

**Schottenstein v Windsor Tov LLC**

2014 NY Slip Op 30803(U)

March 20, 2014

Sup Ct, New York County

Docket Number: 600661/2007

Judge: Shlomo S. Hagler

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

Present: Hon. Shlomo S. Hagler  
*Justice*

IAS Part: 17

**SARAH SCHOTTENSTEIN,**

**Plaintiff,**

**- against -**

**INDEX NO.: 600661/2007**

**Motion Sequence No: 018**

**WINDSOR TOV LLC, BELLMARC PROPERTY  
MANAGEMENT SERVICES, INC., DOUGLAS  
ELLIMAN, LLC, and BOARD OF MANAGERS OF  
WINDSOR PARK CONDOMINIUM,**

**DECISION and ORDER**

**Defendants.**

**FILED**

Motion by defendant Windsor Tov LLC to strike plaintiff's jury demand.

APR 01 2014

Papers  
Numbered

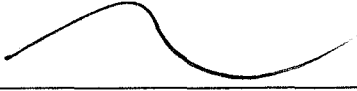
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**NEW YORK  
COUNTY CLERK'S OFFICE**

Cross-Motion:  No  Yes Number of Cross-Motions: 0

**Upon the foregoing papers, it is hereby ordered that this Motion is granted as set forth in the attached separate written Decision and Order and the Clerk is directed to strike plaintiff's Jury Demand.**

Dated: March 20, 2014  
New York, New York

  
Hon. Shlomo S. Hagler, J.S.C.

Check one:  **Final Disposition**  **Non-Final Disposition**

Disposition is:  **Granted**  **Denied**  **Granted in Part**  **Other**

Check if Appropriate:  **SETTLE ORDER**  **SUBMIT ORDER**  **REFERENCE**

**DO NOT POST**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS Part 17**

SARAH SCHOTTENSTEIN,

**Plaintiff,**

- against -

**WINDSOR TOV LLC, BELLMARC PROPERTY  
MANAGEMENT SERVICES, INC.,  
DOUGLAS ELLIMAN, LLC, and  
BOARD OF MANAGERS OF WINDSOR PARK  
CONDOMINIUM,**

**Defendants.**

**Index No.: 600661/2007**

**Motion Sequence Numbers  
018 and 021**

**DECISION & ORDER**

**FILED**

**APR 01 2014**

HON. SHLOMO S. HAGLER, J.S.C.

**NEW YORK  
COUNTY CLERKS OFFICE**

In motion sequence number 018, defendant Windsor Tov LLC (“Windsor Tov” or “Sponsor”) moves to strike plaintiff Sarah Schottenstein’s (“Schottenstein” or “plaintiff”) request for a jury trial. In motion sequence number 021, defendant Board of Managers of Windsor Park Condominium (“Board of Managers”), moves by Order to Show Cause to strike plaintiff’s request for a jury trial. Bellmarc Property Management Services, Inc. (“Bellmarc”), also cross-moves in motion sequence number 021, to strike plaintiff’s jury demand. Plaintiff opposes Windsor Tov’s motion, the Board of Managers’ Order to Show Cause, and Bellmarc’s cross-motion on substantive grounds. Motion sequence numbers 018 and 021, along with the cross-motion to motion sequence number 021, are hereby consolidated for disposition. For the reasons discussed below, Windsor Tov’s motion, the Board of Managers’ Order to Show Cause and Bellmarc’s cross-motion are granted.

### Factual and Procedural Background

On or about August 8, 2005, plaintiff and defendant Windsor Tov entered into a purchase agreement ("Purchase Agreement") for the purchase of condominium Unit 2C ("the Unit") of the building located at 100 West 58th Street, New York, New York 10019 ("the Building"), at a purchase price of \$1,646,000.00. Windsor Tov was the condominium sponsor and defendant Bellmarc is the building manager but was not a signatory to the Purchase Agreement. The Purchase Agreement incorporated by reference the Offering Plan for the condominium, and included a clause waiving the parties' right to a trial by jury in any litigation arising out of, connected with, or relating to the Purchase Agreement or the relationship created by the Purchasing Agreement or the Offering Plan.

