

Kamal v Hashmat

2022 NY Slip Op 31038(U)

March 30, 2022

Supreme Court, New York County

Docket Number: Index No. 652710/2017

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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IMAN KAMAL,

Plaintiff,

INDEX NO. 652710/2017

MOTION DATE N/A

MOTION SEQ. NO. 010

- v -

BILAL HASHMAT, ALI HASHMAT, MARIAN HASHMAT,
AIZID HASHMAT, HASHMAT FAMILY TRUST, HOWARD
GILL, ESTATE OF HILDA GILL, ANDREW GILL, MARK
GILL, BABU EASOW, V SANDERSON, BABAR RAO, JOHN
MUNEY, TIMOTHY PATCHETT, ESTATE OF ROBERT C.
FRITTS, KABOT PARTNERS, CUREMD.COM, INC.;

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 443, 446, 447, 448

were read on this motion to/for

STRIKE JURY DEMAND

BACKGROUND

Plaintiff has two remaining causes of action in this case, both of which seek a declaratory judgment and are ripe to proceed to trial¹. They are for a declaratory judgment seeking to establish plaintiff is the sole shareholder of CureMD.com Inc. (CMD) or alternatively, if she is not the sole shareholder, to obtain a judicial declaration stating that she is the majority shareholder and identifying the remaining shareholders and their interest.

Plaintiff alleges Kamal Hashmat (KH) was the sole shareholder of the corporation through and including the date of his death in 2014 and that all subsequent issuances of share

¹ A cause of action had also been asserted for a permanent injunction and an accounting, but that was dismissed by the court (Kelly, J) pursuant to a decision and order dated November 16, 2021.

certificates are void. While plaintiff acknowledges that she signed a release in November 2015 agreeing to reduce her stock ownership from 100% to 30.89%, she alleges the release was conditioned upon terms that were never met, and that therefore the release and subsequent issuance of share certificates were invalidated.

PENDING MOTION

On February 25, 2021, plaintiff moved for an order striking defendants' jury demand. For the reasons set forth below, the motion is granted.

ALLEGED FACTS

Plaintiff is the widow of KH, and the administrator of his estate. KH formed CMD on November 22, 1999. KH caused all 200 authorized common shares to be certificated and issued to himself on December 20, 1999. KH was listed on the corporate books and records, tax returns and the stock ledger of CMD as its sole shareholder. During KH's life, certain of his family members, Bilal Hashmat, Aizid Hashmat, M.D., Dr. Hashmat's wife, wife Marian Hashmat, Ali Hashmat (the "Hashmat Defendants") participated in the business of CMD. After KH's death, plaintiff allowed her late husband's family to continue in the business. However, plaintiff alleges she controlled CMD since the Estate was its sole shareholder, and she was the court-appointed administrator of the Estate.

Bilal Hashmat, plaintiff's brother-in-law, and KH's brother, was appointed CMD's Interim Chief Executive Officer just after KH's death. Plaintiff alleges that Bilal Hashmat thereafter took the reins of power and has refused to cede them back. Bilal Hashmat is now in the seventh year of his "interim" appointment. Plaintiff alleges he exercises his power without any lawful authority, and over the objections of plaintiff.

KH's uncle, Dr. Aizid Hashmat, was appointed Chairman of the Board of Directors by plaintiff shortly after KH's death. Dr. Hashmat continues to act as Chairman of the Board over

the objection of plaintiff. KH's aunt, Marian Hashmat was appointed to CMD's Board of Directors by plaintiff after KH. Plaintiff alleges that Marian Hashmat also refuses to cede power and continues to act as a Board member without any authority and over the objection of plaintiff.

In or about 2000, CMD prepared, but did not obtain authorization for, or ever file with the Secretary of State of New York, an Amendment to the Certificate of Incorporation of the CMD to increase the authorized common shares from 200 common shares, par value of \$0.001 per share to 20,000,000 common shares, par value of \$0.001 per share.

Plaintiff retained Morrison Cohen LLP ("M&C") in 2015 to advise her and the Estate. Upon advice of M&C, and to support the ongoing profitable business affairs of CMD, a three (3) person Board of Directors was established by plaintiff, consisting of Iman, Dr. Hashmat and Marian Hashmat. Iman did this under M&C's direction. The Board of Directors then asked M&C to investigate and evaluate claims to shared ownership in CMD. M&C concluded that KH was CMD's sole Shareholder, so that plaintiff became CMD's sole Shareholder upon KH's death.

However, M&C recommended that CMD might consider globally settling and resolving the claims, and recommended a process whereby certain releases, agreements and other documents would be prepared and executed by all alleged shareholders as part of a global settlement, conditioned upon all alleged shareholders executing all of the documents and delivering them to M&C. Plaintiff acknowledged her provisional consent to such a global settlement conditioned upon the execution and delivery of all documentation and on other matters to the satisfaction of the Estate, its counsel, Iman, and M&C.

Had the global settlement been accepted by all participants, and had it been properly and finally documented and implemented, the Estate's stock ownership would have been diluted, but

plaintiff alleges the Estate would still have been CMD's largest shareholder with approximately 30.9% of newly authorized and issued common shares based upon a recapitalization.

Anticipating and expecting the global settlement would be fully implemented, the Board of Directors, on or about September 2015, approved an Amendment to the Certificate of Incorporation which had been drafted in 1999, and directed M&C to file same with the Secretary of State of New York, and it was so duly filed increasing the authorized common shares of the CMD to 20,000,000.

However, plaintiff alleges these shares have never been issued. While certain alleged shareholders executed certain settlement documents, the Hashmat Defendants most notably did not do so. As the global settlement failed, plaintiff alleges all settlement documents including the "General Release" are null and void and of no force or effect.

DISCUSSION

CPLR §4101 provides for a jury trial in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only" or in "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 [1], [3].)

The declaratory judgment action was unknown at the time of the adoption of the 1894 New York Constitution, which limited the right to a jury trial to those types of cases in which it was recognized at common law or by statute as of the adoption of the Constitution. (*See Independent Church of Realization of Word of God v Board of Assessors of Nassau County*, 72 AD2d 554, 554 [2d Dept 1979].) However, the right to trial by jury extends to cases that are analogous to those which were traditionally tried by jury. (*Id.*, citing *Wynehamer v People*, 13 NY 378, 426 [1856] and *Colon v Lisk*, 153 NY 188, 193 [1897].)

All parties herein agree that the right to a jury trial in declaratory judgment actions is determined by the “next-nearest-context” rule. Under that rule, courts ask whether a traditional legal or equitable action would have been used to present the instant claim had the declaratory judgment action never been created. If a legal action would have been used, the litigants will have the right to a jury trial. If an equitable action would have been used, the litigants are not entitled to a jury trial. *Arrow Communication Laboratories, Inc. v. Pico Products, Inc.*, 219 A.D.2d 859 (4th Dept. 1995); *Independent Church of Realization of Word of God v. Board of Assessors of Nassau County*, 72 A.D.2d 554, 555 (2d Dept. 1979) The determination of this issue depends on whether “the underlying claims set forth in the complaint are legal rather than equitable in nature” *Martell v. North Riv. Ins. Co.*, 107 A.D.2d 948, 949 (3d Dept. 1985).

While the parties agree on the standard, they disagree as to which traditional action would have been used instead of the instant declaratory judgment action. Plaintiff asserts that this action involves corporate governance and shareholder rights and is therefore akin to derivative actions which have been held to be equitable in nature and not subject to determination by a jury [*Moyal v. Sleppin*, 139 A.D.3d 605 (1st Dept. 2016)]. Defendants argue that the claims sound in tort and contract and are therefore subject to a trial by jury.

The court agrees with the plaintiff. Plaintiff is neither asserting a breach of contract nor a tort. To the extent that defendants allege that plaintiff’s request would require a determination by the court invalidating the release that was executed, the court agrees that such an action is more akin to rescission, which is also not subject to trial by jury (*Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hospital Center* 59 AD3d 481).

Based on the foregoing, plaintiff’s motion to strike the jury demand is granted.

CONCLUSION

WHEREFORE it is hereby:

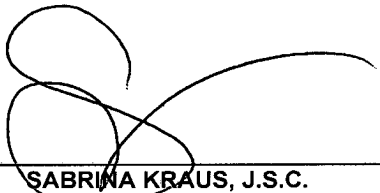
ORDERED that the defendant’s jury demand is stricken and the action shall proceed to a bench trial; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of this court.

3/30/2022
DATE


SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> DENIED	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT