

Capacity Group of NY LLC v Duni
2019 NY Slip Op 34080(U)
December 9, 2019
Supreme Court, Nassau County
Docket Number: 601202/17
Judge: Anna Anzalone
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SUPREME COURT STATE OF NEW YORK

**PRESENT: Honorable Anna R. Anzalone
Justice of the Supreme Court**

CAPACITY GROUP OF NY LLC,

TRIAL/IAS, PART 18

NASSAU COUNTY

Plaintiff,

Index No. 601202/17

- against -

Motion Seq. No.: 13

**MICHAEL A. DUNI AND CHRISTOPHER DUNI,
Defendants.**

MICHAEL A. DUNI AND CHRSTOPHER DUNI,

Third-Party Plaintiffs,

-against-

**EDGEWOOD PARTNERS INSURANCE CENTER,
INC. d/b/a EPIC INSURANCE BROKER &
CONSULTANTS,**

Third-Party Defendants,

The following papers read on this motion:

Defendant/Third- Party Plaintiff's Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Defendant Third-Party Plaintiff's, Michael A. Duni and Christopher Duni ("Duni") motion for an order striking the Plaintiff's, Capacity Group of NY LLC ("CGNY" and or "Plaintiff") demand for a jury trial in a notice of issue that was filed with the Court on September 16, 2019 by the attorneys for the Plaintiff is granted.

The second amended complaint alleges: Count 1: Breach of Fiduciary Duty as to Michael A. Duni; Count II: Breach of Contract as to Christopher Duni; Count III: Breach of Contract as to Michael A. Duni; Counts I, II, and III allege diversion by Duni of CGNY's business. Count IV alleges trade libel as to Michael A. Duni, and Count V alleges libel per se as to Michael A. Duni. Count IV and V claims are due to alleged defamatory statements made about CGNY by Michael Duni. The complaint demands monetary damages as to Count I, II, and III, and seeks monetary damages against Michael A. Duni due to his defamatory statements and enjoining him from making further defamatory statements as to Counts IV and V.

The parties do not dispute that the complaint alleges claims at law (Counts I, II, and III) as well as equitable claims (Counts IV and V). CPLR § 4101 (as outlined below) provides for the actions in which a trial by jury is required; for the most part, they are the actions evolved through the common law courts, as opposed to those developed in equity which continue to be triable by the court. *See Siegal, New York Practice 6th Ed. § 377.*

§ 4101. Issues triable by a jury revealed before trial

In the following actions, the issues of fact shall be tried by a jury unless a jury trial is waived or a reference is directed under section 4317, except that equitable defenses and equitable counterclaims shall be tried by the court:

- 1. an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only;*
- 2. an action of ejectment; for dower; for waste; for abatement of and damages for a nuisance; to recover a chattel; or for determination of a claim to real property under article fifteen of the real property actions and proceedings law; and*
- 3. any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury.*

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 *see, CPLR §4102 (c); Bryant v. Broadcast Music, Inc.* 88AD3d631, 930 NYS2d 245 (2d Dept 2011). 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 AD3d 481, 873 NYS2d 202 (2d Dept 2009).

Duni argues that all Counts in the complaint stem from the same transaction, hence a deliberate joinder of claims for legal and equitable relief which amounts to a waiver of the right to demand a jury trial. Plaintiff argues that the claims for equitable relief in the Second Amended Complaint are merely incidental to a money judgment, so there is no waiver of the right to a jury trial. Additionally, Plaintiff submits that the libel claims in Counts IV and V relate to an entirely different event where Duni wrote an email to countless individuals in which he defamed CGNY. Moreover, Plaintiff is willing to discontinue the libel claims pled in Counts IV and V to avoid any question that this action is strictly about money damages.

After review of the papers, this Court finds that Complaint in question seeks legal and equitable claims as a result of the same transaction. The parties do not dispute that this case stems from a dispute between CGNY, an insurance broker, and two of its former insurance salesmen, Michael A. Duni and his son Christopher Duni. Christopher Duni was terminated from CGNY in 2015. On or about late 2016 Michael A. Duni was barred from entering the business office of CGNY which triggered the instant action. Michael A. Duni was terminated on or about April 2018. In the Second Amended Complaint CGNY added a new claim against Michael A. Duni which pertained to an email which CGNY alleged that Michael A Duni had sent out on May 31, 2018, a month after he had been terminated. The Court concurs with Duni that the factual predicate for the equitable claims (Counts IV and V of the Second Amended Complaint) are connected and related to the allegations in support of Plaintiffs legal claims for diversion of CGNY's business (Counts I, II, and III). Plaintiff's argument that the libels claims in Counts IV and V relate to an entirely different event is unavailing. Furthermore, if the Plaintiff were to now discontinue the libel claims, this would be of no significance since 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 AD3d481, 873 NYS2d202 (2d Dept 2009).

Accordingly, Defendants Third-Party Plaintiff's Michael A. Duni and Christopher Duni ("Duni") motion for an Order striking the plaintiff's, Capacity Group of NY LLC demand for a jury trial Plaintiff is granted.

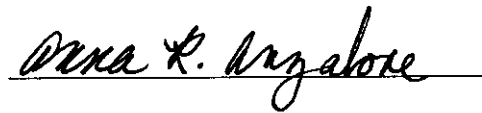
Counsel for Duni shall file and serve a copy of the within order with notice of entry upon all parties within fifteen (15) days from the date of this Order.

The parties are directed to appear in the DCM Pretrial Part, at 100 Supreme Court Drive, Mineola, New York as scheduled on December 19, 2019 at 9:30 am.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 9, 2019
Mineola, New York

ENTER



HON. ANNA R. ANZALONE

ENTERED
DEC 12 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE