trial”). “What is critical is whether the facts pleaded in the particular case ‘imperatively require’ equitable relief or whether under those facts the requested relief of money damages only can also provide full redress”. *Murphy v. American Home Products Corp.*, 136 AD2d 229, 233-234 (1st Dept 1988).

Here, the complaint contains eight causes of action, all arising out of defendant’s alleged breach of the oral agreement between the brothers. It is noted that plaintiff’s fourth and eighth causes of action have been dismissed.⁽¹⁾ The first cause of action seeks an accounting of all money received by each defendant related to the project. The second cause of action seeks the imposition of a constructive trust on plaintiff’s behalf, upon the assets of defendants, representing all real property and monies found to be due plaintiff. The third cause and fifth causes of action seek monetary damages in the amount of \$3 million, based upon fraud and conversion. The sixth cause of action seeks to pierce the corporate veil. The seventh cause of action seeks a declaration that defendants deed the fourth floor apartment to plaintiff.

⁽¹⁾ *See Benn v. Benn*, 82 AD3d 548 (1st Dept 2011), affirming the dismissal of the fourth and eighth causes of action.

While it is not disputed that plaintiff asserts both legal and equitable claims, when viewed in its entirety, plaintiff's case sounds in law, rather than equity. *See Horiz, Inc. v. Wolkowicki*, 2008 NY Slip Op 30207U (Sup Court, NY County January 15, 2008), *modified on other grounds* 55 AD3d 337 (1st Dept 2008)(finding that action for accounting and piercing corporate veil sounded in law and not equity, denying motion to strike jury demand). The gravamen of plaintiff's complaint revolves around the alleged breach of the alleged oral agreement between the brothers; in essence, whether defendant breached the oral agreement to transfer the subject apartment. While claims for equitable relief have been asserted (demand for an accounting, a constructive trust, piercing the corporate veil and a declaration of title to the apartment in dispute), such claims are merely incidental to plaintiff's breach of contract and tort claims (fraud and conversion), which are the true basis for this lawsuit. *See Alouzay v. Cassin*, 103 AD2d 836 (2nd Dept 1984)(jury trial permitted where complaint contained a legal claim of breach of contract, in addition to equitable demands for an accounting and a determination of title to real properties). Similarly, in *Lex Tenants Corp. v. Gramercy N. Assoc.*, (284 AD2d 278 [1st Dept 2001]), it was specifically held that an accounting sought for the purposes of determining the amount of money damages necessary to fully compensate plaintiff did not result in a waiver of a right to a jury trial. Further, in *Greenfield v. Philles Record*, (243 AD2d 353 [1st Dept 1997]), the plaintiffs' equitable claim for the imposition of a constructive trust, was held to be incidental to the monetary relief plaintiffs sought on their causes of action for breach of contract and conversion, and did not result in the waiver of the right to a jury trial.

Additionally, while plaintiff's seventh cause of action which seeks an order requiring the transfer of title to the apartment in dispute, such relief merely requires a determination as to whether there was in fact a breach of the parties' oral agreement with respect to the transfer in ownership of the subject apartment, and, thus, is also incidental to the legal claims asserted. Moreover, as conceded by plaintiff, he may be fully compensated by the issuance of a judgment for the monetary damages sought. *See Murphy v. American Home Products*, 136 AD2d 229 (1st Dept 1988); *Cadwalader Wickersham & Taft v. Spinale*, 177 AD2d at 316.

Accordingly, it is

ORDERED that defendant's motion to strike plaintiff's demand for a jury trial is denied; it is

further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

It is noted that, as the within matter involves a family dispute between brothers, the court continues to *strongly encourage* settlement discussions.

Dated: April 16, 2012



DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

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