

117-119 Leasing Corp. v Reliable Wool Stock, LLC
2018 NY Slip Op 33029(U)
November 26, 2018
Supreme Court, New York County
Docket Number: 654310/13
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

-----X
117-119 LEASING CORP.,

Plaintiff,

Index No.: 654310/13
DECISION/ORDER

-against-

RELIABLE WOOL STOCK, LLC,

Defendant.

-----X
RELIABLE WOOL STOCK, LLC,
Third-Party Plaintiff,

-against-

RICHARD ROBINSON.,

Third-Party Defendant.

-----X
HON. ROBERT D. KALISH, J.S.C.:

In this commercial landlord/tenant action, defendant/third-party plaintiff Reliable Wool Stock, LLC (Reliable) moves pursuant to CPLR 4101 to strike the jury demand that was made by counsel for plaintiff 117-119 Leasing Corp (117-119) and third-party defendant Richard Robinson (Robinson) (motion sequence number 012). For the foregoing reasons, the motion is granted.

BACKGROUND

Reliable is the owner of a building (the building) located at 117-119 Mercer Street in the County, City and State of New York. *See* notice of motion, exhibit A (complaint), ¶ 5. On August 18, 1993, 117-119 entered into a 40-year lease for the building (the lease) with Reliable's predecessor-in-interest, Reliable Wool Stock Corp. *Id.*, ¶ 6; Smith affirmation in opposition, exhibit 1. On January 29, 1997, those parties also executed a first amendment to the lease which

extended the term of 117-119's tenancy through January 31, 2036 (the amendment). *Id.* Earlier, on August 18, 1993, Robinson (117-119's president) had entered into a guaranty agreement (the guaranty) with Reliable's predecessor in interest to personally guaranty 117-119's obligations under the lease. *Id.*; exhibit C, ¶ 6; Smith affirmation in opposition, exhibit 1.

This matter has proceeded on a long and tortious path in the courts spanning years of discovery conferences and orders and twelve motions including the instant motion. The following is a brief synopsis of the history of this matter that is material to the resolution of the motion. On December 12, 2013, Reliable served 117-119 with a notice of termination that recited that 117-119 had committed a number of defaults in its obligations under the lease. Immediately thereafter, on December 16, 2013, 117-119 sought a yellowstone injunction and commenced this action by filing a summons and complaint that set forth causes of action for: 1) a declaratory judgment (that 117-119 is not in violation of the lease, and that the notice of termination is invalid); and 2) attorney's fees. *See* notice of motion, exhibit A. On January 6, 2014, Reliable filed an answer that included counterclaims for: 1) a declaratory judgment (that 117-119 is in violation of the lease); 2) a declaratory judgment (that 117-119 is liable for use and occupancy); 3) a declaratory judgment and permanent injunction (that 117-119 may not hold itself out as the building's owner or landlord); 4) a declaratory judgment and mandatory injunction (that 117-119 must grant Reliable access to the building for duly noticed inspection); and 5) attorney's fees. *Id.*; exhibit B. On February 26, 2014, Reliable commenced the third-party action against Robinson by filing a summons and complaint that set forth causes of action for: 1) a declaratory judgment (that Robinson is liable for 117-119's alleged lease violations); and 2) attorney's fees. *Id.*; exhibit C. On March 1, 2014, Robinson filed a third-party answer that included a

counterclaim for attorney's fees. *Id.*; exhibit D. Discovery was taken, and, at the court's direction, Reliable filed a note of issue for a trial without jury on May 11, 2018. *Id.*; exhibit E. Thereafter, however, on May 16, 2018, counsel for 117-119 and Robinson filed a jury demand. *Id.*; exhibit F.

DISCUSSION

CPLR 4101 provides as follows:

"In the following actions, the issues of fact shall be tried by a jury unless a jury trial is waived or a reference is directed under section 4317, except that equitable defenses and equitable counterclaims shall be tried by the court:

"1. an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only;

"2. an action of ejectment; for dower; for waste; for abatement of and damages for a nuisance; to recover a chattel; or for determination of a claim to real property under article fifteen of the real property actions and proceedings law; and

"3. any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury."

CPLR 4101. It has been held that, where an "action is primarily equitable in nature, and the damages demanded by the plaintiff are merely incidental to his claim for equitable relief, the plaintiff has no right to a jury trial" under CPLR 4101. *Williams v Eason*, 78 AD3d 935, 935 (2d Dept 2010), *citing Ingenuit, Ltd. v Harriff*, 56 AD3d 428, 429 (2d Dept 2008). Here, Reliable argues that the court should strike the instant jury demand because: 1) all of the claims and counterclaims in this action are equitable in nature, and therefore not subject to trial by jury; and 2) pursuant to the terms of the lease and the guaranty, 117-119 and Robinson have waived their rights to a jury trial. *See* notice of motion, Cummings affirmation, ¶¶ 10-23. The court notes that

all of the causes of action and counterclaims that are pled in this action seek either declaratory judgments, injunctions or attorney's fees, and that the former two claims are clearly equitable in nature while the latter one seeks money damages. *Id.*; exhibits A, B, C, D. The court also notes the longstanding Appellate Division precedent regarding CPLR 4101, which holds that:

"By mingling claims for money damages with substantial and independent claims sounding in equity, plaintiffs have effectively waived their right to trial by jury. Inclusion of a demand for money damages in the complaint does not, in and of itself, guarantee entitlement to a jury trial. Rather, it must be determined whether the main thrust of the action is for legal damages or for equitable relief."

Phoenix Garden Rest. v Chu, 234 AD2d 233, 234 (1st Dept 1996) (internal citations omitted); *see also Kaplan v Long Is. Univ.*, 116 AD2d 508 (1st Dept 1986). Here, Reliable argues that the majority of the relief sought in these actions is "indisputably equitable" because it requests determinations of rights and obligations under the lease, the amendment and the guaranty, rather than money damages. *See* notice of motion, Cummings affirmation, ¶¶ 11-19. Reliable also argues that, to the extent that the attorney's fees claims herein seek monetary relief, they are "ancillary to the main relief sought by all parties," and should not vitiate the waiver of the right to a jury trial that is mandated by CPLR 4101. *See* defendant's reply mem at 5-9. Nevertheless, 117-119 and Robinson raise several opposition arguments.

First, 117-119 and Robinson make the procedural argument that Reliable's motion should be denied because its form did not comport with the court's rules; specifically, since Reliable's counsel made his client's legal arguments in the affirmation in support of the motion, rather than submitting a separate memorandum of law. *See* mem of law in opposition, at 3-4. Reliable replies that it has "substantially complied" with the court's rules, and notes that, in the 11 motion sequence numbers which preceded this one, neither party's counsel submitted separate

memoranda of law, but opted instead to include their legal arguments in their respective attorney's affirmations (with no rebuke from the court). *See* reply mem of law, at 10-11. Counsel for Reliable concludes that 117-119 and Robinson had the opportunity to review and respond to his legal arguments in their opposition papers, and that they suffered "no prejudice" from his failure to present those arguments in a memorandum. *Id.* Without intending to abrogate its own rules, the court finds Reliable's position to be persuasive. The two legal arguments set forth in the attorney's affirmation that supports Reliable's motion only cover 13 paragraphs over five pages, and are not so detailed as to require the index, table of contents or table of authorities normally contained in a memorandum of law to make them understandable. Further, the fact that counsel for 117-119 and Robinson made a more detailed response to those arguments in his own opposition memorandum of law demonstrates that his clients clearly suffered no prejudice as a result of opposing counsel's drafting choice. In short, this is a spurious claim. Therefore, the court rejects the first opposition argument.

Next, 117-119 and Robinson argue that they have not "waived the right to a jury trial," because the subject jury waiver clauses are contained in the lease, the amendment and the guaranty, which they executed with Reliable's predecessor in interest, and Reliable itself is not a party to those contracts. *See* mem of law in opposition, at 4-6. Reliable replies that the March 25, 2015 order of this court (Singh, J.) that disposed of motion sequence number 001 in this case contained the specific finding that Reliable *is* the successor in interest to Reliable Wool Stock Corp., the party to the subject contracts. *See* reply mem of law, at 3-4. Reliable also notes that paragraph 28.1 of the lease plainly states that:

"To the extent permitted by law, Lessee [i.e., 117-119] waives: . . . any right to

trial by jury in any action or proceeding or in any matter in any way connected with this lease or the demised premises; . . .”

See notice of motion, exhibit G. Reliable further notes that such lease provisions have long been held to be valid and enforceable. *Id.* Reliable’s statement of the law appears to be correct. See e.g.; *Inwood Gardens, Inc. v Udoh*, 49 Misc 3d 137(A),), 2015 NY Slip Op 51536(U) (App Term, 1st Dept 2015), citing *Teitler v Tetenbaum*, 123 Misc 2d 702 (App Term, 1st Dept 1984). Also, the documents that Reliable presents speak for themselves. It is clear that paragraph 28.1 of 117-119’s lease contains a jury waiver clause that applies to any litigation between 117-119 and Reliable that is “in any way connected with this lease or the demised premises.” 117-119 has not presented any argument as to why that clause should not be applied. As a result, the court determines that the jury waiver clause is applicable as against 117-119, and finds that Reliable’s motion to strike the instant jury demand should be granted as against 117-119. This finding is not applicable as against Robinson, however, who notes that Reliable has not demonstrated that his guaranty also contains a jury waiver clause. As a result, the court’s inquiry continues.

The final opposition argument is that Robinson is entitled to a jury trial because his sole counterclaim for attorney’s fees is “indisputably a legal - not an equitable - counterclaim” which is not subject to the proscription on jury trials set forth in CPLR 4101. See mem of law in opposition, at 11-12. Reliable replies that, even though Robinson’s counterclaim for monetary relief is legal in form, that counterclaim is equitable in nature because it is inextricably tied to the equitable defenses in his third-party answer, all of which CPLR 4101 requires to be tried by the court. See reply mem of law, at 9. Those affirmative defenses allege: 1) failure to state a cause of action; 2) no liability for attorney’s fees; 3) failure to mitigate damages; 4) the doctrines of

waiver and/or unclean hands; 5) no wrongful conduct; 6) the doctrine of equitable estoppel; 7) no remedy at law; and 8) Reliable waived its objections by its tacit acceptance of 117-119's conduct. *See* notice of motion, exhibit D, ¶¶ 6-13. Reliable is correct that these affirmative defenses may all be accurately characterized as equitable in nature. Further, the third-party answer plainly states that Robinson's counterclaim arises out of attorney's fees and other expenses that he incurred "as a result of the commencement of the instant action." *Id.*, exhibit D, ¶¶ 14-15. The court is mindful of the line of First Department case law interpreting CPLR 4101 that recognizes that the statute waives the right to a jury trial of a facially "legal" counterclaim which a plaintiff has joined to equitable defenses or counterclaims arising out of the same acts or transaction. *See e.g. Hudson View II Assoc. v Gooden*, 222 AD2d 163 (1st Dept 1996); *Kaplan v Long Is. Univ.*, 116 AD2d 508 (1st Dept 1986); *Chemical Bank v Summers*, 67 AD2d 856, 856 (1st Dept 1979). Here, it appears that Robinson has based his attorney's fees counterclaim solely on the expenditures that he expects to incur while defending himself against Reliable's third-party action. He has not alleged any separate, contractual basis for his right to collect attorney's fees. As a result, the court concludes that Robinson has joined a facially "legal" counterclaim with equitable affirmative defenses, all of which arose from the same underlying acts. Because such a counterclaim is brought under the "equitable defenses and equitable counterclaims" exception of CPLR 4101 in the First Department, the court finds that Reliable's motion to strike the instant jury demand should be granted as against Robinson as well.

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CONCLUSION

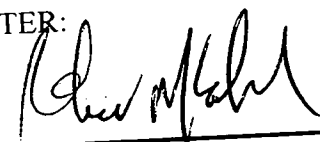
ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 4101 and 4102, of defendant/third-party plaintiff Reliable Wool Stock, LLC (motion sequence number 012) is granted, and jury demand of plaintiff 117-119 Leasing Corp. and third-party defendant Richard Robinson is stricken; and it is further

ORDERED that, within 10 days of the date of the decision and order on this motion, movant shall serve a copy of this order with notice of entry on all parties and on the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M), who are directed to amend their records accordingly.

Dated: New York, New York
November 26, 2018

ENTER:


HON. ROBERT D. KALISH
J.S.C.