Plaintiff alleges that the Sponsor prevented her from inspecting the Unit prior to purchasing it, and shortly before the parties' scheduled closing date, Windsor Tov expressed to Plaintiff that the Unit was not sufficiently complete for a walk through. The parties closed on the Unit on March 27, 2006. After plaintiff took possession of the Unit, she alleges that she observed numerous defects, including leaks into the Unit, inconsistent with the Offering Plan and the by-laws by which the condominium was governed. Plaintiff retained an environmental inspection company, RTP Environmental Associates, Inc. ("RTP"), to conduct a microbiological indoor air quality assessment of the Unit. RTP concluded that the entire Unit required mold remediation. Plaintiff purportedly notified the defendants of the defects.

Plaintiff alleges defendants were required to disclose and remedy the defective condition of the Unit, that they have failed to do so and, that as a result of defendants' inaction, the Unit is uninhabitable. Plaintiff filed an initial summons and complaint on or about March 2, 2007. Plaintiff

then filed a second supplemental and amended complaint on or about May 9, 2008, alleging breach of contract, breach of express warranty, and fraud, and also sought rescission of the sale of the Unit, an injunction directing defendants to repair defects in the Unit and in the building, and an accounting of the finances of the condominium. Plaintiff filed a note of issue containing a demand for trial by jury on or about March 30, 2007, pursuant to New York Civil Practice and Rules (“CPLR”) §4102. On or about August 3, 2012, Windsor Tov filed motion sequence number 018 to strike plaintiff’s request for a jury trial. The Board of Managers filed its Order to Show Cause to strike plaintiff’s jury demand, motion sequence number 021, on or about March 7, 2013., which was signed by this Court on March 11, 2013. Bellmarc filed its cross-motion to strike plaintiff’s request for a jury trial on or about March 27, 2013.

### **Discussion**

In her complaint, plaintiff seeks both legal relief for damages for breach of contract, breach of the warranty of habitability, and fraud, as well as equitable relief seeking rescission of the sale of the Unit,<sup>1</sup> an injunction directing defendants to repair defects in the Unit and in the building,<sup>2</sup> and an accounting of the finances of the condominium.<sup>3</sup>

To the extent that plaintiff seeks damages stemming from the alleged breach of contract, plaintiff necessarily affirmed the existence of the contract on which she is suing and thus is bound

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1. In her fourth cause of action, plaintiff acknowledged that her request for rescission is not a remedy in law (Plaintiff’s Second Supplemental and Amended Complaint at ¶¶ 61 and 62, attached as Exhibit “A” to defendant Windsor Tov’s Motion).

2. See Plaintiff’s Second Supplemental and Amended Complaint’s sixth cause of action at ¶ 75, attached as Exhibit “A” to defendant Windsor Tov’s Motion.

3. See Plaintiff’s Second Supplemental and Amended Complaint’s seventh cause of action at ¶¶ 76-82, attached as Exhibit “A” to defendant Windsor Tov’s Motion.

by the jury waiver provision in the contract (*Paralegal Institute, Inc. v Big Sol Mfg. Co., Inc.*, 190 AD2d 595, 596 [1st Dept 1993] [“plaintiff had waived its right to a jury trial by virtue of the mutual waiver clause in paragraph 26 of the parties’ lease . . . and by joining claims for equitable and legal relief arising out of the same transaction” (*internal citations omitted*)]; *Sherry Associates v Sherry-Netherland, Inc.*, 273 AD2d 14, 15 [1st Dept 2000] [“Plaintiffs waived their right to a jury trial with respect to claims arising under the 1996 proprietary lease, pursuant to the express waiver clause of that agreement . . . Moreover, plaintiffs ‘may not at the same time rely upon the lease as the foundation for their claim for damages and repudiate the provisions by which they waived their constitutional right to a jury trial’ ”]; *Leav v. Weitzner*, 268 AD 466, 468 [1st Dept 1944]). To the extent that plaintiff is suing under the contract for its breach, plaintiff is also bound by the contract’s jury waiver clause (*Leav*, 268 A.D. at 468).

In addition, plaintiff is seeking equitable relief in her complaint by seeking rescission of the Purchase Agreement, an injunction and an accounting of the finances of the condominium. Claims for equitable relief are not entitled to trial by jury. In *Homburger v Levitin*, 140 AD2d 583, 584 (2d Dept 1988) appeal denied 73 NY2d 701 (1988), which involved a claim for an accounting, the Appellate Division held that “[i]t is well established that where a plaintiff’s complaint states an action in equity, it is triable by the court without a jury, and the defendant, as a matter of law is not entitled to a trial by jury” (citing *Phoenix Mut. Life Ins. Co. v Conway*, 11 NY2d 367 [1962], an action which dealt with the rescission of an life insurance contract). (*See also, Downtown Art Co. v Zimmerman*, 227 AD2d 226 [1st Dept 1996] [plaintiff seeking injunction]; *Ingenuit, Ltd. v Harriff*, 56 AD3d 428, 428-429 [2d Dept 2008] [where the main relief sought by plaintiffs is an injunction, the primary character of the case is equitable and there is no right to a jury trial]).

Furthermore, plaintiff has joined claims in law and equity that arose out of the same transaction, *i.e.*, her purchase of the condominium Unit, and thus waived her right to a jury trial. (*Horizon Asset Management, LLC v. Duffy*, 106 AD3d 594 , 595 [1st Dept 2013]; *Willis Re Inc. v Hudson*, 29 AD3d 489, 489 [1st Dept 2006]; *Epstein v Paganne Ltd.*, 39 AD2d 855 [1st Dept 1972]).

In opposing the motions and cross-motion to strike her request for a jury trial, plaintiff offered *Lex Tenants Corp v. Gramercy N. Assoc.*, 284 AD2d 278 (1st Dept 2001) as evidence that joining equitable claims with legal claims need not necessarily result in a waiver of the right to a jury trial. However, the proposition for which *Lex Tenants* stands is inapplicable to the facts of the case at bar. The court therein noted that the primary character of the first 14 causes of action, all of which related only to the offering plan was legal in nature, the two claims for an accounting was deemed legal because it was sought solely to determine the amount of money damages necessary to fully recompense plaintiff, and the claim for rescission in that case stemmed from a separate transaction. However, in the instant case, plaintiff has asserted essentially an equal number of legal and equitable claims, the demand for an accounting does not seek to determine the amount of plaintiff's damages, and her claim for rescission arises from the same conduct as her legal claims. Finally, as pointed out by counsel for Windsor Tov in his reply affirmation, *Lex Tenants Corp.* did not involve a jury waiver clause in its contract (Reply Affirmation of Eric S. Horowitz in Further Support of Defendant Windsor Tov's Motion to Strike Plaintiff's Request for a Jury Trial, with Exhibits "E" through "G"). Therefore *Lex Tenants Corp.* is inapplicable to the case at bar.

In the cases cited by plaintiff regarding fraud in the inducement of the contract, the jury waiver clause in the contract was not applicable because the parties elected to rescind the contract.

However, these cases did not discuss the fact that rescission of the contract is an equitable remedy, which as discussed above, does not give rise to a trial by jury. Furthermore, to the extent that plaintiff has raised the issue of fraud in her fourth cause of action, she is seeking monetary damages under the contract, which would, therefore, still trigger the jury waiver clause.

Since plaintiff's equitable claims for rescission, injunctive relief and an accounting are not entitled to a trial by jury and plaintiff's legal claims for breach of contract, breach of the warranty of habitability and fraud are all based on the contract, which includes the jury waiver clause, plaintiff's jury demand cannot be sustained.

### Conclusion

Accordingly, for the reasons stated above, it is hereby

ORDERED that the motion by Windsor Tov (under motion sequence number 018), the Order to Show Cause by the Board of Managers of Windsor Park Condominium and the cross-motion by Bellmarc Property Management Services, Inc. (under motion sequence number 021) to strike plaintiff Sarah Schottenstein's request for a jury trial is granted, and it is further

ORDERED that the Clerk shall strike plaintiff's demand for a jury trial.

The foregoing constitutes the decision and order of this Court.


**FILED**

APR 01 2014

ENTER:

NEW YORK

Dated: March 20, 2014 COUNTY CLERK'S OFFICE  
New York, New York

  
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Hon. Shlomo S. Hagler, J.S.C.