

Zekry v Zekry

2012 NY Slip Op 32689(U)

October 26, 2012

Supreme Court, New York County

Docket Number: 102550/2008

Judge: Deborah A. Kaplan

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

PRESENT: KAPLAN
HON. DEBORAH A. KAPLAN *Justice*

PART 20

ZERRY, NICOLE LAW

INDEX NO. 102550/08

MOTION DATE _____

- v -
PINHAS ZERRY, ETAL.

MOTION SEQ. NO. 31

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision/order.

FILED
OCT 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 26, 2012

Deborah Kaplan
DEBORAH A. KAPLAN *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):

At the Matrimonial Term, Part 20, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York, on the 26th day of October, 2012

PRESENT: HON. DEBORAH A. KAPLAN

-----X
NICOLE LAWI ZEKRY

Plaintiff,

-against-

PINHAS ZEKRY and
DAVID BEN BAROUCK, CORP.,

Defendants.
-----X

Decision and Order
Motion Seq.: 031
Index No. 102550/2008
FILED
OCT 26 2012
NEW YORK
COUNTY CLERKS OFFICE

DEBORAH A. KAPLAN, J.:

Defendants Pinhas Zekry (Zekry) and R. David Ben Barouck, Corp. (Barouck Corp) move to strike the jury demand filed by plaintiff Nicole Lawi Zekry (Lawi).

The parties executed an agreement on April 20, 2004, wherein they created a partnership for the purpose of operating a hair salon, spa and cosmetology business at 428 Columbus Avenue, New York, NY (the Shareholders Agreement) under Barouck Corp. Pursuant to the Shareholders Agreement, the shares, and the net profits and losses were to be divided 40% to Lawi and 60% to Zekry.

In February 2008, Lawi commenced this action against Barouck Corp. and Zekry, as its President, Treasurer and 60% shareholder, asserting the following causes of action: reformation of the Shareholder Agreement (first); breach of contract (second); breach of Zekry's fiduciary duties (third); conversion (fourth); and fraud in the inducement (fifth). Lawi essentially

alleges that Zekry misrepresented his initial capital contribution to the business, and that she did not receive her proper share of the corporation's profits as a result of Zekry's manipulation of the corporation's books and records, diversion of cash and other assets of the corporation and false claims of grossly inflated expenses incurred by the corporation.

In their answer, defendants asserted thirteen counterclaims: (1) breach of fiduciary duty; (2) breach of contract; (3) conversion; (4) unjust enrichment; (5) reformation of contract; (6) fraud in the inducement; (7) breach of fiduciary duty due to gross mismanagement; (8) misappropriation; (9) accounting, (10) punitive damages; (11) fraud; (12) slander; and (13) attorneys' fees.

On June 1, 2011, Lawi filed a note of issue, in which she demanded a trial by jury on all issues. Shortly thereafter, Lawi moved, and defendant cross-moved, for summary judgment. In January 2012, this court denied the parties' respective summary judgment motions and set the case for trial on February 13, 2012. The parties subsequently moved for various pretrial relief, which resulted in an adjournment of the trial to September 20, 2012. The trial was adjourned on consent to October 31, 2012.

On October 9, 2012, defendants moved to strike Lawi's jury demand, initially arguing that Lawi waived her right to a jury trial, since she raised both equitable and legal claims in her complaint based upon the same transactions. They further allege that she is not entitled to a jury trial based upon their counterclaims, since the thrust of their counterclaims are equitable.

Lawi opposes defendants' application as untimely, in that it was made on the eve of trial, and would cause her unfair prejudice, if granted, since she has been preparing for a jury trial, and it would leave her "with little time to prepare her case for a nonjury trial" (Lawi's

memorandum of law in opposition to defendant's motion dated 10/15/12 at 13). She also alleges that, because the overall nature of her claims is legal, and not equitable, she did not waive her right to a jury trial. She avers that her legal claims (breach of contract, breach of fiduciary duty and conversion) sound in tort and contract, and primarily seek money damages, while her equitable claims (reformation or, alternatively, rescission of the Shareholders Agreement) are merely incidental to the legal relief she seeks. She further argues that, since defendants' counterclaims are overwhelmingly legal in nature, and so intertwined with her own claims that they are virtually mirror images, a single trial of all claims before a jury is appropriate.

In reply, defendants dispute that they notified Lawi of their objection to her jury demand on the eve of trial, and submit an e-mail sent more than one month prior to the trial date of October 31, 2012, wherein they informed her counsel of their objection (Defendants' reply affirmation, Exhibit B, e-mail from defendants' counsel to Lawi's counsel dated 9/21/12). They further assert that there is no additional work involved in preparing for a nonjury trial, but will consent to any reasonable adjournment if the plaintiff requires one.

Defendants further contend that the primary relief sought by the parties in their respective claims is equitable, and their ultimate requests for monetary relief are incidental to their equitable claims. Thus, they contend that Lawi is not entitled to a jury trial.

Initially, this court notes that a motion to strike a jury demand may be made at any time before trial as long as the delay does not unduly prejudice the other side (*A. J. Fritschy Corp. v Chase Manhattan Bank*, 36 AD2d 600 [1st Dept 1971]). There is no apparent prejudice to Lawi caused by the defendants' application made approximately three weeks prior to the trial date. The record demonstrates that Lawi was advised of the defendants' objection to the jury

demand more than one month prior to the trial date and asked whether she would be amenable to stipulating to withdraw the jury demand or whether they needed to make a motion (Defendants' reply affirmation dated 10/17/12, Exhibit B, e-mail dated 9/21/12). Further, Lawi fails to proffer any basis for which additional time would be required by her counsel for preparing for a nonjury trial as opposed to a jury trial. Thus, this court finds that this motion to strike the jury demand was not untimely.

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 *Calwalader Wickersham & Taft v Spinale*, 177 AD2d 315 [1st Dept 1991]; CPLR 4101). “[T]he right to a jury trial is waived by joining legal and equitable causes of action arising out of the same alleged wrong” (*Ossory Trading v Geldermann, Inc.*, 200 AD2d 423, 423 [1st Dept 1994]; *Kaplan v Long Is. Univ.*, 116 AD2d 508 [1st Dept 1986]; CPLR 4102 [c]). However, when the primary character of the action is legal in nature, and money damages would afford a full and complete remedy, a plaintiff does not waive the right to a jury trial merely by inclusion of equitable relief (*id.*; *Fox v Skolnick*, 294 AD2d 225 [1st Dept 2002]; see also *Calwalader Wickersham & Taft v Spinale*, 177 AD2d 315, *supra*). “[I]t must be determined whether the main thrust of the action is for legal damages or for equitable relief” (*Phoeniz Garden Rest. v Chu*, 234 AD2d 233, 234 [1st Dept 1996]).

It is undisputed that Lawi asserted both legal and equitable claims in this action. While she pled equitable claims for reformation, or alternately rescission of the Shareholders' Agreement, an examination of the complaint discloses that the gravamen of her action sounds in contract and tort, in which she seeks monetary damages caused by Zekry's purported misrepresentation regarding his initial investment in the Barouck Corp., and his alleged

misappropriation of corporate funds. Since the primary character of Lawi's action is legal, and an award of monetary damages would afford a full and complete remedy to her, the equitable claims are incidental to the monetary relief sought in her claims for breach of contract, breach of fiduciary duty and conversion (*Decana Inc. v Contogouris*, 45 AD3d 363 [1st Dept 2007]; *Fox v Skolnick*, 294 AD2d 225, *supra*; *Lipson v Dime Sav. Bank of N.Y.*, 203 AD2d 161 [1st Dept 1994]). Thus, she did not waive her right to a jury trial.

In light of the forgoing, this court need not address defendants' remaining arguments for striking Lawi's demand for jury. Thus, defendants' motion is denied.

Accordingly, it is


ORDERED that defendant's motion to strike Lawi's jury demand is denied; and it is further

ORDERED that the parties are directed to appear for trial on October 31, 2012 in Part 40, 60 Centre Street, New York, New York 10007 at 9:30 A.M., and it is further

ORDERED that counsel for plaintiff is directed to serve the within order with Notice of Entry by fax or e-mail by October 29, 2012 upon counsel for defendants.

This constitutes the Decision and Order of this Court.

FILED
OCT 26 2012
NEW YORK
COUNTY CLERKS OFFICE

ENTER:

J.S.C.

DEBORAH A. KAPLAN
J.S.C.