

**Wadsworth Condos, LLC v 43 Park Owners Group,
LLC**

2014 NY Slip Op 30112(U)

January 13, 2014

Sup Ct, New York County

Docket Number: 600694/09

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 600694/2009

WADSWORTH CONDOS

vs

43 PARK OWNERS GROUP

Sequence Number : 006

STRIKE JURY DEMAND

PART 4B

FILED

JAN 15 2014

NEW YORK
COUNTY CLERK'S OFFICE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

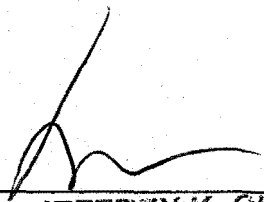
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

~~This~~ motion is decided in accordance with the annexed decision and order of the Court."

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

Dated: 1/13/14



JEFFREY K. OING J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x

WADSWORTH CONDOS, LLC, ELI BOBKER, and
BEN BOBKER,

Plaintiffs,

Index No.: 600694/09

-against-

Mtn Seq. No. 006

43 PARK OWNERS GROUP, LLC,
MARK F. ENGEL, PERRY FINKELMAN and
INWOOD EQUITIES GROUP, INC.,

DECISION AND ORDER

FILED

Defendants.

JAN 15 2014

NEW YORK
COUNTY CLERK'S OFFICE
JEFFREY K. OING, J.:

Defendants, 43 Park Owners Group, LLC ("43 Park Owners") and Perry Finkelman ("Finkelman") (collectively the "moving defendants"), move, pursuant to CPLR 4102, for an order striking plaintiffs' jury demand.

In 2005, plaintiff Wadsworth Condos, LLC ("Wadsworth") acquired a Manhattan property located at One Wadsworth Terrace (the "property") for the purpose of developing a condominium project (the "project") with a first mortgage from the Community Preservation Corporation ("CPC"). In July 2005, defendant 43 Park Owners, of which defendants Mark F. Engel ("Engel") and Finkelman are the owners and managing members, acquired a 20% interest in the property, thus becoming a tenant-in-common with Wadsworth which retained an 80% interest. At the same time, development of the property was partially financed by a second mortgage of \$2.5 million provided by defendant Inwood Equities

Group, Inc. ("Inwood Equities"), of which Engel and Finkelman are the owners and managing members.

Plaintiffs claim that during the development of the property 43 Park Owners and its principals embarked upon a plan to freeze Wadsworth out of any participation in the further development of the property. Plaintiffs further allege that sometime in 2009 43 Park Owners abandoned the project, and that it plotted with Inwood Equities to wipe out Wadsworth's interest in the project by acquiring the underlying CPC mortgage. Plaintiffs further allege that 43 Park Owners, without Wadsworth's consent, unilaterally retained and paid attorneys, engineers, and architects with project funds to change the project's plans and specifications that had been filed with the New York City Department of Buildings from a condominium development to a rental building.

Plaintiffs assert the following causes of action: 1) breach of the parties management agreement; 2) breach of fiduciary duties pursuant to the management agreement; 3) permanently enjoin defendants from taking any action which violates the management agreement; 4) specific performance directing defendants to restore the project to what it was prior to defendants' alleged breach; 5) declaratory judgment declaring the Inwood Equities' loan void ab initio; and 6) declaratory judgment

declaring that defendants are entitled to no credit to, or increase in, their capital contribution to the project.

Plaintiffs filed the note of issue in July 2013 demanding a trial by jury. Moving defendants claim that plaintiffs, Wadsworth, Eli Bobker, and Ben Bobker, waived the right to a jury trial by joining equitable and legal claims together in their complaint, which arise out of the same alleged wrongs or transactions. In response, plaintiffs point out that the property at issue has been sold pursuant to a revised judgment of foreclosure and sale, dated June 25, 2012, and entered in the action The Community Preservation Corporation v Wadsworth Condos, LLC, et al., Index No 114865/09 (Coupey Affirm., Ex. A). As such, plaintiffs claim that their equitable claims, i.e., injunctive relief to stop defendants from continuing to damage plaintiffs, have been rendered moot by the judgment. Plaintiffs argue that all that remains are their claims for breach of contract and declaratory judgment.

Plaintiffs' argument is unavailing. Plaintiffs waive their right to a jury trial when the complaint joins legal and equitable causes of action arising out of the same alleged wrong, or seeks both legal and equitable relief (Zimmer-Masiello, Inc. v Zimmer, Inc., 164 AD2d 845 [1st Dept 1990]). Further, even if plaintiffs' request for equitable relief were moot, the right to

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a jury trial is not revived (Giammalvo v 2170-2178 Broadway LLC, 293 AD2d 390 [1st Dept 2002]).

Plaintiffs' reliance on Mercantile & General Reinsurance Co. PLC v Colonial Assurance Company, 82 NY2d 248 (1993) to support their argument that their equitable claims should have no bearing on whether a jury can decide their legal claims is misplaced.

In Mercantile & General Reinsurance Co. PLC v Colonial Assurance Company, 82 NY2d 248 (1993), the plaintiff asserted an equitable claim for rescission of reinsurance contracts based on the defendant's misrepresentation, and the defendant interposed a legal counterclaim for breach of contract. At trial, Supreme Court treated the plaintiff's claim as an equitable defense and a counterclaim to the defendant's breach of contract claim. The issue before the Court of Appeals was "the legal effect of the jury's misrepresentation finding on the trial court's power to make a contrary factual finding" (Id. at 252). Thus, contrary plaintiffs' argument, the issue before the Court of Appeals in Mercantile was not whether the plaintiff was entitled to a jury trial when the plaintiff itself had asserted both legal and equitable claims, as is the issue in the present case.

Similarly, the issue in Hudson View II Associates v Gooden, 222 AD2d 163 (1st Dept 1996) was "the import of equitable defenses and/or counterclaims on [the] defendants' right to a

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jury trial on [the] plaintiffs' legal claims." And, in Paciello v. Graffeo, 8 AD3d 543 [2nd Dept 2004], the issue involved the plaintiff's cause of action to resolve competing claims to real property in which a jury trial is guaranteed under Article 15 of the Real Property Actions and Proceedings Law.

Accordingly, it is hereby

ORDERED that defendants' motion to strike the jury demand is granted and the jury demand is stricken.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/13/14



HON. JEFFREY K. OING, J.S.C.

FILED
JAN 15 2014
NEW YORK
COUNTY CLERK'S OFFICE