

<b>McCarroll v Law Firm of Jerome A. Wisselman, P.C.</b>
2007 NY Slip Op 33937(U)
November 19, 2007
Supreme Court, Queens County
Docket Number: 0000108/2006
Judge: David Elliott
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## MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 14

MARY ROSE McCARROLL X INDEX NO. 108/2006

SEQ. NO. 1

- against -

BY: ELLIOT, J.

THE LAW FIRM OF JEROME A.  
WISSELMAN, P.C.

DATED: NOVEMBER 19, 2007

X

The Law Firm of Jerome A. Wisselman, the defendant and interpleading plaintiff in this action, has moved for an order, inter alia, permitting it to pay into court the sum of \$25,016.49. Plaintiff Mary Rose McCarroll has cross-moved for an order directing the Law Firm of Jerome A. Wisselman to pay a sum held in escrow to her.

Pursuant to a written escrow agreement dated October 7, 2003, plaintiff Mary Rose McCarroll and interpleaded defendant Rory Harris agreed to sell real property known as 55-06 68th Street, Maspeth, New York and to place the net proceeds of the sale in a non-interest bearing IOLA account with the Law Firm of Jerome A. Wisselman, P.C. ("the Wisselman firm"). The escrow agreement provided in relevant part: "Escrowee shall not distribute any of the proceeds to either party in the absence of a fully executed written agreement or court order." The Wisselman firm alleges that the parties eventually placed \$84,086.40 in the

escrow account, and, after deducting payments consented to by the parties, the sum of \$25,016.49 remains in the account. McCarroll subsequently obtained a judgment against Harris in the amount of \$35,733.28, and on January 11, 2005 and July 19, 2005 she served an execution with notice to garnishee upon the Wisselman firm demanding the turnover of the funds held in escrow to the sheriff. On or about September 13, 2005, the Sheriff of Nassau County levied on the funds held in escrow, but the Wisselman firm refused to turn the funds over to him. The Wisselman firm sent a letter to plaintiff McCarroll's attorneys stating that Harris would only consent to an equal division of the sum held in escrow. Plaintiff McCarroll refused such a distribution, and on or about January 4, 2006, she began this action against the Wisselman firm seeking damages and injunctive relief. On or about February 15, 2006, the Wisselman firm began an interpleader action against Rory Harris seeking, inter alia, a judgment directing the payment of the sum held in escrow, less costs, disbursements, and attorney's fees, into court. Rory Harris has defaulted in answering the interpleader complaint.

The Wisselman firm first seeks an order amending its answer and interpleader complaint concerning the amount of money held in escrow. As a general rule, the amendment of a complaint will be permitted where there is no significant prejudice or surprise to the defendant. (See, Edenwald Contr. Co. v City of New

York, 60 NY2d 957; Dal Youn Chung v Farberov, 285 AD2d 524.) There is no prejudice to plaintiff McCarroll, who acknowledges that the sum held in escrow amounts to \$25,016.49.

Accordingly, that branch of the motion which is for an order permitting the Wisselman firm to amend its answer and interpleader complaint to set forth the amount held in escrow as \$25,016.49 is granted. The amending pleadings shall be served within twenty days of the service of a copy of the order to be entered hereon with notice of entry.

The Wisselman firm also seeks an order, inter alia, discharging it from liability to McCarroll and Harris. A party may protect itself from conflicting claims by bringing an interpleader action pursuant to CPLR 1006. (See, Lincoln Life and Annuity Co. of New York v Caswell, 31 AD3d 1; Matter of Bernstein, 156 AD2d 683.) CPLR 1006 provides in relevant part: "(f) Discharge of stakeholder. After the time for all parties to plead has expired, the stakeholder may move for an order discharging him from liability in whole or in part to any party. ... The court may grant the motion and require payment into court, delivery to a person designated by the court or retention to the credit of the action, of the subject matter of the action to be disposed of in accordance with further order or the judgment. ... The court shall impose such terms relating to payment of expenses, costs and disbursements as may be just and which may be charged against the

subject matter of the action.” (See, Sun Life Ins. and Annuity Co. of New York v Braslow, 38 AD3d 529.) In the case at bar, the Wisselman firm established its entitlement to a discharge from all further liability upon payment of the escrow money as directed by this court by demonstrating that the firm is a neutral stakeholder against whom no claim of independent liability is made. (See, Sun Life Ins. and Annuity Co. of New York v Braslow, 38 AD3d 529; Lincoln Life and Annuity Co. of New York v Caswell, 31 AD3d 1.) Moreover, plaintiff McCarroll established her right to an order pursuant to CPLR 1006(f) that the funds held in escrow be paid directly to her. Although her cross motion is not denominated as one for summary judgment, a remedy available in the context of an interpleader action (see, e.g., Pacific Indem. Co. v Koskey, 17 AD3d 553; Albert & Kimmel v Herman, 276 AD2d 413), she showed prima facie that she holds an unsatisfied judgment against Harris in excess of the amount held in escrow and that she has levied upon the funds held in escrow. Harris defaulted in this action, and, of course, has failed to raise a triable issue of fact in opposition. Finally, the Wisselman firm established its entitlement to an award of attorney’s fees, costs, disbursements, and expenses pursuant to CPLR 1006(f), since, as a neutral stakeholder, it was forced to participate in a dispute between adverse claimants. (See, Sun Life Ins. and Annuity Co. of New York v Braslow, 38 AD3d 529; American Intern. Life Assur. Co. of New York v Ansel, 273 AD2d 421.) If the

parties cannot agree on the proper amount to be awarded to the Wisselman firm, a hearing will be held at a date, time, and place to be fixed in the order to be entered hereon. (See, Lincoln Life and Annuity Co. of New York v Caswell, 31 AD3d 1.)

Accordingly, that branch of the motion by the Wisselman firm which is for an order discharging it as a stakeholder is granted upon payment of the sum of \$25,016.49 less costs, expenses, disbursements, and attorney's fees to plaintiff McCarroll. If the parties cannot agree on the proper amount to be awarded to the Wisselman firm, a hearing will be held at a date, time, and place to be fixed in the order to be entered hereon. Plaintiff McCarroll's cross motion is granted to the extent that the Wisselman firm is directed to turn over the sum of \$25,016.49 less costs, expenses, disbursements, and attorney's fees to her.

Settle order.

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J.S.C.