

Mendoza v Sterling Props., Inc.
2020 NY Slip Op 31753(U)
June 5, 2020
Supreme Court, Kings County
Docket Number: 511574/14
Judge: Donald Scott Kurtz
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At an IAS Part 26 of the Supreme Court of the State of New York, Kings County on the 5th day of June, 2020

Present: HON. DONALD SCOTT KURTZ
Justice, Supreme Court

Index No.: 511574/14

JOSE MENDOZA,

Plaintiff,

DECISION/ORDER

-against-

STERLING PROPERTIES, INC. and BUFFALO
PLAZA, LLC,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	<u>1-10, 14-18</u>
Answering Affidavits/Affirmations.....	<u>11-12, 19-20</u>
Reply Affidavits/Affirmations.....	<u>13, 21</u>
Memoranda of Law.....	
Other.....	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant Sterling Properties, Inc. (“Sterling”) moves, under sequence #7, for an order striking the jury demand filed herein. Defendant Buffalo Plaza, LLC (“Buffalo”) cross-moves, under sequence #8, for an order vacating the note of issue and/or striking the jury demand filed herein.

Background Facts and Procedural History

On or about March 25, 2014, plaintiff Jose Mendoza (“plaintiff”) and Sterling entered into a contract (“the 2014 contract”) for plaintiff’s purchase of the property located at 66 Buffalo Avenue in Brooklyn, New York (“the subject property”). However, the closing of the sale of the subject property never occurred. Thereafter, on or about December 8, 2014, plaintiff commenced the instant action asserting causes of action sounding in specific performance of the 2014 contract, breach of the 2014 contract and for a declaratory judgment that the 2014 contract is valid and enforceable. On or about December 11, 2014, plaintiff filed a notice of pendency. Sterling interposed an answer on or about January 29, 2015. The parties then engaged in discovery and motion practice.

A review of the court’s record indicates that on or about September 22, 2017, the instant action was administratively disposed of for the failure to file a note of issue. Subsequently, on October 24, 2017, the parties entered into a so-ordered stipulation canceling the notice of pendency filed herein and amending the complaint to add Buffalo as a defendant. By stipulation dated January 16, 2018, the parties stipulated to restore the instant action to active status and to extend the time to file the note of

issue. Thereafter, on or about January 17, 2018, plaintiff filed an amended complaint adding Buffalo as a defendant and alleging, among other things, that Sterling conveyed the subject property to Buffalo on March 3, 2016 (“the 2016 conveyance) during the pendency of the instant action. In the amended complaint, plaintiff asserts causes of action sounding in: (1) specific performance of the 2014 contract; (2) breach of the 2014 contract by Sterling; (3) a declaratory judgment that plaintiff’s contract with Sterling is valid, that Sterling and Buffalo are alter egos of each other, that Buffalo is not a bona fide purchaser and that the 2016 conveyance should be set aside as void and illegal; and (4) a temporary and permanent injunction restraining Buffalo from acquiring title, transferring, conveying or selling the subject property pending the final determination of the instant action.

Subsequently, on or about March 8, 2018, plaintiff filed a note of issue without a jury demand on March 8, 2018. On or about March 28, 2018, Buffalo interposed an answer with counterclaims. Sterling then moved, under sequence #3, and Buffalo cross-moved, under sequence #4, to vacate the note of issue. By short form order (Schneier, Judicial Hearing Officer [JHO]) dated April 18, 2018, motion sequences #3 and #4 were granted and plaintiff’s note of issue was vacated. By short form order (Hubsher, JHO) dated December 7, 2018, Buffalo’s motion, under sequence #5, to strike the complaint, preclude and/or compel plaintiff and plaintiff’s cross-motion, under sequence #6, to strike the answer and/or preclude Buffalo were granted to the extent of, among other things, directing discovery and setting a new note of issue filing date. Thereafter, on or about February 25, 2019, plaintiff filed a note of issue with a jury demand. Sterling then moved, under sequence #7, and Buffalo cross-moved, under sequence #8, for the relief requested herein. Notably, the Court deems motion sequence #8 a motion, rather than a cross-motion, as it is a request for affirmative relief against plaintiff, a non-moving party (*see* CPLR 2215; *see also Sanchez v Metro Builders Corp.*, 136 AD3d 783, 785 [2d Dept 2016]).

Discussion

Sterling’s Motion to Strike the Jury Demand

In support of its motion, Sterling contends that plaintiff’s claim for specific performance is equitable in nature and, as such, is not subject to a trial by jury. Sterling further argues that plaintiff’s joinder of equitable claims with legal claims for damages for breach of contract results in a waiver of his right to a trial by jury. In this regard, Sterling maintains that the jury demand filed herein should be stricken.

In opposition, plaintiff asserts that, despite the joinder of legal and equitable claims in the amended complaint, he is entitled to a trial by jury on his legal claims. Plaintiff insists that when the amended complaint is viewed in its entirety, the “action is substantially a legal one” (Memorandum of Law in Opposition to the motion to Strike Jury Demand). In the alternative, plaintiff asserts that the Court can permit the breach of contract cause of action to be tried by a jury. Plaintiff also acknowledges that his claim for specific performance is a claim for equitable relief that is discretionary in nature and an alternative to money damages for a claim to enforce a contract.

In reply, Sterling reiterates its argument that plaintiff has waived his right to a jury trial by joining equitable claims with legal claims in the amended complaint. Sterling maintains that the primary relief sought by plaintiff in the instant action is for the equitable relief of specific performance

of the 2014 contract. Sterling further argues that plaintiff added Buffalo as a defendant to the instant action so as to obtain specific performance of the 2014 contract and also to void the 2016 conveyance of the subject property from Sterling to Buffalo. Finally, Sterling maintains that, contrary to plaintiff's contentions, once a plaintiff waives the right to a jury trial, a defendant (not plaintiff) may then demand a jury trial on plaintiff's legal claims.

CPLR 4101 provides, in relevant part, that:

In the following actions, these 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 counterclaims shall be tried by the court.

(1) An action in which a party demands and sets forth the 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 chattel; or for a determination of a claim to real property under article fifteen of the real property actions and proceedings law.

Specific performance is a discretionary remedy that "provides an alternative to an award of damages as a means of enforcing a contract" (*Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 966 [2d Dept 2011]). It is well settled that "[w]here a plaintiff joins an equitable claim for specific performance to a legal claim for damages, the plaintiff waives the right to a jury trial ... [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 AD3d 1004, 1006-07 [2d Dept 2017, internal citation and quotation marks omitted]). Subsequent dismissal, settlement or withdrawal of the equitable claims will not revive the right to a trial by jury (*see Bryant v Broadcast Music, Inc.*, 88 AD3d 631, 632 [2d Dept 2011]).

Based upon a review of the relevant case law and the papers submitted by the parties, the Court finds that the instant action is essentially equitable in nature and that plaintiff has waived his right to a trial by jury by joining equitable and legal claims. In the amended complaint, plaintiff's equitable claim for specific performance (*see generally Victory State Bank*, 169 AD3d at 966) is joined with legal claims and, as such, results in a waiver of plaintiff's right to a jury trial. In this regard, the Court hereby grants Sterling's motion to strike the jury demand filed herein.

Buffalo's Motion to Vacate the Note of Issue and/or Strike the Demand for Trial by Jury

In support of its motion, Buffalo adopts the arguments made by Sterling in support of its motion. Buffalo also points out that the initial note of issue filed by plaintiff demanded a trial without a jury. Buffalo argues that the primary character of plaintiff's claims are for breach of contract damages

against Sterling rather than specific performance. In addition, Buffalo maintains that the instant action should be dismissed as against it and that the note of issue should be stricken.

In opposition to the portion of motion sequence #8 seeking to strike the jury demand filed herein, plaintiff relies upon his arguments made in opposition to motion sequence #7. Plaintiff argues that the portion of motion sequence #8 seeking to vacate the note of issue is untimely.

In reply, Buffalo argues that if it remains in the instant action as a defendant, the note of issue filed herein should be vacated. Buffalo further argues that plaintiff is essentially seeking damages for breach of contract against Sterling and, as a result, the instant action should be dismissed against it.

Insofar as Buffalo seeks to vacate the note of issue filed herein, the Court denies that portion of Buffalo's motion as it was not made within twenty days of the filing of the note of issue and Buffalo has failed to state any unusual and unanticipated circumstances to warrant additional discovery (*see* 22 NYCRR Section 202.21 [e]; *see also Bundhoo v Wendy's*, 152 AD3d 734, 737 [2d Dept 2017]). Insofar as Buffalo seeks dismissal of the instant action against it, the Court notes that Buffalo has not made a motion for affirmative relief requesting dismissal of the instant action against it.

That portion of Buffalo's motion seeking to strike the jury demand filed herein is granted for the reasons stated above.

Conclusion

Accordingly, it is

ORDERED that Sterling's motion to strike the jury demand filed herein is granted; and it is further

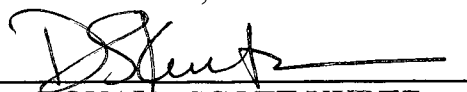
ORDERED that the portion of Buffalo's motion to vacate the note of issue is denied; and it is further

ORDERED that the portion of Buffalo's motion to strike the jury demand filed herein is granted; and it is further

ORDERED that the instant action is hereby overridden and referred to the Non-Jury Trial Readiness Part.

The foregoing shall constitute the Decision and Order of the Court.

ENTER,



DONALD SCOTT KURTZ
Justice, Supreme Court