

**McPherson Bldrs., Inc. v Performance Premises,  
LLC**

2020 NY Slip Op 30838(U)

January 21, 2020

Supreme Court, Tompkins County

Docket Number: Index No. 2017-0480

Judge: Joseph A. McBride

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 22<sup>nd</sup> day of November, 2019.

PRESENT: HON. JOSEPH A. MCBRIDE  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : TOMPKINS COUNTY

MCPHERSON BUILDERS, INC.,

Plaintiff,

-vs-

PERFORMANCE PREMISES, LLC and  
TOMPKINS TRUST COMPANY,

Defendants.

DECISION AND ORDER

Index No. 2017-0480  
RJI No. 2018-0064-N

APPEARANCES:

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**JOSEPH A. MCBRIDE, J.S.C.**

This matter is before the Court to address the motion of Plaintiff, McPherson Builders, Inc., (“Plaintiff”) seeking an Order pursuant CPRL §4101 and Lien Law §45 striking the demand for trial by jury of the Defendant, Performance Premises, LLC (“Defendant”). Defendant filed opposition to said motion. The Court received and reviewed moving papers filed electronically and maintained by the County Clerk and made a determination as discussed below.

**BACKGROUND FACTS**

On October 7, 2016, Plaintiff and Defendant entered a contract where Plaintiff was to provide the labor and materials for improvements to the property located at 107 Cherry Street in Ithaca, NY. The contract contained a time is of the essence clause in which substantial completion must be completed within 85 days, by December 30, 2016. Construction was not completed by the end of December 2016. Rather than terminate the contract, Defendant allowed Plaintiff to complete the project, which was ultimately completed in May 2017. Defendant did not pay Plaintiff for the work that took place after December 30, 2016. In July 2017, Plaintiff file a notice of mechanic’s lien asserting that they were owed \$94,810.00. That sum has yet to be paid. On August 9, 2017, Plaintiff filed the present action by serving a summons and complaint initiating a foreclosure on the mechanic’s lien. On August 28, 2017, Defendant filed a verified answer with an affirmative defense and counterclaim alleging that the failure to complete the work by December 30, 2016 constituted a material breach of contract and excused the Defendant from paying the remaining balance.

On September 11, 2019, Plaintiff filed a Note of Issue for a trial without a jury. Subsequently, Defendant filed their demand for trial by jury. The Court scheduled a jury trial to commence March 2, 2020 (scheduled as a back-up). Plaintiff now moves this Court to strike the demand for a trial by jury of Defendant pursuant CPLR §4101 and Lien Law §45. The motion was scheduled for oral argument on November 22, 2019. At oral argument, Plaintiff urged the Court to follow the third department and relevant statutes indicating that because this is a claim of equity the Defendant is not entitled to a jury trial. Defendant urged the Court to follow the

fourth department's interpretation of relevant statute, commenting that the third department cases do not apply to the present facts. The Court decides as outlined below.

## ANALYSIS AND DISCUSSION

It is well established throughout history and a cornerstone of the US Constitution, that causes of action rooted in legal theory are entitled to a trial by jury while causes which debate equity are generally cases for the Court to decide. Accordingly, within an action for foreclosure on a mechanic's lien (an action of equity), a defendant that asserts a counter claim for exaggeration in his answer for that foreclosure action, "shall be deemed to have waived a trial by jury of the issues raised thereby." NY CLS Lien §45; Fulmer v. Sovocool, 26 A.D.2d 889 (3<sup>rd</sup> Dept. 1966). When cases merge in law and equity, the separation is not as straight forward. For example, "a plaintiff that has asserted a complaint of both legal and equitable causes of action arising out of the same transaction constitutes a waiver by plaintiff of his right to a trial by jury." John W. Cowper Co. v. Buffalo Hotel Dev. Venture, 99 A.D.2d 19, 21 (4<sup>th</sup> Dept. 1984). However, the waiver of a jury in a combined law and equity pleading "applies only to the plaintiff as defendant retains his rights to a jury on the legal issues." John W. Cowper Co., 99 A.D.2d at 21; citing Di Menna v. Cooper & Evans Co., 220 N.Y. 391 (Ct. of App. 2017). Therefore, regardless of the Plaintiff's characterization of the action, if a defendant asserts a counterclaim based in legal theory, such a breach of contract, "the defendants are therefore entitled to a jury trial on their legal counterclaims." Stokes v. Johnston, 138 A.D.2d 481, 482 (2<sup>nd</sup> Dept. 1988); see also John W. Cowper Co., 99 A.D.2d at 21-23.

In John W. Cowper Co., the Fourth Department held that in an action where plaintiff asserts a foreclosure on a mechanics lien, and defendant asserts a counterclaim that includes a claim seeking money damages for breach of contract, "the defendants are entitled to a jury trial on the legal issues raised by the pleadings." 99 A.D.2d at 20. The Cowper court very thoroughly explained that a plaintiff cannot deprive a defendant of a jury trial by artfully constructing an equitable cause of action and that interwoven claims must be scrutinized for substance over form. *Id.* at 22.

The Court notes that in a letter dated November 4, 2019, the Plaintiff called the Court's attention to the case Edward Joy Co. v. McGuire & Bennett, Inc. (221 A.D.2d 891 [3<sup>rd</sup> Dept.

1995)), claiming that the third department declined to follow the Cowper precedent as established in the fourth department. The Court respectfully disagrees. In Edward Joy Co., while the third department arrived at a different result, holding that the jury was waived in cases mixed in equity and law, the third department was completely consistent with the fourth department and in fact cited Cowper in their decision. 221 A.D.2d at 892. The circumstances surrounding Edward Joy Co. are entirely distinguishable from the case at hand. In Edward Joy Co., the plaintiff filed the pleadings mixed in equity and law and demanded a trial by jury in which the third department rejected, stating the plaintiff's causes of action joining law and equity arising out of the same transaction, waived their right to a trial by jury. *Id.* As opposed to a defendant being pulled into the case, does not carry the same burden when retaining their right to a jury. This notion is completely consistent with the fourth department's emphatic declaration that the plaintiff does not get the benefit of artfully crafting a pleading. See John W. Cowper Co., 99 A.D.2d at 22. In essence, the plaintiff makes a choice by crafting their pleadings first. If the plaintiff mixes law and equity they have made the choice to waive their right to a jury. If the defendant asserts a counterclaim in equity, they too have waived their right to a jury. However, if the defendant asserts a counterclaim based on legal theory, they are entitled to a jury trial. That choice cannot be taken away from the defendant by plaintiff.

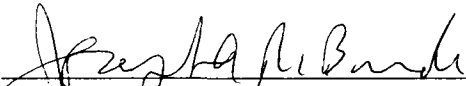
Here, Plaintiff filed a claim of foreclosure on a mechanic's lien, a cause of action in equity. The Defendant asserted an affirmative defense and counterclaim alleging breach of contract, a cause of action based on legal theory. Since the Defendant's counterclaim is one of law, not one of equity, the Defendant did not waive his right to a jury. The Plaintiff cannot deprive the defendant of his right to a jury trial just by asserting an equity claim. Like in Cowper, the Court must look at substance over form. *Id.* at 22. The Court finds that although the Defendant's pleading arise out of the same facts and circumstances as alleged by the Plaintiff's complaint, the Defendant has asserted a legal claim alleging that the material breach in contract is a defense to non-payment and demands a monetary award for consequential damages.

## CONCLUSION

Based upon the foregoing, Plaintiff's motion to stike the Defendant's demand for trial by jury is DENIED in its entirety. The case remains as scheduled for a jury trial.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 1/21, 2020  
Ithaca, New York

  
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HON. JOSEPH A. MCBRIDE  
Supreme Court Justice

Entered 01/21/2020