

**Long Island Med. & Gastroenterology Assoc., P.C. v
Mocha Realty Assoc., LLC**

2018 NY Slip Op 33523(U)

July 9, 2018

Supreme Court, Nassau County

Docket Number: 604173-14

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

-----X
**LONG ISLAND MEDICAL & GASTROENTEROLOGY
ASSOCIATES, P.C. and JAY G. MERKER, M.D.,**

**TRIAL/IAS PART: 11
NASSAU COUNTY**

Plaintiffs,

Index No. 604173-14

Motion Seq. No. 3

-against-

Submission Date: 6/25/18

**MOCHA REALTY ASSOCIATES, LLC and
RICHARD GABAY, 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) the Note of Issue dated May 4, 2018 in the above-captioned action, Index No. 604173-14 ("Instant Action" or "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,*

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 the Instant Action (Zinner Aff. in Supp. at n. 1).

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 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 # 600098-17 (“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.

Defendants Mocha Realty Associates (“Mocha”) and Richard Gabay, M.D. (“Gabay”) oppose the motion.

B. The Parties’ History

The parties’ history is set forth in a prior decision (“Prior Decision”) of the Court dated June 16, 2015 (Ex. C to Bock Aff. in Opp.) and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, 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 entity then owned equally by the four doctors.

² The Court has issued separate decisions in Action #2 and Action #6 in which the Court has also granted the motion to strike the jury demands filed in those Actions.

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 Mocha and Gabay ("Gabay Counsel") submits

that the Court should deny the motion because the counterclaim for a declaratory judgment is legal in nature, and a sum of money alone can provide full relief to Gabay and Mocha on their counterclaim under the facts alleged. Thus, Gabay and Mocha have a right to a trial by jury. Gabay Counsel notes that the counterclaim also seeks money damages in the amount of \$845,381.42, with rent and additional rent that has accrued through the termination of the LIMGA 2008 Lease (*see* Ex. D to Zinner Aff. in Supp. at Wherefore clause, sub. e). In the Prior Decision, the Court *inter alia* denied Mocha/Gabay's motion for summary judgment on their counterclaim, and for declaratory relief with respect to the LIMGA 2008 Lease. Gabay Counsel submits that the "basic issues" in the Instant Action (Block Aff. in Opp. at ¶ 15) are the existence of a lease, whether the 2006 or 2008 LIMGA lease controls, whether the controlling lease has been breached, and whether Mocha/Gabay have sustained damages and the amount of those damages. Gabay Counsel submits that, regardless of whether the 2006 or 2008 LIMGA lease controls, Mocha/Gabay will be fully compensated by an award of money damages in the form of past due rent, real estate taxes and interest under either lease. In addition, once the past due rent is paid, termination of the lease is no longer necessary. Under these circumstances, he submits, Mocha/Gabay are entitled to a jury trial. At a minimum, it is argued, the legal causes of action should be severed so that they may be tried by a jury, leaving the equitable causes of action to be tried simultaneously, yet separately, by the Court.

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 Mocha/Gabay 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. Moreover, Mocha and Gabay's requests for equitable relief are not only contained in the various prayers for relief but, rather, are interwoven throughout the causes of action. Under these circumstances, Movants submit, Mocha and Gabay have waived their right to a jury, and their assertion that they will be satisfied with a monetary recovery does not alter that conclusion.

C. The Parties' Positions

Movants submit that Defendants have waived their right to a jury trial by joining legal and equitable claims in their counterclaim. Movants outline the claims in the counterclaim, which include requests for declaratory judgments, both in the body of the counterclaim as well as the "wherefore" clause.

Gabay and Mocha oppose the motion submitting that their counterclaim for a declaratory judgment is legal in nature. They assert that a sum of money alone can provide full relief to them on their counterclaim under the facts alleged and, therefore, that their request for equitable relief does not defeat their right to a jury trial.

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. Mocha and Gabay 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 Mocha and Gabay 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 the counterclaim in support of their request for a declaratory judgment, which is in the nature of a prayer for specific performance. 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 Mocha and Gabay waived their right to a jury by joining legal and equitable claims in their counterclaim.


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