

**Long Island Med. Anesthesiology, P.C. v Long
Island Med. & Gastroenterology Assoc., P.C.**

2018 NY Slip Op 33522(U)

July 9, 2018

Supreme Court, Nassau County

Docket Number: 600098-17

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

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**LONG ISLAND MEDICAL ANESTHESIOLOGY, P.C.
and RICHARD GABAY, M.D., individually, and on
behalf of MOCHA REALTY ASSOCIATES, LLC and
DAY OP OF NORTH NASSAU, INC.,**

TRIAL/IAS PART: 11

NASSAU COUNTY

Index No. 600098-17

Motion Seq. No. 1

Submission Date: 6/25/18

Plaintiffs,

-against-

**LONG ISLAND MEDICAL & GASTROENTEROLOGY
ASSOCIATES, P.C., JAY G. MERKER, M.D.,
STEWART A. ROBBINS, M.D. and
NATHAN D. SCHULMAN, M.D.,**

Defendants.

-----X
Papers Read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Reply Affirmation in Further Support.....X**

This matter is before the court on the motion by movants Long Island Medical & Gastroenterology Associates, P.C. ("LIMGA"), Jay G. Merker, M.D., Stewart A. Robbins, M.D. and Nathan D. Schulman, M.D. ("Movants") to strike three (3) jury demands filed by Long Island Medical Anesthesia, P.C. ("LIMA") and Dr. Richard Gabay ("Gabay"),¹ specifically:

¹ Counsel for Movants affirms that, for the sake of convenience, he refers to LIMA and Gabay as the "Plaintiffs" even though they are not identified as plaintiffs in the caption of Action #1 (Zinner Aff. in Supp. at n. 1).

1) the Note of Issue dated May 4, 2018 in the action titled *Long Island Medical & Gastroenterology Associates, P.C. and Jay G. Merker, M.D. v. Mocha Realty Associates, LLC and Richard Gabay, M.D.*, Index No. 604173-14 (“Action #1”) (Ex. A to Zinner Aff. in Supp.), 2) the Note of Issue dated April 20, 2018 in the action titled *Long Island Medical Anesthesiology, P.C. and Richard Gabay, M.D., individually and on behalf of Mocha Realty Associates, LLC and Day Op of North Nassau, Inc. v. Long Island Medical & Gastroenterology Associates, P.C., Jay G. Merker, M.D., Stewart A. Robbins, M.D. and Nathan D. Schulman, M.D.*, Index No. 604894-14 (“Action #2”) (Ex. B to Zinner Aff. in Supp.), and 3) the Note of Issue dated April 20, 2018 in the above-captioned action, Index # 600098-17 (“Instant Action” or “Action #6”) (Ex. C to Zinner Aff. in Supp.). These actions (“Actions”) have been joined for trial scheduled for November 5, 2018. For the reasons set forth below, the Court grants the motion.²

BACKGROUND

A. Relief Sought

Movants move for an Order, pursuant to CPLR §§ 4101 and 4102, striking the jury demands filed in the three (3) Actions.

Plaintiffs oppose the motion.

B. The Parties’ History

The parties’ history is set forth in prior decisions of the Court regarding these Actions and the Court incorporates those prior decisions by reference as if set forth in full herein. As noted in the prior decisions, the parties’ disputes involve several issues, including the propriety of the termination of Gabay and which lease governs the relationship between the parties concerning LIMGA’s occupancy of the medical building at issue which is located in Great Neck, New York. In support of the motion now before the Court, counsel for Movants (“Movants’ Counsel”) affirms that this litigation involves the breakdown of a business relationship between Drs. Merker, Schulman and Robbins, who are gastroenterologists, and Dr. Gabay, who is an anesthesiologist. This litigation followed the termination of an exclusivity agreement (“Exclusivity Agreement”) pursuant to which LIMA, Gabay’s entity, had the exclusive right to perform anesthesiology procedures at the offices of Day Op of North Nassau, Inc. (“Day Op”), an

² The Court has issued separate decisions in Action #1 and Action #2 in which the Court has also granted the motion to strike the jury demands filed in those Actions.

