

<b>RCDolner LLC v Samson Mgt., LLC</b>
2009 NY Slip Op 30056(U)
January 2, 2009
Supreme Court, New York County
Docket Number: 100694/07
Judge: Emily Jane Goodman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GOODMAN  
Justice

PART 17

RCDOLNER LLC

INDEX NO. 100694/07

- v -  
SAISON MANAGEMENT, LLC,  
ETAL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided*

*per attached*

**FILED**  
JAN 14 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 1/2/09  
1/2/09

**EMILY JANE GOODMAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

FILED IN NEW YORK COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X

RCDOLNER LLC,

Plaintiff,

Index No. 100694/07

-against-

SAMSON MANAGEMENT, LLC and 50 MADISON  
AVENUE, LLC,

Defendants.

-----X

EMILY JANE GOODMAN, J.S.C.:

Plaintiff RCDolner LLC (Dolner) moves for an order restraining the attorneys for Defendants Samson Management, LLC (Samson Management) and 50 Madison Avenue LLC (50 Madison; collectively with Samson Management, Samson) from releasing escrow funds to Samson, held pursuant to paragraph 8 of a Settlement Agreement between the parties. Samson and its attorneys oppose the motion on the basis that (1) the purpose of the escrow fund was solely to insure that funds were available to pay contractors and other third parties, and was not intended to benefit Plaintiff, (2) the payment of funds from the account to Plaintiff were conditioned on Plaintiff fully and timely performing its obligations, providing mechanics' lien waivers and discharges, and because there is no dispute that Plaintiff is in breach, the funds can be released, and (3) the Settlement Agreement entitled Samson "in its sole discretion" to expend sums

necessary to repair/address any floor defects and items defined as Immediate Tasks and set off those expended sums against the respective payments set forth in Paragraph 8. Samson's attorneys have not opposed the motion on the grounds that they are non-parties.

In reply, Plaintiff claims that it is not in default of the Settlement Agreement, and that in any event, Samson is not entitled to offset any payments from the escrow account because the funds "were clearly placed in escrow so that they could not be touched by either party." Further, Plaintiff argues that Samson cannot offset any payments from the account unless Plaintiff failed "to timely commence and/or complete the work" and Samson did not even allege that Dolner failed to complete the Immediate Tasks.

Paragraph 8(a) of the Settlement Agreement provides, in relevant part, that:

8. Payment. Conditioned upon and in consideration of Dolner fully and timely performing its obligations. . . Samson agrees to pay to Dolner the sum of \$1,950,385.84 (the Settlement Amount) as follows:

(a) \$1,069,135.84 immediately deposited by Samson into its attorneys' escrow account, to be released and paid over to Dolner as follows...Should Dolner fail to timely commence and/or complete the work provided for in paragraph 1 hereof, then Samson may, in its sole discretion, immediately contract with another party to perform such work and set off the cost of such contract, and all of the services and materials provided pursuant thereto, against the payment provided for in this subparagraph..."

Thus, the plain language of the Settlement Agreement

provides for the establishment of an attorney's escrow account and nothing in the language of the Settlement Agreement indicates that the purpose of the escrow fund was limited to benefitting contractors and other third parties, but not Plaintiff.

Accordingly, the court will not read in such a limitation, where none is expressed. Moreover, the WHEREAS clause of the Settlement Agreement states that it was entered into because "certain disputes have arisen between Samson and Dolner concerning the Work and the parties performance...". It is unpersuasive for Samson to argue that the escrow account was never intended to benefit Plaintiff when it specifically provides for a method pursuant to which Plaintiff is to be paid, despite the parties' disputes.

The fact that the payment of funds from the account were conditioned on Plaintiff fully and timely performing its obligations and providing certain mechanics' lien waivers and discharges, is irrelevant to whether the escrow account can be dissolved, without Plaintiff's consent. There is no provision in the Settlement Agreement allowing for this, and none will be implied. To the extent that Samson maintains that it is entitled to the escrow funds because it is clear that Plaintiff breached the contract, and therefore, the condition precedent for payment can never be met, nothing in the Settlement Agreement allows for Samson to be unilateral decision maker of this fact. Notably, in

other places, the Settlement Agreement does expressly allow Samson to take actions "in its sole discretion." Thus, whether Plaintiff or Samson, or both, are in breach of the Settlement Agreement cannot be decided at this time, and the Court has rejected two prior attempts for such a premature determination (see Decisions and Orders dated 9/4/07 and 11/20/08).

However, the Court agrees that certain monies may be released to Samson if those amounts are released pursuant to the offset provisions of paragraphs 7 and 8 of the Settlement Agreement. Under paragraph 7, Samson has the "sole discretion" to arrange to have work completed or arrange for some payment or accommodation with an individual condo unit owner, and "set off" the cost of "retaining the alternative contractors to complete the work, or to settle with the Owner through some payment or other accommodation" and set off those amounts against the respective payments set forth in paragraphs (a)-(f), including the amounts funded by the escrow account. Paragraph 8 contains a similar provision, allowing Samson, in "its sole discretion," to contract with another party to perform the work and set off the cost of such contract. Because the set off provisions allow Samson to take these actions "in its sole discretion," as long as Samson has actually made the payment, the amounts may be set off whether or not such payments were necessary or whether or not it is ultimately determined that Plaintiff breached the Settlement

Agreement. Accordingly, funds may be released by Samson's attorney to Samson, to the extent those amounts are set offs pursuant to Paragraph 7 or 8.

CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff's motion is decided pursuant to the terms herein; and it is further

ORDERED that the temporary restraining order is dissolved and Defendants' law firm is restrained from releasing funds to Samson only to the extent that said funds are not set offs pursuant to Paragraphs 7 and 8 of the Settlement Agreement.

This Constitutes the Decision and Order of the Court.

Dated: January 2, 2009

ENTER:



J.S.G.

**EMILY JANE GOODMAN**

**FILED**  
JAN 14 2009  
COUNTY CLERK'S OFFICE  
NEW YORK