

**Lizard O's Inc v Baha Lounge Corp.**

2022 NY Slip Op 31274(U)

April 13, 2022

Supreme Court, New York County

Docket Number: Index No. 651734/2019

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. NANCY BANNON PART 42**

*Justice*

-----X

LIZARD O'S INC and ANA LIZ,

Plaintiffs,

- v -

BAHA LOUNGE CORP., BAHA LOUNGE URBAN CANTINA  
CORP., TWO LIZARDS MEXICAN GRILL CORP., FAST  
CAPITAL FUNDING, INC., JUAN LIZ, CORP. #1-5, JOHN  
DOE #1-5, JANE DOE #1-5

Defendants.

-----X

**INDEX NO.** 651734/2019

**MOTION DATE** 01/14/2022

**MOTION SEQ. NO.** 006

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff Ana Liz and defendant Juan Liz were married from 1995 through 2014, and were co-shareholders of plaintiff Lizard O's, Inc. and defendant Baha Lounge Corp., which they operated as restaurants. Plaintiff Ana Liz maintains that from 2012 to 2018 Juan Liz caused a substantial portion of the income generated by Lizard O's to be funneled to entities that she did not own, including defendants Two Lizards Mexican Grill Corp. and Fast Capital Funding Inc., and for his own personal expenses. In August 2018, Ana Liz was appointed to act as the temporary receiver of Lizard O's Inc. and Baha Lounge Corp. in a separate matrimonial equitable distribution action. The defendants deny the plaintiffs' allegations and maintain that plaintiff Ana Liz mismanaged and wasted assets of the restaurants.

In their complaint, the plaintiffs allege thirteen causes of action entitled unjust enrichment, breach of contract, breach of fiduciary duty, waste of corporate assets, constructive trust and equitable accounting, and seek money damages as well as injunctive and other equitable relief. The defendants assert counterclaims against plaintiff Ana Liz for unjust enrichment, breach of fiduciary duty, constructive trust and conversion, and also seek money

damages as well as injunctive and other equitable relief. Discovery and extensive motion practice ensued.

In the meantime, in January 2019, defendant Juan Liz and Baha Lounge Corp. had commenced an action in the Supreme Court, Queens County, against Ana Liz and her attorney alleging breach of fiduciary duty, conversion and legal malpractice, arising from Ana Liz' management of the restaurants during 2018 while she was the receiver. That action, *Liz v Liz*, Index No. 702862/2019, is pending.

By an order dated June 22, 2020, this court denied a motion by defendants Juan Liz and Baha Lounge Corp. to dismiss this action pursuant to CPLR 3211(a)(4), prior action pending. Juan Liz and Baha Lounge Corp. also moved to disqualify that attorney from representing the plaintiffs in this action, which motion was denied in an order dated December 21, 2020.

The defendants now move pursuant to CPLR 3212 for summary judgment dismissing the entire complaint or, in the alternative, to strike the plaintiffs' jury demand that was included in the Note of Issue filed June 14, 2021. The plaintiffs oppose the motion. The motion is granted to the extent that the jury demand is stricken.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See *Alvarez v Prospect Hospital*, supra; *Zuckerman v City of New York*, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see *Alvarez v Prospect Hospital*, supra; *Zuckerman v City of New York*, supra; *O'Halloran v City of New York*, 78 AD3d 536 [1<sup>st</sup> Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *O'Halloran v City of New York*, supra). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." *Bronx-Lebanon Hosp. Ctr. v*

Mount Eden Ctr., 161 AD2d at 480 (1<sup>st</sup> Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2<sup>nd</sup> Dept. 1970).

The defendants have failed to meet their burden on the motion in the first instance. In support of the motion, they submit, *inter alia*, the pleadings, deposition transcripts, various documents and an affidavit of defendant Juan Liz. However, their papers fall far short of demonstrating the absence of any material, triable issue of fact. Rather, the papers present disputed and triable issues, such as whether and to what extent defendant Juan Liz diverted money from Lizard O's Inc. and Baha Lounge Corp. to other businesses or to his own personal use, and whether Ana Liz mismanaged the restaurants and wasted assets while she was acting as receiver for the businesses. Indeed, the same issues are raised by the defendants' counterclaims, on which they do not seek summary judgment. The affidavit of Juan Liz offers little factual support for the relief requested. Nor are the legal arguments in the defendants' Memorandum of Law persuasive. The court notes that much of the defendants' argument centers on Ana Liz's criminal history while failing to mention Juan Liz's own criminal history. To the extent that the defendants are arguing that plaintiffs' claims are precluded by the parties' 2018 Dominican divorce judgment, which appears to distribute some of the parties' marital property, they also admit that neither party included any New York assets in that proceeding. Nor have the defendants demonstrated, on the papers submitted, that the plaintiffs' present claims are precluded by any prior action in New York.

The court further notes that the defendants failed to submit a Statement of Material Facts, as required, and only did so when the plaintiffs pointed out the omission in their opposition papers. The defendants then did so in reply, but the allegations made do not support the granting of summary judgment in their favor. However, the defendants are entitled to the alternative relief of striking of the plaintiffs' jury demand.

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." A plaintiff is not entitled to a jury trial on claims that are equitable in nature. See Moyal v Sleppin, 139 AD3d 605 (1<sup>st</sup> Dept. 2016); Mulder v Donaldson, Lufkin & Jenrette, 261 AD2d 134 (1<sup>st</sup> Dept. 1999); Centrifugal Assocs., Inc. v Highland Metal Indust., Inc., 224 AD2d 254(1<sup>st</sup> Dep. 1996). Furthermore "[u]nder established principles, the joinder of claims for legal and equitable relief

amounts to a waiver of the right to demand a jury trial.” Kaplan v Long Island Univ., 116 AD2d 508, 509 (1<sup>st</sup> Dept. 1986); see Aroch v 391 Broadway LLC, \_\_ AD3d \_\_ 2022 N.Y. Slip op. 02187 (1<sup>st</sup> Dept. March 31, 2022); Chichilnisky v Trustees of Columbia Univ., 52 AD3d 206 (1<sup>st</sup> Dept. 2008). Here, the plaintiffs are seeking both legal and equitable relief, and the defendants are also seeking both legal and equitable relief in their counterclaims. “By mingling claims for money damages with substantial and independent claims sounding in equity, plaintiffs have effectively waived their right to a trial by jury.” Phoenix Garden Rest., Inc. v Chu, 234 AD2d 233, 234 (1<sup>st</sup> Dept. 1996). The plaintiffs offer no cogent opposition to this relief.

The court has considered and rejected the defendants’ remaining arguments. The defendants also seek relief under CPLR 3211(a)(7) in this motion. However, the defendant failed to include that ground in their prior motion to dismiss, which was denied by order dated June 22, 2020. Any relief not expressly granted herein is denied.

The parties are encouraged to explore settlement. They shall promptly comply in full with this court’s order dated December 9, 2021, referring this matter to the court’s Commercial ADR Program. Failure to do so may result in sanctions, as set forth in that order.

Accordingly, and upon the foregoing papers, it is

ORDERED that the defendant’s motion is granted to the extent that the plaintiff’s demand for a jury trial is stricken, and the motion is otherwise denied, and it is further

ORDERED that the Clerk shall mark the files accordingly.

This constitutes the Decision and Order of the court.

4/13/2022  
DATE

  
\_\_\_\_\_  
NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART