

**Brummer v Wey**

2020 NY Slip Op 33560(U)

October 26, 2020

Supreme Court, New York County

Docket Number: 153583/2015

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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CHRISTOPHER BRUMMER,

Index No. 153583/2015

Plaintiff

- against -

DECISION AND ORDER

BENJAMIN WEY, FNL MEDIA LLC, and NYG  
CAPITAL LLC d/b/a NEW YORK GLOBAL  
GROUP,

Defendants

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APPEARANCES:

For Plaintiff

Nicole Gueron Esq.  
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For Defendants Wey and NYG Capital LLC

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LUCY BILLINGS, J.S.C.:

Defendants Wey and NYG Capital LLC move to vacate  
plaintiff's jury demand, striking the action from the jury  
calendar and placing it on the nonjury trial calendar. Plaintiff  
cross-moves for a determination that plaintiff did not waive his  
right to a jury. For the reasons explained below, the court  
grants defendants' motion and denies plaintiff's cross-motion.

While a party is entitled to a trial before a jury on legal claims, equitable claims are tried by the court. Motor Veh. Mfrs. Assn. of U.S. v. State of New York, 75 N.Y.2d 175, 181 (1990); Ambac Assur. Corp. v. Countrywide Home Loans Inc., 179 A.D.3d 518, 522 (1st Dep't 2020). The joinder of claims for equitable and legal relief, arising from the same transaction, waives the right to a jury. Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research, 176 A.D.3d 459, 459 (1st Dep't 2019); Marko v. Korf, 166 A.D.3d 545, 546 (1st Dep't 2018); Security Pac. Natl. Bank v. Evans, 148 A.D.3d 465, 466 (1st Dep't 2017); Willis Re Inc. v. Hudson, 29 A.D.3d 489, 489-90 (1st Dep't 2006). To evaluate whether the right to a jury trial has been waived, the court determines whether the injunctive or other equitable relief sought is more than incidental to the legal damages sought. Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research, 176 A.D.3d at 459; Marko v. Korf, 166 A.D.3d at 546; Wathne Imports, Ltd. v. PRL USA, Inc., 129 A.D.3d 555, 555 (1st Dep't 2015); New Media Holding Co. L.L.C. v. Kagalovsky, 118 A.D.3d 68, 79 (1st Dep't 2014).

Plaintiff's second amended complaint includes two claims for defamation and one claim for intentional infliction of emotional distress. Plaintiff asks the court to issue an injunction

requiring defendants' removal of all their defamatory postings about plaintiff on the internet, as well as to award damages for plaintiff's past injury. Thus, monetary damages alone would not provide plaintiff the full relief that he seeks. Although plaintiff does not separately claim equitable relief, each claim seeks both equitable and legal relief, unambiguously joining claims for both forms of relief arising from the same transaction. Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research, 176 A.D.3d at 459; Marko v. Korf, 166 A.D.3d at 546; Security Pac. Natl. Bank v. Evans, 148 A.D.3d at 466; New Media Holding Co. L.L.C. v. Kagalovsky, 118 A.D.3d at 79.

Plaintiff's requested injunctive relief, specifically the removal of defendants' defamatory postings from 2015 and the prohibition against future defamatory postings, is a principal motivation for this action. Marko v. Korf, 166 A.D.3d at 546; Wathne Imports, Ltd. v. PRL USA, Inc., 129 A.D.3d at 555; New Media Holding Co. L.L.C. v. Kagalovsky, 118 A.D.3d at 79; Giammalvo v. 2170-2178 Broadway, 293 A.D.2d 390, 390 (1st Dep't 2002). Plaintiff is not seeking an injunction just to maintain the status quo. Given his second amended complaint, plaintiff's

attempt to recast the requested injunctive relief as incidental or a "tag along" to his claim for damages is unconvincing.

Willis Re Inc. v. Hudson, 29 A.D.3d at 490. See Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research, 176 A.D.3d at 459; Security Pac. Natl. Bank v. Evans, 148 A.D.3d at 466;.

Plaintiff also proposes a bifurcation of the issues: a determination of defendants' liability and an assessment of damages by a jury, with an injunction issued by the court. This type of bifurcation would be applicable only if plaintiff pleaded exclusively legal claims and defendants pleaded an equitable counterclaim. C.P.L.R. § 4101; Mercantile & Gen. reins. co. v. Colonial Assur. Co., 82 N.Y.2d 248, 252-52 (1993). See Cannon Point N., Inc. v. City of New York, 87 A.D.3d 861, 865 (1st Dep't 2011); Chichilnisky v. Trustees of Columbia Univ. of City of N.Y., 52 A.D.3d 206, 206 (1st Dep't 2008).

Consequently, plaintiff has waived his right to a jury, Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research, 176 A.D.3d at 459; Security Pac. Natl. Bank v. Evans, 148 A.D.3d at 466; Marko v. Korf, 166 A.D.3d at 546; Wathne Imports, Ltd. v. PRL USA, Inc., 129 A.D.3d at 555, requiring the court to grant defendants' motion to vacate plaintiff's jury

demand and deny plaintiff's cross-motion for a determination that plaintiff did not waive his right to a jury. C.P.L.R. § 4102(c).

DATED: October 26, 2020

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.