entity then owned equally by the four doctors. Simultaneously with the termination of the Exclusivity Agreement, Gabay was removed as an officer and director of Day Op, based on the termination of the Exclusivity Agreement and other conduct. This further required Gabay's ownership interest in Day Op to be redeemed according to a valuation methodology set forth in Day Op's shareholder agreement. Movants' Counsel affirms that the issue of whether Gabay's removal as an officer and director, and subsequently as a shareholder, of Day Op was proper is also in dispute. Based primarily on these issues, Plaintiffs have alleged numerous legal claims seeking monetary damages of not less than \$2.5 million for causes of action including breach of the Exclusivity Agreement, breach of duty, breach of the lease, conversion, breach of fiduciary duty and corporate waste.

Movants' Counsel affirms that, in addition to the legal claims asserted, Plaintiffs have also pleaded ten (10) equitable claims in the Actions, including requests for injunctive relief and receivership, demands for an accounting, declaratory judgment and judicial dissolution. Movants' Counsel submits that Plaintiffs have asserted the following equitable claims in the Actions which preclude a jury:

Action #1 - In their Answer and Counterclaim (Ex. D to Zinner Aff. in Supp.), Mocha alleges that it is entitled to a judgment declaring that the LIMGA 2008 Lease is terminated, and awarding possession of the LIMGA Office Space to Mocha (Ex. D at ¶ 31) and Mocha and Gabay demand judgment *inter alia* declaring the LIMGA 2008 Lease to govern and control the terms of LIMGA's use and occupancy of the demised premises and declaring LIMGA to be in default of the LIMGA 2008 Lease, and terminating the LIMGA 2008 Lease (Ex. D at Wherefore clause subs. b and c);

Action #2 - In their Verified Complaint (Ex. E to Zinner Aff. in Supp.), Plaintiffs have asserted the following equitable claims: 1) LIMA's request for an order enjoining and restraining defendants from employing or otherwise utilizing the services of any anesthesiology group, physician or provider other than LIMA (Ex. E at ¶ 42); 2) Mocha's request for an order enjoining and restraining LIMGA from the alleged violations of the 2008 LIMGA Lease (Ex. E at ¶ 79); 3) Mocha and LIMA's request for an order

enjoining and restraining LIMGA's unauthorized uses of the LIMGA Office Space (Ex. E at Wherefore clause sub. d); 4) a request for the appointment of a receiver to preserve Day Op's property, ensure that it carries on its business, and to protect the interests of its shareholders (Ex. E at ¶ 101) and a request for the appointment of a receiver to preserve Mocha's property, ensure that it carries on its business, and to protect the interests of its members (Ex. E at ¶ 113); and 5) a request for the "completion of an accounting as to Mocha's finances" (Ex. E at Wherefore clause sub. G);

Action #6 - In their Verified Complaint (Ex. F to Zinner Aff. in Supp.), Plaintiffs have asserted the following equitable claims: 1) a request for a judgment declaring that the Day Op Resolution is null and void and of no effect, that there was no basis for termination of the Exclusivity Agreement and that there was no valid termination of the Exclusivity Agreement (Ex. F at ¶¶ 123-125); 2) a request for dissolution of Day Op pursuant to BCL § 1104-a or, in the alternative, granting Gabay payment of fair value of his shares (Ex. F at ¶¶ 163, 164); 3) a request for a judgment declaring that the Mocha Resolution is null and void and of no effect (Ex. F at ¶ 172); and 4) a request for a judgment dissolving Mocha or, in the alternative, granting Gabay payment of fair value for his membership interest (Ex. F at ¶ 184).

Movants' Counsel submits that the claims for injunctive relief and receivership are "quintessential" equitable claims (Zinner Aff. in Supp. at ¶ 11) which operate to waive Plaintiffs' right to a jury trial. Movants' Counsel also cites legal authority holding that causes of action for accounting and dissolution are equitable in nature (*see* Zinner Aff. in Supp. at ¶ 12). Movants' Counsel contends, further, that the declaratory judgments sought by Plaintiffs are effectively requests for mandatory injunctions, including Plaintiffs' request that the resolution removing Gabay as an officer and director of Day Op be declared void. Thus, Movants contend, Plaintiffs' requests for declaratory judgments also seek equitable relief. Movants submit that, as Plaintiffs have joined both legal and equitable claims, and those claims relate to the same transaction, Plaintiffs have waived their right to a jury trial.

In opposition to the motion, counsel for Plaintiffs (“Plaintiffs’ Counsel”) submits that Movants have selectively focused on Plaintiffs’ claims for equitable relief in arguing that Plaintiffs are not entitled to a jury trial. With respect to their request for a declaratory judgment declaring the Day Op Resolution null and avoid, and the dissolution of Day Op and Mocha, Plaintiffs submit that, as the Court has already determined that Plaintiffs’ services cannot be restored at the premises due to concerns regarding patient’s rights, “the only relief that can possibly make Plaintiffs whole” with respect to the Day Op Resolution is monetary damages (Bock Aff. in Opp. at ¶ 20). Plaintiffs contend, further, that because Defendants have been operating the center and the premises for the past 4 years and can continue to operate going forward upon proper payment to Plaintiffs, Plaintiffs “can be made whole monetarily” (*id.* at ¶ 22) for any waste that has occurred involving Day Op and Mocha, and the value of Plaintiffs’ interests, without dissolution. Under these circumstances, Plaintiffs submit, Plaintiffs’ claims in the Instant Action are claims for money damages, which are triable by a jury.

In reply, Movants’ Counsel submits that the opposition is premised on “a misguided interpretation of applicable law” (Rosenberg Reply Aff. at ¶ 3). Movants’ Counsel submits that Plaintiffs suggest, incorrectly, that the Court should look at the current status and viability of their claims to determine whether they have joined legal and equitable claims. Rather, the Court must look to the pleadings to determine whether legal and equitable claims are joined.

Movants submit that Plaintiffs’ claim for a declaratory judgment declaring void the Day Op Resolution, which terminated the Exclusivity Agreement, terminated Gabay as a shareholder of Day Op and required him to return his shares of Day Op, is equitable in nature. Movants contend that a declaration that the Day Op Resolution is void would be in the nature of rescission, and would have the effect of reinstating Gabay as a shareholder, which is the equivalent of a mandatory injunction. In addition, with respect to Plaintiffs’ claims for dissolution of Day Op and Mocha, the possibility of a monetary resolution of those claims does not alter their equitable nature.

C. The Parties’ Positions

Movants submit that Defendants have waived their right to a jury trial by joining legal and equitable claims in their complaint. Movants outline the claims in Plaintiffs’ complaint, which include requests for declaratory judgments, which would effectively provide injunctive

relief and are therefore equitable in nature, as well as requests for the dissolution of Mocha and Day Op, which are also equitable claims.

Plaintiffs oppose the motion submitting that despite their claims for equitable relief, they can be afforded full relief solely by an award of monetary damages and, therefore, their request for equitable relief does not defeat their right to a jury trial. Plaintiffs also argue that their dissolution causes of action are legal in nature because the basic issues are the actual values of the entities, whether waste has occurred, what the value of the entities would be but for the waste, and the amount, if any, that Plaintiffs should receive for the value of those entities due to the waste committed by Defendants. Plaintiffs submit, further, that their causes of action for a declaratory judgment are legal in nature because the basic issues are whether the resolutions should have occurred, whether Plaintiffs have been damaged as a result, and what damages, if any, have been sustained by Plaintiffs as a result, warranting a jury trial. Alternatively, Plaintiffs submit, the legal causes of action should be severed so that they may be tried by a jury, with the Court simultaneously trying the equitable causes of action.

RULING OF THE COURT

A. Waiver of Right to Jury Trial by Joinder of Legal and Equitable Claims

The prevailing rule is that the deliberate joinder of claims for legal and equitable relief arising out of the same transaction amounts to a waiver of the right to demand a jury trial. *Anesthesia Assoc. of Mount Kisco, LLP v. Northern Westchester Hosp. Ctr.*, 59 A.D.3d 481, 482 (2d Dept. 2009), quoting *Hebranko v. Bioline Labs.*, 149 A.D.2d 567, 567-68 (2d Dept. 1989). Once the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claim(s) will not revive the right to trial by jury. *Anesthesia Assoc. of Mount Kisco, LLP v. Northern Westchester Hosp. Ctr.*, 59 A.D.3d at 482, quoting *Zimmer-Masiello, Inc. v. Zimmer, Inc.*, 164 A.D.2d 845, 846-47 (1st Dept. 1990). Where, however, a plaintiff alleges facts upon which monetary damages alone will afford full relief, inclusion of a demand for equitable relief in the complaint's prayer for relief will not constitute a waiver of the right to a jury trial. *Anesthesia Assoc. of Mount Kisco, LLP v. Northern Westchester Hosp. Ctr.*, 59 A.D.3d at 482, quoting *Hebranko v. Bioline Labs.*, 149 A.D.2d at 568.

Where a plaintiff joins an equitable claim for specific performance to a legal claim for damages, the plaintiff waives the right to a jury trial. *Trimarco v. Data Treasury Corp.*, 146

A.D.3d 1004, 1006 (2d Dept. 2017) citing, *inter alia*, *Matter of Weslowski v. Day*, 136 A.D.3d 931, 932 (2d Dept. 2016); *Chim Chul Yi v. Marcy Realty Co.*, 291 A.D.2d 368 (2d Dept. 2002). A declaratory judgment action can be legal or equitable in nature, and to determine whether a party is entitled to a jury trial, it is necessary to examine which of the traditional actions would most likely have been used to present the instant claim had the declaratory judgment action not been created. *Trimarco v. Data Treasury Corp.*, 146 A.D.3d at 1006, citing *State Farm Mut. Auto Ins. Co. v. Sparacio*, 25 A.D.3d 777, 778-79 (2d Dept. 2006), quoting *Independent Church of Realization of Word of God v. Board of Assessors of Nassau County*, 72 A.D.2d 554, 555 (2d Dept. 1979).

Trimarco addressed a dispute resulting from the plaintiff's acceptance of an employment offer which included a stock option and the defendant's subsequent failure to honor the plaintiff's request to exercise that option. 146 A.D.3d at 1005. After the defendant failed to honor the plaintiff's attempt to exercise the stock option, the plaintiff commenced the action seeking damages for breach of contract and a judgment declaring that the stock option grant was valid and enforceable. 146 A.D.3d at 1005. The trial court granted the defendant's motion to strike the plaintiff's demand for a jury trial on the ground that his declaratory judgment cause of action was equitable in nature. *Id.* The Second Department held that the trial court had correctly determined that the plaintiff's declaratory judgment cause of action was in the nature of a prayer for specific performance, and had correctly determined that the plaintiff had waived his right to a jury trial. *Id.* at 1006-07.

B. Application of these Principles to the Instant Action

The Court grants the motion. Plaintiffs have deliberately joined claims for legal and equitable relief arising out of the same transaction, thereby waiving their right to demand a jury trial. This is not a situation in which Plaintiffs have alleged facts upon which monetary damages alone will afford full relief, and simply included a demand for equitable relief in the counterclaim's prayer for relief. Rather, they have included allegations in their complaint in support of their request for a declaratory judgment, which would effectively provide injunctive relief, as well as a request for dissolution of two entities, which is also equitable in nature. Their assertion, in opposition to the instant motion, that monetary damages would be sufficient to compensate them, or that the legal and equitable claims can be severed for trial before a jury and the Court respectively, does not alter the fact that Plaintiffs waived their right to a jury by joining

legal and equitable claims in their complaint.

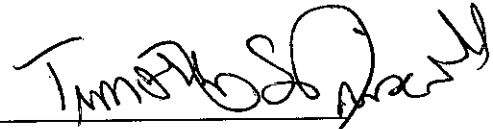
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a pre-trial conference on September 5, 2018 at 9:30 a.m.

ENTER

DATED: Mineola, NY
July 9, 2018



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

JUL 11 2018

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**