

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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CRISTINA QUAZZO,  
  
Plaintiff,

- v -

UGO QUAZZO, 9 CHARLTON STREET CORPORATION,  
STEPHEN QUAZZO, PEARLBUD REALTY  
CORPORATION, MARCO QUAZZO, ORBIS  
INTERNATIONAL CORPORATION, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE (NOMINAL  
PARTY),

Defendant.

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INDEX NO. 652282/2010  
MOTION DATE 02/13/2020  
MOTION SEQ. NO. 012

**DECISION + ORDER ON  
MOTION**

CRISTINA QUAZZO, 9 CHARLTON STREET  
CORPORATION, PEARLBUD REALTY CORPORATION,  
ORBIS INTERNATIONAL CORPORATION,

Plaintiff,

- v -

9 CHARLTON STREET CORPORATION, PEARLBUD  
REALTY CORPORATION, ORBIS INTERNATIONAL  
CORPORATION, UGO QUAZZO, STEPHEN QUAZZO,  
MARCO QUAZZO, SILVIA PIZZETTI, DINAH HELLER,  
WALTER GABUTTI, 9 CHARLTON STREET  
CORPORATION, PEARLBUD REALTY CORPORATION,  
ORBIS INTERNATIONAL CORPORATION

Defendant.

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INDEX NO. 652002/2011  
MOTION DATE 02/13/2020  
MOTION SEQ. NO. 007

**DECISION + ORDER ON  
MOTION**

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 367, 368, 369, 370

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 240, 241, 242, 244

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

This special proceeding and related plenary action involve a dispute over three closely-held family businesses, 9 Charlton Street Corporation (Charlton), Pearlbud Realty Corporation, and Orbis International Corporation (collectively, the corporations). In the special proceeding (Index No. 652282/2010), Cristina Quazzo (Cristina), as petitioner, moves to strike the demand for a jury trial filed by the corporations, Ugo Quazzo (Ugo), and Stephen Quazzo (Stephen), as respondents (motion sequence 012). In the plenary action (Index No. 652002/2011), Cristina, in her individual and derivative capacity as plaintiff, moves to strike the demand for a jury trial filed by the corporations, Ugo, and Stephen, as defendants (motion sequence 007).<sup>1</sup>

Familiarity with these matters is assumed, the details of which are extensively set forth in prior decisions of this court. (See e.g. Matter of Quazzo v 9 Charlton St. Corp., 2019 NY Slip Op 30098 [U], 2019 WL 160414 [Sup Ct, NY County 2019] [decision on motions for summary judgment in the special proceeding and plenary action]; Quazzo v 9 Charlton St. Corp., 2019 NY Slip Op 30097 [U], 2019 WL 160411 [Sup Ct, NY County 2019]; Quazzo v 9 Charlton St. Corp., 2014 NY Slip Op 30625 [U], 2014 WL 978322 [Sup Ct, NY County 2014]; Quazzo v 9 Charlton St. Corp., 2012 NY Slip Op 33366 [U], 2012 WL 10007036 [Sup Ct, NY County 2012] [Fried, J.] [decision on motions to dismiss in the plenary action].)

Petitioner/plaintiff (hereafter plaintiff) argues that where a claim for relief sounds in equity, there is no right to a jury trial. She asserts that because all of her causes of action “sound[] in equity and most seek equitable relief,” respondents/defendants’ (hereafter defendants) demands for a jury trial should be stricken in their entirety. (Pet./Pl.’s Memo. In

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<sup>1</sup> As the individual respondents/defendants share the same surname, they will be referred to by their first names, not out of disrespect but in order to avoid confusion.

Supp., at 1.)<sup>2</sup> In moving to strike the jury demand in the special proceeding, plaintiff points out that no claim for monetary relief is made in the proceeding, which seeks dissolution of the corporations, access to books and records, appointment of a receiver, and injunctive relief. (Id., at 2.) As to the plenary action, the remaining causes of action are plaintiff's individual claims for breach of fiduciary duty, and derivative claims brought in the name of the corporations. Plaintiff contends that these claims are all "equitable in nature" and must therefore be tried by the court. (Id.)

In opposition, defendants acknowledge that they are not entitled to a jury trial on any of the claims set forth in the special proceeding, as such claims seek only equitable relief. (Resps./Defs.' Joint Memo. In Opp., at 1.) They also concede that they are not entitled to a jury trial on their equitable defenses. (Id., at 15.) With respect to the plenary action, however, they argue that plaintiff's individual claims for breach of fiduciary duty primarily seek monetary relief and must therefore be tried by a jury. (Id., at 1, 3-5.) Defendants further contend that damages will provide redress for the derivative claims in the plenary action and that they are therefore also triable by jury. (Id., at 9.) Defendants acknowledge that the derivative claims seek equitable as well as monetary relief, but argue that the requests for equitable relief are "incidental" and therefore do not bar the demand for a jury trial. (Id., at 10.)

Plaintiff and defendants assert conflicting positions as to the meaning and effect of CPLR 4101 (1) on the right to trial by jury in the cases before this court. CPLR 4101 specifies the actions for which a trial by jury is required and provides, in pertinent part:

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<sup>2</sup> In the special proceeding and plenary action, the parties filed identical memoranda of law on petitioner/plaintiff's motions to strike the jury demands. The memoranda address both the proceeding and the action. The memorandum in support is NYSCEF Doc. Nos. 352 and 364 in the special proceeding and NYSCEF Doc. Nos. 224 and 236 in the plenary action. Respondents/defendants joint memorandum in opposition is Doc. No. 367 in the special proceeding and Doc. No. 240 in the plenary action. The reply memorandum is Doc. No. 370 in the special proceeding and Doc. No. 244 in the plenary action.

“In the following actions, the issues of fact shall be tried by a jury unless a jury trial is waived . . . , 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.”

Plaintiff in effect contends that, under CPLR 4101 (1), an action will only be considered “one which would permit a judgment for a sum of money only” if the action was “historically” or “traditionally” triable “by law” rather than “in equity.” (Pet./Pl.’s Memo. In Supp., at 7-8.) Defendants contend that “CPLR 4101 extends the right to a jury trial to any claim redressable through ‘a judgment for a sum of money only,’ even if the claim sounds in equity.” (Resps.’/Defs.’ Joint Memo. In Opp., at 6 [emphasis in original].)

As the Appellate Division has explained, CPLR 4101 “is declaratory” of the right to a trial by jury guaranteed by the New York State constitution, and “enlarges upon that right by specifically including actions which do not fall within the constitutional ambit.” (Murphy v American Home Prods. Corp., 136 AD2d 229, 232 [1st Dept 1988].) At common law, actions at law were triable by jury while suits in equity were not. Although the law-equity distinction has been abolished, it “still has relevance in determining whether a jury trial was historically utilized in a particular type of action and [is] thereby protected” by the constitution and therefore also by CPLR 4101. (Id.; accord Hudson View II Assocs. v Gooden, 222 AD2d 163, 164-166 [1st Dept 1996].)

The historical categorization of a claim is not, however, the sole inquiry in determining whether the claim is triable by jury. Substantial long-standing authority holds that, in determining this issue, the court must consider not only the historical treatment of a claim as legal or equitable, or the relief demanded, but also whether, on the facts alleged, money damages afford a full and complete remedy. (See e.g. Miller v Epstein, 293 AD2d 282, 282 [1st Dept

2002] [upholding the denial of a motion to strike a demand for a jury trial on claims of fraud and breach of fiduciary duty, among others, “since plaintiffs’ claims were primarily legal in nature and plaintiffs, under the facts alleged, could obtain full relief by means of a monetary award”], citing Cadwalader Wickersham & Taft v Spinale, 177 AD2d 315, 316 [1st Dept 1991] [holding that under CPLR 4101, “the question [] is not whether an equitable” claim exists – there, an equitable counterclaim – “but whether, when viewed in its entirety, the primary character of the case is legal or equitable,” and that “[w]here, as here, money damages afford a full and complete remedy, the action sounds in law and may be tried by a jury”], citing Murphy, 136 AD2d at 232 [holding that “[i]t has long been held that the mere fact that the complaint demands a money judgment only is not dispositive but that it is the facts pleaded which are controlling in determining whether the relief was ‘improperly confined to a money demand merely’. If, in fact, a sum of money alone can provide full relief to the plaintiff under the facts alleged, then there is a right to a jury trial”]; accord Hudson View II Assocs., 222 AD2d at 168 [citing Murphy and holding: “Generally, the determinant as to whether a claim is at law or at equity is the nature of the relief which, under the facts alleged, could fairly compensate the party bringing the claim. If money damages alone could achieve that end, the action is generally at law”]; see Siegel, NY Practice § 377 [“If the demand for relief is responsive to the facts pleaded and manifests a claim at law, the court is likely to allow a jury today even though the claim may have been interposed in a form generally regarded as equitable”].)

As to the individual claims in the plenary action, Cristina pleads a first cause of action for breach of fiduciary duty, a second cause of action for conspiracy to breach fiduciary duty, and a third cause of action for aiding and abetting breach of fiduciary duty. (Plenary Action, Compl., First, Second, Third Causes of Action.) Plaintiff contends that these claims are not triable by

jury because fiduciary duty claims historically sound in equity. (Pet./Pl.’s Memo. In Supp., at 8-10.) In support of this contention, she cites authority which broadly holds that “[t]here is no right to a jury trial where the cause of action is to recover damages for a breach of fiduciary duty, which sounds in equity.” (Matter of Estate of Rappaport, 150 AD2d 779, 780 [2d Dept 1989]; see also e.g. Zainal v America-Europe-Asia Intl. Trade & Mgt. Consultants, Ltd., 254 AD2d 52, 53 [1st Dept 1998]; Matter of Estate of Coyle, 34 AD2d 612, 613 [3d Dept 1970] [“The claim is for a breach of fiduciary duty, which is an action in equity, and there is no right to a trial by jury in such case. . .”].)

In relying on this categorical authority, plaintiff fails to persuasively distinguish the authority, discussed above, which holds that, in determining whether an action is triable by jury, the court must consider not only the historical treatment of a claim as legal or equitable, or the relief demanded, but also whether, on the facts alleged, money damages afford a full and complete remedy. Plaintiff also ignores that, with respect to fiduciary duty claims in particular, courts which have undertaken such an inquiry into the nature of the claims have concluded that breach of fiduciary duty claims that “primarily seek[] monetary relief” are considered “legal in nature” and are therefore triable by jury (Miller, 293 AD2d at 282), while “causes of action seeking equitable relief for breach of fiduciary duty are equitable in nature and do not require a jury trial.” (KNET, Inc. v Ruocco, 145 AD3d 989, 992 [2d Dept 2016].)

Here, plaintiff initially sought both equitable and monetary relief on the breach of fiduciary duty claims. In a prior decision and order, this court, over plaintiff’s objection, dismissed the breach of fiduciary duty claims insofar as they sought equitable relief, pursuant to CPLR 3211(a)(4), on the ground that the same claims were pending in the special proceeding. (Quazzo, 2012 WL 10007036, at \* 3 [Fried, J.]; Pl.’s Memo. In Opp., at 31-32 [Plenary Action,

NYSCEF Doc. No. 33].) The breach of fiduciary duty claims in the plenary action thus now seek only money damages. As money damages will provide full relief to plaintiff on these claims, the court holds, following the weight of authority discussed above, that the claims are triable by jury.

In so holding, the court rejects plaintiff's contention that because the "vast majority" of plaintiff's other causes of action in the plenary action—i.e., the derivative causes of action—"seek some form of equitable relief," the jury demands should be struck even if the court concludes that the fiduciary duty causes of action are triable by jury. (Pet./Pl.'s Memo. In Supp., at 13-14.) Plaintiff in effect contends that a plaintiff's joinder of equitable and legal claims in a single action waives all parties' rights to a jury trial on all claims. Settled law is to the contrary. "When [a] 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, 459 [1st Dept 2019] [emphasis added].) "[T]he fact that a plaintiff may have waived its own right to a jury trial by joining a legal claim with an equitable claim will not affect a defendant's entitlement to a jury trial on plaintiff's legal causes of action." (Hudson View II Assocs., 222 AD2d at 167, n 1; Le Bel v Donovan, 96 AD3d 415, 417 [1st Dept 2012]; KNET, Inc., 145 AD3d at 992.)

The court turns to plaintiff's derivative causes of action in the plenary action. Plaintiff pleads 22 derivative causes of action. The seventh, eighth, and tenth are based on breach of fiduciary duty. These causes of action seek damages of at least \$150,000. The seventh, eighth, and tenth also seek an injunction against transfers of corporate assets, and the seventh also seeks an accounting and appointment of a receiver. The twelfth is based on misappropriation of

corporate assets, and seeks damages of at least \$150,000 and an accounting. The thirteenth and fourteenth are based on conversion of corporate assets, and seek damages of at least \$150,000 and an injunction. The thirteenth also seeks an accounting. The sixteenth is based on waste of corporate assets and seeks at least \$150,000 in damages and an accounting. The seventeenth and eighteenth causes of action seek removal of directors and officers, respectively. The nineteenth is based on violations of Business Corporation Law § 719 and seeks at least \$150,000 in damages. The twentieth is based on violations of Business Corporation Law § 720 and seeks an accounting and a judgment setting aside unlawful conveyances, assignments, or transfers of corporate assets and directing defendants to reimburse the corporations for same. The twenty-first pleads an independent claim for an accounting to ascertain the damages. The twenty-second is for attorney's fees for prosecution of the derivative claims.<sup>3</sup>

In claiming that the derivative causes of action are not triable by jury, plaintiff argues that “no party, plaintiff or defendant, has a right to a jury trial on equitable, derivative claims.” (Pet./Pl.’s Reply Memo., at 9.) In support of this contention, plaintiff relies on cases which broadly hold that shareholder derivative claims are “equitable in nature” and therefore not triable by jury. (E.g. Moyal v Sleppin, 139 AD3d 605, 605 [1st Dept 2016], quoting Sakow v 633 Seafood Rest., Inc. 25 AD3d 418, 419 [1st Dept 2006]; Horizon Asset Mgt., LLC v Duffy, 106 AD3d 594, 595 [1st Dept 2013].)

Plaintiff’s reliance on this seemingly categorical authority fails to take into account the weight of authority, discussed above, which, in determining whether an action is triable by jury,

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<sup>3</sup> The ninth, eleventh, and fifteenth derivative causes of action allege breach of fiduciary duty and conversion claims against individuals who are no longer defendants in the plenary action. The derivative causes of action which demand \$150,000 money damages also demanded punitive damages. The claim for punitive damages was dismissed. (Quazzo, 2012 WL 10007036, at \* 5.)

focuses not merely on the historical categorization of the claim but on whether, on the pleaded facts, money damages will afford a full and complete remedy.<sup>4</sup>

Significantly, also, there is substantial authority that a defendant will not have a right to a jury trial on the plaintiff's causes of action if the equitable relief sought is not "incidental" to the legal relief or legal causes of action, such that "it can no longer be said that money damages would afford a complete remedy." (E.g. Errant Gene Therapeutics, LLC, 176 AD3d at 459; Ingenuit, Ltd. v Harriff, 56 AD3d 428 [2d Dept 2008] [holding that the defendant has no right to a jury trial where the "primary character" of the action is equitable and the plaintiff's damages claims are "incidental"]; Gordon v Continental Cas. Co., 91 AD2d 987, 987 [2d Dept 1983] [holding that the defendant is not entitled to a jury trial if the legal relief sought by the plaintiff "is sufficiently incidental to equitable relief such that, at common law, the Chancellor had jurisdiction over the entire matter"]; Jerry Kindman & Co. v Stollar, 142 Misc 2d 603, 604 [Sup Ct, NY County 1989] [Saxe, J.] [same, citing Gordon].)

Here, monetary relief is sought solely in the plenary action. Moreover, the equitable relief sought by plaintiff on the derivative causes of action that also seek monetary relief is incidental to the monetary relief. As discussed above, the requested equitable relief on such causes of action is generally injunctive relief against transfers of corporate assets, with some of the causes of action also or instead seeking an accounting, and one cause of action (the first) also seeking the appointment of a receiver. As in the case of plaintiff's individual breach of fiduciary

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<sup>4</sup> It is also noted that the authority on which plaintiff relies, Moyal v Sleppin (139 AD3d 605, supra) and Horizon Asset Mgt., LLC v Duffy (106 AD3d 594, supra) in fact struck demands for a jury trial not by defendants but by shareholder plaintiffs who brought the equitable derivative claims. KNET, Inc. v Ruocco (145 AD3d at 992), on which plaintiff also relies, involved a demand for a jury trial by a defendant. The Court held that the derivative (and fiduciary duty) claims brought by the plaintiffs were equitable because they sought equitable relief. In further holding that the defendant was entitled to a jury trial on a legal claim brought by the plaintiffs, the Court reasoned that "[w]here the plaintiffs join legal and equitable claims, the defendants are not deprived of their right to a jury trial of the legal claims."

duty causes of action, the requests for injunctive relief and appointment of a receiver are duplicative of the equitable relief sought in the special proceeding. (Special Proceeding, Am. Pet., Wherefore Clause, ¶¶ 3, 4.) Although the plenary action also seeks relief in the nature of an accounting, which is equitable, while the special proceeding does not seek such relief,<sup>5</sup> where the accounting is sought merely as a means to calculate money damages on a legal claim, the accounting is incidental to the legal relief. (See e.g. Abrams v Rogers, 195 AD2d 349, 349-350 [1st Dept 1993]; Cadwalader Wickersham & Taft, 177 AD2d at 316; see also Le Bel, 96 AD3d at 416.) That is the case here on the causes of action for money damages of at least \$150,000, which also seek an accounting. The derivative causes of action thus seek predominantly legal relief.

The court accordingly holds that the seventh, eighth, tenth, twelfth, thirteenth, fourteenth, sixteenth, and nineteenth causes of action are triable by jury. The seventeenth, eighteenth, twentieth, and twenty-first causes of action seek equitable relief only and are not triable by jury. The twenty-second cause of action for attorney's fees is also not triable by jury.

The remaining issue is the procedure to be followed in conducting the trial. Plaintiff argues that if the court determines that any issues are triable by jury, the court should try the issues that are not triable by jury before empaneling a jury. (Pet./Pl.'s Memo. In Supp., at 13-14 [relying on 22 NYCRR 202.40].) Defendants argue that the court should request that the jury issue an advisory verdict on issues that are not triable by jury. (Resps./Defs.' Joint Memo. In Opp., at 14-18.)

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<sup>5</sup> The petition in the special proceeding pleaded a claim for an accounting (Special Proceeding, Pet., Wherefore Clause, ¶ 4), whereas the amended petition pleaded a claim for access to corporate books and records but did not plead a claim for an accounting (Am. Pet., ¶¶ 63-67).

The court has discretion to direct the method by which issues are tried. (LeBel, 96 AD3d at 416-417.) “The trial court can decide the equitable claims while submitting the claims at law to the jury. . . . Alternatively, the trial court can submit all claims, equitable and at law, for resolution to a jury,” and treat the jury’s determination on the equitable claims as “advisory.” (Id., at 417, citing John W. Cowper Co. v Buffalo Hotel Dev. Venture, 99 AD2d 19, 23 [4th Dept 1984].) The latter alternative is appropriate where the facts underlying the legal and equitable claims are “intertwined and related.” (Jerry Kindman & Co., 142 Misc 2d at 604; Hudson View II Assocs., 222 AD2d at 169.) The court, however, retains discretion to “regulate and direct the sequence of the trial of the issues as [it] deems proper under the circumstances then prevailing.” (Vinlis Constr. Co. v Roreck, 23 AD2d 895, 896 [2d Dept 1965] [citing CPLR 603].)

Given the extent to which the legal and equitable claims are intertwined here, a single trial may be not only appropriate but necessary to avoid potentially inconsistent determinations on these claims. The court holds, however, that a final decision on the format of the trial should await further elucidation from the parties, at a pre-trial conference, on the proof to be adduced on the various claims. Moreover, a formal motion to join the special proceeding and plenary action for trial has not been made. The parties have addressed, and this decision has considered, the causes of action in both the special proceeding and the plenary action in determining whether the causes of action in the plenary action are equitable or legal in nature and whether the equitable relief sought on causes of action which seek monetary relief is incidental to the monetary relief. While joint trial of the proceeding and action would seem to be the only appropriate course, no motion to join the cases for trial has been made. (See Pet./Pl.’s Memo. In Supp., at 15, n 5.). At the pre-trial conference, if the parties do not consent to the joint trial, they must address whether the court has discretion to join the cases for trial sua sponte.

It is accordingly hereby ORDERED that the motion of petitioner Cristina Quazzo in the special proceeding (Motion Seq. No. 12) to strike the jury demands of respondents 9 Charlton Street Corporation, Pearlbud Realty Corporation, Orbis International Corporation, Ugo Quazzo, and Stephen Quazzo is granted; and it is further

ORDERED that the motion of plaintiff Cristina Quazzo in the plenary action (Motion Seq. No. 7) to strike the jury demands of defendants 9 Charlton Street Corporation, Pearlbud Realty Corporation, Orbis International Corporation, Ugo Quazzo, and Stephen Quazzo is granted to the extent set forth in the above decision.

This constitutes the decision and order of the court.

7/17/2020  
DATE

  
MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: