

<b>Oceanhousenyc, LLC v 140 W. St. (NY), LLC</b>
2022 NY Slip Op 33304(U)
September 30, 2022
Supreme Court, New York County
Docket Number: Index No. 656345/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART 14**

*Justice*

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**INDEX NO. 656345/2020**

OCEANHOUSENYC, LLC, PRASHANT LAL,

**MOTION DATE N/A**

Plaintiffs,

**MOTION SEQ. NO. 004**

- v -

140 WEST STREET (NY), LLC, BENJAMIN SHAOUL,  
VERIZON NEW YORK INC.

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252<sup>1</sup>

were read on this motion to/for STRIKE JURY DEMAND.

The motion by defendants 140 West Street (NY) LLC and Shaoul (“Defendants”) to *inter alia* strike plaintiff’s jury demand is granted. The parties agreed to resolve certain portions of the instant motion (NYSCEF Doc. No. 253). The note of issue remains and there will be no adjournments for the deadline to file dispositive motions.

**Background**

Plaintiffs live in a mixed used condo building (a building with both commercial and residential units). The building used to be exclusively occupied by defendant Verizon New York Inc. (“Verizon”) but now houses both Verizon (on the lower floors) and residential apartments on the upper floors.

<sup>1</sup> The Court did not consider the parties’ letters (NYSCEF Doc. Nos. 254, 255) which constitute impermissible sur-replies.

Plaintiffs, who live on the lowest residential floor (and immediately above Verizon's top floor) claim that the noise from a certain bank of elevators (the "C" bank) makes it unbearable to live in their apartment. Plaintiffs also complain about the machine room, which they allege is excessively noisy and is located directly under their apartment. They insist there is substantial interference with the quiet use and enjoyment of their apartment. Plaintiffs contend that the noise and vibrations violate all relevant building and noise codes. They allege that the family's two daughters cannot use their bedrooms because of the noise.

The remaining issue on this motion is plaintiffs' jury demand. Defendants claim that the complaint seeks both monetary and equitable relief and therefore a jury trial is not permitted. They claim that the eleventh cause of action demands a permanent injunction and that plaintiffs allege they have no adequate remedy at law. Defendants argue that plaintiffs waived their right to seek a jury trial by including equitable relief as part of the complaint. They also argue that plaintiffs' demand of rescission (of the contract for the subject apartment) also nullifies the jury demand.

In opposition to this branch of the motion, plaintiffs insist that they seek primarily legal relief and so the jury demand is appropriate. They point out that seven (of the eleven) causes of action alleged are legal in nature as opposed to equitable claims. They insist that the four claims that are equitable are merely alleged in the alternative. Plaintiffs emphasize that case law permits jury trials where both legal and equitable claims are asserted.

In reply, Defendants insist that the primary character of plaintiffs' case is equitable. They observe that plaintiffs seek rescission and injunctive relief, including an allegation that they have no adequate remedy at law in support of the injunctive relief.

## **Discussion**

CPLR 4101 provides that “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: . . . 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.”

“When, as here, the complaint either joins legal and equitable causes of action arising out of the same alleged wrong or seeks both legal and equitable relief, there is a waiver of a plaintiff’s right to a jury trial” (*Errant Gene Therapeutics, LLC v Sloan-Kettering Inst. for Cancer Research*, 176 AD3d 459, 107 NYS3d 847 [1st Dept 2019] [citations omitted]). A plaintiff can waive “his right to a jury trial by including a claim for equitable relief which is not merely incidental to his claims at law” (*Daley v Related Companies, Inc.*, 213 AD2d 205, 205, 623 NYS2d 248) [1st Dept 1995]). “The fact that plaintiff is seeking money damages does not, in and of itself, guarantee entitlement to a jury trial” (*Aroch v 391 Broadway LLC*, 203 AD3d 642, 163 NYS3d 406 [1st Dept 2022] [internal quotations and citation omitted]). However, “[a] party’s entitlement to demand a jury trial is dependent upon the facts pleaded, not the demand for relief” (*Kaplan v Long Is. Univ.*, 116 AD2d 508, 509, 497 NYS2d 378 [1st Dept 1986]).

Plaintiffs’ complaint contains eleven causes of action. The eleventh cause of action seeks injunctive relief, namely that all defendants are permanently enjoined from continuing to operate a certain bank of elevators and elevator machinery that is allegedly causing noise in plaintiffs’ apartment (NYSCEF Doc. No. 215 at 25-26). The seventh cause of action alleges nuisance and also seeks injunctive relief that is nearly identical to the eleventh cause of action—that defendants be enjoined from using the particular bank of elevators and elevator machinery (*id.* at

21). The Court observes that the eighth cause of action seeks damages based on nuisance, but this claim is alleged in the alternative to the seventh cause of action for injunctive relief (*id.* at 22-23).

Therefore, as an initial matter, there is no dispute that plaintiffs seek both legal and equitable relief. This Court's task is therefore to consider whether the equitable relief is merely incidental to the legal relief sought. The Court finds that it is not "merely incidental" and instead arises out of the same facts and alleged wrong—the noisy elevators. Plaintiffs plainly want to stop all defendants from using the elevator; that is clearly equitable relief. This is not a situation where plaintiffs seek equitable relief that merely aids in calculating the damages, such as an accounting (*Cadwalader Wickersham & Taft v Spinale*, 177 AD2d 315, 315, 576 NYS2d 24 [1st Dept 1991] [finding that the request for an accounting did not waive the right to a jury trial]).

However, the Court's analysis does not stop there. As plaintiffs point out, CPLR 4101(2) seems to permit a jury trial for nuisance cases, including where the plaintiff seeks an abatement of that nuisance. The question, then, is how this provision has been interpreted when a plaintiff seeks a jury trial while claiming an abatement of a nuisance. The Second Department found that "where the plaintiffs sought abatement of and damages for a nuisance and an injunction restraining the continuance of the nuisance, they were not entitled as of right to a trial by jury" (*Adelstein v City of New York*, 212 AD2d 748, 749, 623 NYS2d 298 [2d Dept 1995]). That is exactly the case here, where plaintiff seek an abatement of the nuisance along with injunctive relief (the seventh cause of action), damages based on the nuisance in the alternative (the eighth cause of action) and a permanent injunction (the eleventh cause of action).

The Court of Appeals opined, when considering a predecessor statute, that "it is clear, we think, that an equitable action to restrain the continuance of a nuisance, or an action for a

nuisance in which equitable relief is also demanded, is not action for nuisance [where a jury trial is permitted]” (*Cogswell v New York, N.H. & H.R. Co.*, 105 NY 319, 322, 60 Sickels 319 [1887]).

A Queens County Supreme Court case exploring this same issue noted that “an action for nuisance . . . is limited in its application to the remedies which were available at common law, that is those actions seeking damages for a nuisance and abatement and damages and that an action to restrain a nuisance is not an action ‘for a nuisance’ triable by jury but is an equity action triable by the court” (*City of New York v 114-25 Farmers Blvd.*, 178 Misc 2d 404, 405 [Sup Ct, Queens County 1998]).

While at oral argument, plaintiffs claimed the CPLR allows a jury trial to abate the nuisance, which is the same as an injunction to stop the nuisance, the cases interpreting the CPLR section insist there is a distinction. And, to be fair, when plaintiffs drafted their complaint, they saw a distinction too – presumably, that is why they alleged separate causes of action. Therefore, the Court finds that plaintiffs are not entitled to a jury trial based on the facts and causes of action alleged complaint. These cases hold that even though the statute might appear, on first glance, to provide a jury trial for nuisance cases, the fact that plaintiffs also sought equitable relief (in addition to the nuisance claims) means that they waived their right to a jury trial.


Accordingly, it is hereby

ORDERED that the remaining portion of the motion by defendants 140 West Street (NY) LLC and Shaoul to strike plaintiffs’ jury demand is granted; and it is further

ORDERED that the remaining portions of the motion were resolved via stipulation (NYSCEF Doc. No. 253); and it is further

ORDERED that within 15 days from the entry of this order, movants shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who is hereby directed to strike the case from the *jury trial calendar* and place it on the *non-jury trial calendar* and make all required notations thereof in the records of the court; and it is further

ORDERED that such upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

<u>9/30/2022</u> DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE