

RCDolner LLC v Samson Mgt., LLC
2007 NY Slip Op 32920(U)
September 4, 2007
Supreme Court, New York County
Docket Number: 0100694/2007
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Emily Jane Goodman
Justice

PART 17

RC Diller LLC

INDEX NO. 100694/07

- v -

Samson Management LLC

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided for

RC Diller

FILED

SEP 18 2007

NEW YORK
COUNTY CLERKS OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/4/07

Emily Jane Goodman
EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----X

RCDOLNER LLC,

Plaintiff,

Index No. 100694/07

-against-

SAMSON MANAGEMENT, LLC and 50 MADISON
AVENUE, LLC,

Defendants.

-----X

EMILY JANE GOODMAN, J.:

FILED
SEP 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff RCDolner (RCD) moves, by order to show cause⁷ for an order that the "Settlement Agreement" between the parties is valid and enforceable and that under the terms of that agreement, defendants may not withhold any more than the disputed \$81,264.63 and must immediately disgorge all remaining amounts due under the agreement.

FACTS

On October 1, 2003, RCD contracted with defendants 50 Madison Avenue, LLC and its agent, Samson Management, LLC (collectively, Samson) to perform renovations to the building located at 50 Madison Avenue, New York, New York. Disputes arose between the parties concerning the work, and the parties entered into a subsequent agreement, on May 31, 2006, which they denominated a "Settlement Agreement." There was no litigation regarding the dispute, so the May 31, 2006 agreement (Agreement)

was not in settlement of any litigation; it was merely the name given to the new agreement that the parties executed.

The Agreement provided that RCD would "complete or reasonably commence to complete and diligently pursue with all best efforts prompt completion of the tasks set forth on the schedule annexed hereto as Exhibit 'A'... ." Order to Show Cause, ex. B., at 1. The Agreement also addressed various other issues, including subcontractor claims and mechanics' liens, the fire pump room, floor repairs, and punch list items. In discussing payment for the remaining work, the Agreement stated: "Conditioned upon and in consideration of [RCD] fully and timely performing its obligations set forth in paragraphs 1 through 7 hereof, Samson agrees to pay [RCD] the sum of \$1,950,385.84 (the "Settlement Amount") as follows:" *Id.* at 6, ¶ 8.

The parties continued to have disagreements regarding the manner and timeliness with which the work was performed. Samson paid RCD part of the amount that was outstanding, but has refused to pay the entire amount set forth in the Agreement, contending that RCD has not fulfilled all of its obligations. RCD contends that the only outstanding issue is a floor on the seventh floor of the building, in a unit owned by Ludmilla Lorne (Lorne). RCD asserts that the total amount at issue regarding Lorne's floor is \$81,264.63. Samson, on the other hand, contends that the costs of reinstalling the floor and subfloor, was \$85,789.68. In

addition, the relocation and storage expenses incurred because Lorne had to vacate her apartment for so many months, is not less than \$183,000.00. Samson alleges further damages due to RCD's failure to complete the punch list items, which, it claims, total not less than \$950,500.00.

RCD commenced this action, filing a summons and complaint on the same day as it filed its order to show cause. In its first cause of action, RCD seeks a declaratory judgment declaring that the terms of the Agreement are fully enforceable; that under those terms defendants may not withhold any more than the disputed \$81,264.63 and must disgorge all remaining amounts due immediately, specifically the \$307,424.96 Lien Payment, the \$35,000 Pump Room Payment, and the \$71,250 Punch List Payment. In the second, third and fourth causes of action, RCD seeks damages in the amount of each of the payments specified above, for breach of contract.

DISCUSSION

RCD contends that Samson is not entitled to hold back all payments under the terms of the Agreement, merely because one portion of the payments is in dispute. RCD argues that it was entitled to payment when lien waivers were provided, when the necessary permits, approvals and/or sign offs for the Fire Pump Room were provided, when the punch list work was completed, and eight months after the completion of the floor repairs.

Samson opposes the motion on several grounds. First, Samson maintains that RCD is, in effect, seeking summary judgment in its motion to show cause, despite the fact that issue had not been joined when the motion was made, and Samson did not have an opportunity to respond in any way or conduct discovery. Since RCD filed its application, Samson answered the complaint, denying liability for the amounts sought and asserting counterclaims against RCD in amounts exceeding \$1.6 million. Samson contends that RCD breached the Agreement, and points out that the Agreement is not a settlement agreement that RCD seeks to enforce, but what is involved in this action is merely a contract dispute. Samson further points out that RCD has not demonstrated any of the requirements for a preliminary injunction. Samson also notes that the relief sought in this order to show cause is the ultimate relief RCD seeks under its first cause of action, while the remaining causes of action seek damages for the same sums that RCD seeks to have disgorged pursuant to the first cause of action.

RCD responds that it is not seeking either summary judgment or a preliminary injunction. Rather, RCD maintains that it "simply asks this Court to rule that Samson cannot simply withhold all the monies that are presently due under the ... Agreement on the spurious basis that a portion of those payments are in dispute." Reply Memorandum of Law, at 2.

RCD does not specify under what section of the CPLR it is moving, nor does it suggest the basis on which it seeks the requested relief, if not summary judgment on the first cause of action. In fact, in its arguments, it repeatedly refers to the purported lack of defendants' evidence because they submitted attorneys' affirmations rather than affidavits of those with personal knowledge of the facts. This type of argument is one that is typically raised on a summary judgment motion, when the parties must produce evidence. It appears from RCD's arguments, and from the tenor of its order to show cause, that it is indeed seeking summary judgment, even if it declines to use that name for the motion. Inasmuch as issue had not been joined at the time the order to show cause was filed, the motion is premature. CPLR 3212 (a); *City of Rochester v Chiarella*, 65 NY2d 92, 101 (1985).

RCD has also failed to meet the requirements for preliminary relief, in the event that that is what it is seeking. Even if RCD demonstrated a likelihood of success on the merits and that the equities tip in its favor, which it has not, injunctive relief will not be granted where an action is essentially for an amount of money damages, because such damages do not constitute irreparable injury. See *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541 (2000). Here, RCD is seeking, essentially, money damages, despite couching its demand in terms

of a declaratory judgment.

Were this court to address this motion on its merits, relief would also have to be denied. There appears to be significant disagreements between the parties as to whether RCD performed its obligations under the Agreement. While RCD maintains that the only matter at issue is the floor in Lorne's apartment, that position is disputed by Samson. Indeed, the correspondence between the parties indicates that they had ongoing disagreements. See Zuckerman Affidavit, ex. C, D, E, F and G; Dolce Reply Affidavit, ex. A, B, C and D. Further, payment, pursuant to the Agreement, was conditioned on RCD performing many tasks in an appropriate and timely manner. RCD has not demonstrated that it has done so. Thus, at the very least, there is a question of fact for the decider of fact to determine with respect to whether RCD complied with its obligations under the Agreement. In view of the fact that no discovery has been held, issue was joined only after RCD brought this motion, and there appear to be questions of fact in dispute, it would be improper to determine the merits at this time.

CONCLUSION

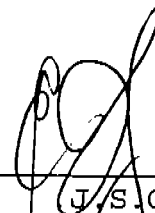
Accordingly, it is hereby

ORDERED that the motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: September 4, 2007

ENTER:



J.S.C.

EMILY JANE GOODMAN

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