

**Hess v PA Bldrs., Inc.**

2025 NY Slip Op 34494(U)

November 24, 2025

Supreme Court, New York County

Docket Number: Index No. 451934/2022

Judge: James G. Clynnes

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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. JAMES G. CLYNES PART 39M

Justice

-----X

JUDITH HESS a/k/a JUDE HESS and JUDE HESS FINE ARTS, LLC

Plaintiffs,

- v -

PA BUILDERS, INC.,

Defendant.

-----X

PA BUILDERS, INC.,

Plaintiff,

-against-

JUDITH HESS a/k/a JUDE HESS and "JOHN DOE 1" THROUGH "JOHN DOE 10" (SAME BEING FICTITIOUS NAMES REPRESENTING ANYONE WHO MAY POSSESS, OR CLAIM TO POSSESS, A LIEN OR INTEREST IN THE PREMISES)

Defendants.

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INDEX NO. 451934/2022

MOTION DATE 07/22/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Index No. 152218/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 100, 101, 102, 103, 104

were read on this motion to/for STRIKE JURY DEMAND

Plaintiffs and counterclaim-defendants Judith Hess a/k/a Jude Hess and Jude Hess Fine Arts, LLC ("Hess") move for an order striking defendant PA Builders, Inc.'s ("PA Builders") demand for trial by jury. The motion is opposed. For the following reasons, the motion is denied.

I. Factual Background and Procedural History

This breach of contract action arises from a written contract entered on July 2, 2021, between Hess and PA Builders for certain renovations and improvements to her apartment located at 139 Spring Street, Apt. 7A, New York, New York. Hess commenced the instant action by filing

the summons and complaint on February 22, 2022 (“Action 1”), alleging a cause of action for breach of contract (NY St Cts Elec Filing [NYSCEF] Doc No. 1, Complaint). On March 14, 2022, PA Builders joined issue by filing its answer with counterclaims for breach of contract (NYSCEF Doc No. 24, Answer ¶¶ 56-61), quantum meruit (*id.* ¶¶ 62-67), unjust enrichment (*id.* ¶¶ 68-74), and account stated (*id.* ¶¶ 75-80). On the same day, PA Builders commenced an action entitled *PA Builders Inc. v Jess Hess* in Supreme Court, Westchester County under Index No. 56745/2022 (“Action 2”) alleging a cause of action for foreclosure of mechanic’s lien (NYSCEF Doc No. 28, Complaint). Simultaneously, PA Builders filed a demand to change venue in the instant action (NYSCEF Doc No. 29). Thereafter, PA Builders moved to consolidate Action 2 with Action 1, and to change the place of trial of the consolidated actions to Supreme Court, New York County pursuant to CPLR 511. Pursuant to the decision and order dated June 23, 2022, Justice William J. Giacomo, granted PA Builder’s motion and joined Action 2 with Action 1 to the extent for joined discovery and trial with separate verdicts, separate judgments, and separate costs (NYSCEF Doc No. 67, June 23 Decision). On March 19, 2024, Hess filed a Note of Issue for a trial without jury (NYSCEF Doc No. 92), and PA Builders filed a demand for a jury trial (NYSCEF Doc No. 94).

## II. Parties’ Contentions

In support of their motion, Hess contends that PA Builders is not entitled to a jury trial because it has asserted both equitable and legal claims (NYSCEF Doc No. 101, Memorandum of Law in Support of Helene R. Hechtkopf, Esq. [memo] at 2). Hess argues that PA Builders’ claims for foreclosure of a mechanic’s lien, quantum meruit, and unjust enrichment are equitable claims, and has waived it’s right to a jury trial (*id.* at 2-3). Hess further argues that PA Builders waived its right to a jury trial by consolidating Action 1 and Action 2, where PA Builders asserted equitable counterclaims (*id.* at 3-4).

In opposition, PA Builder first argues that its quasi-contract claims of quantum meruit, and unjust enrichment are legal in nature, and triable by a jury (NYSCEF Doc No. 103, Memorandum of Law in Opposition of Douglas J. Lutz, Esq. [opp] at 6-8). It claims that in Action 1, it only asserted contractual theory causes of action for breach of contract, quantum meruit, unjust

enrichment and account stated, arising from the contract dispute between the parties, and in Action 2, it alleged a cause of action for mechanic's lien foreclosure (*id.* at 9). PA Builder further argues that Hess failed to cite any caselaw that states a plaintiff, or a counterclaim-defendant waives its right to a jury trial when it asserts quasi-contract claims or counterclaims in addition to its breach of contract claim or counterclaim in a contract dispute action (*id.*). Second, PA Builder claims that its lien foreclosure claim in Action 2 was joined for the purposes of discovery and trial, but not consolidated with Action 1, and therefore, it did not waive its entitlement to a jury trial in Action 1 (*id.* at 11-14).

In reply, Hess avers PA Builder concedes that its claim for foreclosure on a mechanic's lien is an equitable claim not eligible for a trial by jury (NYSCEF Doc No. 104, Memorandum of Law in Reply of Helne R. Hechtkopf, Esq. [reply] at 2). Hess further argues that the June 23 Decision provides little insight into the reasoning that guided the court's decision not to order consolidation in either venue despite finding that both actions arise out of the same contract, concerned the same parties, and involved common questions and law and fact (*id.*).

### III. Discussion

The First Department has held that “[w]here [a] plaintiff brings a claim triable by jury and the defendant asserts a related counterclaim not triable by jury, defendant thereby waives a jury trial in all respects, including on the main claim” (*Cannon Point N. Inc. v City of New York*, 87 AD3d 861, 865 [1st Dept 2011], quoting *Hudson View II Assoc. v Gooden*, 222 AD2d 163, 167 [1st Dept 1996]). Waiver may be inapplicable if the defendant's equitable counterclaims are merely incidental to its claims for damages (*see Cadwalader Wickersham & Taft v Spinale*, 177 AD2d 315, 316 [1st Dept 1991] [“The question, however, is not whether an equitable counterclaim exists but whether, when viewed in its entirety, the primary character of the case is legal or equitable”]). “Generally, the determinant as to whether a claim is at law or at equity is the nature of the relief which under the facts, could fairly compensate the party bringing the claim ... If money damages alone could achieve that end, the action is generally at law” (*see Hudson View II Assoc.*, 222 AD2d at 168 [citations omitted]). Where money damages alone afford a full and

complete remedy, the action sounds in law and may be tried by a jury (*see Cadwalader Wickersham & Taft*, 177 AD2d at 316). In analyzing these cases, courts must first determine whether the main thrust of the action is for legal damages or for equitable relief (*see Matter of Unity Corp. v New York Guangdong Fin. Inc.*, 203 AD3d 498, 499 [1st Dept 2022]).

In this case, PA Builders is seeking only money damages on the theory of quantum meruit, as compensation for the services rendered (*see* NYSCEF Doc No. 24 ¶¶ 62-67). Likewise, the third counterclaim for recovery on unjust enrichment is legal in nature, as the claim only seeks an award for monetary damages (*see Miller v Epstein*, 293 AD2d 282, 282 [1st Dept 2002]). Similarly, the fourth counterclaim for account stated is primarily a demand for money, and the accounting is merely a method to determine the amount in monetary damages, making the action in law and not in equity (*see Cadwalader Wickersham & Taft*, 177 AD2d at 316.). Since PA Builders' counterclaims are not equitable within the contemplation of CPLR 4101, PA Builders, by asserting its counterclaims, has not waived its right to a jury trial on the legal claims (*Hudson View II Assocs.*, 222 AD2d at 168).

PA Builders did not waive its right to a jury trial by asserting an equitable claim in Action 2. This Court is not persuaded that the two actions are “inextricably intertwined” by Justice Giacamo’s decision. Consolidation differs from joinder of trial and discovery. Under a consolidation order, the actions “[a]re merged into a single action to be disposed of by a single decision or verdict, in the case of a jury trial, and a single judgment with one bill of costs; the new title is one which merges all the litigants into one group of plaintiffs and one group of defendants” (*Padilla v Greyhound Lines*, 29 AD2d 495, 497 [1st Dept 1968]). On the other hand, “[a] joint trial preserves the integrity of the several actions, requires a separate decision or verdict, as the case may be, and several judgments, with the costs of the particular action in each case” (*id.*). In his decision, Justice Giacamo ordered a joint discovery and trial on both actions, but separate verdicts, judgments and costs, and he clearly stated that “[a] joint trial preserves the integrity of the separate actions, requires a separate decision or verdict, and judgments ...” (*see* NYSCEF Doc No. 67). Even if the claims are considered joint, PA Builders is entitled to a jury trial (*see Stokes v Johnston*,

138 AD2d 481, 482 [2d Dept 1988] [responding to a defendant’s request for a jury trial, holding that an action joining claims for a foreclosure on a mechanic’s lien and breach of contract is properly before a jury]). The Court is free to decide the equitable claims while submitting the legal claims to a jury, or submit all claims, to the jury and simply treat the jury’s determination on the equitable claims as advisory (see *Le Bel v Donovan*, 96 AD3d 415, 416-17 [1st Dept 2012]).


The Court has considered Hess’ remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that plaintiffs’ motion for an order to strike defendant’s trial by jury demand is denied.

This constitutes the Decision and Order of the Court.

11/24/2025  
DATE

  
JAMES G. CLYNES, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE