

**Chieffo v Queens Screen Co. Inc.**

2009 NY Slip Op 33180(U)

December 29, 2009

Supreme Court, Suffolk County

Docket Number: 26127-05

Judge: Peter Fox Cohalan

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INDEX # 26127-05  
RETURN DATE: 11-26-08 (003 & 005)  
11-20-08 (004)  
MOT. SEQ. # 003, 004 & 005

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:  
Hon. PETER FOX COHALAN

-----x  
THOMAS CHIEFFO, JOHN J. MORGADO  
and CHIEFFO MORGADO ENTERPRISES,

Plaintiffs,

-against-

QUEENS SCREEN CO. INC., JACK  
WALKER, RANDOLPH CRUSE and KEVIN J.  
POWERS,

Defendants.  
-----x

CALENDAR DATE: April 8, 2009  
MNEMONIC: Seq. 003 -MD;  
Seq. 004 -X MG;  
Seq. 005 - MG

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Hauppauge, NY 11788

Upon the following papers numbered 1 to 53 read on these motions to release funds and dismissal ;  
Notice of Motion/Order to Show Cause and supporting papers 1-10, 27-47 ; Notice of Cross-Motion and  
supporting papers 11-16 ; Answering Affidavits and supporting papers 1-24, 48-50 ; Replying  
Affidavits and supporting papers 17-20, 25-26, 51-53 ; Other \_\_\_\_\_ ; and after hearing counsel in support of  
and opposed to the motion it is,

**ORDERED** that this motion (seq. #003) by Thomas Chieffo, John J. Morgado  
and Chieffo Morgado Enterprises, Inc. (hereinafter plaintiffs), for an order releasing escrow  
funds in the possession of the co-defendant Kevin J. Powers (hereinafter Powers) to the  
plaintiffs and the cross-motion (seq. #005) by Powers permitting the escrow funds to be  
deposited in Court and releasing Powers as escrow agent, as well as a motion (seq. #004) by  
Powers for summary judgment and dismissal of the plaintiffs' action as against Powers  
pursuant to CPLR §3212 are hereby decided as follows.

**ORDERED** that the plaintiff's motion seeking the release of the escrow funds  
held by the escrow agent Powers to the plaintiffs directly is hereby denied in its entirety; and it  
is further

**ORDERED** that the cross-motion by Powers permitting the escrow funds to be deposited into Court and releasing Powers as escrow agent is hereby granted and Powers is directed to turn over the escrow funds plus any applicable interest and deposit same with the Court through the Suffolk County Treasurer under the applicable Index number within thirty (30) days of service of a copy of this order with notice of entry thereon and upon such deposit Powers will be released as escrow agent; and it is further

**ORDERED** that the motion by Powers for summary judgment and dismissal of the plaintiffs' complaint pursuant to CPLR §3212 as against him is hereby granted in its entirety and the plaintiffs' complaint is dismissed as against Powers.

This action arose from a failed sale involving the property and business known as Queens Screen Company Inc., which operated as an aluminum products manufacturing company located at 157 Montauk Highway in Moriches, Town of Brookhaven (hereinafter Town), Suffolk County on Long Island, New York. The purchase and sale agreement, dated April 2001 between the defendant/sellers, Jack Walker and Randolph Cruse as Queens Screen Co. (hereinafter premises), Inc. and the plaintiff/buyers, Thomas Chieffo and John J. Morgado as Chieffo Morgado Enterprises, Inc., called for the sellers to deliver certificates of occupancy from the Town for the building that the business occupied within one (1) year of the date of closing on the sale of the business. The defendant/sellers placed \$65,000.00 at closing in escrow with Powers

“to be used to pay any and all expenses including  
any modifications to additions to the structures  
required by the municipal authorities”

in order to obtain the certificate of occupancy from the Town. The plaintiffs claim the defendant/sellers breached the agreement by failing to obtain the requisite certificate of occupancy for the business premises.

There were two actions originally entitled under Index #26127-05 with the named defendants being the sellers and the business, and the second action under Index # 15164-07 involved a claimed breach of fiduciary duty by Powers as well as a legal malpractice and accounting claim for the escrow monies being held as part of the sale of the premises by Powers, the attorney acting as escrow agent. These two actions were consolidated in an order of this Court, dated September 17, 2008, under the first and original index number of this case, Index #26127-05. The action against Powers was based upon the sales agreement which provided that the escrowed funds were to be released to pay the expenses in acquiring the certificate of occupancy for the business being sold. The amount presently in escrow as of the date of the motions was \$41,524.52. The defendant/sellers never obtained the certificate of occupancy for the business.

Powers, the defendant/seller's attorney, was charged by plaintiffs for failing to follow the escrow agreement in connection with the sale of the premises and also with the handling of the escrow funds pursuant to that agreement. The escrow agreement required

the escrow agent to dispense escrow funds to expedite the obtaining of a certificate of occupancy which the plaintiffs claim Powers did not do and in fact the plaintiffs claim that Powers obstructed the attempts to get the certificate of occupancy from the Town. The plaintiffs now move for an order directing that the escrowed funds being held by Powers be released directly to the plaintiffs. This motion is opposed by Powers who cross-moves for an order of this Court directing the deposit of the escrow funds into Court and seeking to be discharged as escrow agent. Powers also seeks summary judgment and dismissal of the plaintiffs' complaint as against him pursuant to CPLR §3212 arguing that he is merely an escrow agent holding funds deposited by the defendant/sellers with the duty imposed by the defendant/sellers to disburse funds from the escrow account to the expediter, Ernest Hoffstaetter, for expenses related to getting a certificate of occupancy from the Town. Powers claims he never represented the plaintiffs as they were represented by counsel and therefore the plaintiffs' actions against him should be dismissed. The plaintiffs claim that Powers breached his fiduciary duty to the plaintiffs by improperly releasing escrow funds.

The escrow funds are subject to the purchase sales agreement under which the defendant/sellers deposited said funds to aid in obtaining the certificate of occupancy from the Town. The certificate of occupancy has not yet been obtained. The plaintiffs have not submitted proof of their expenses in their purported attempts to obtain a certificate of occupancy. This precludes turning over to the plaintiff the escrow funds merely on a demand for such funds. The funds in escrow remain the property of the defendant/sellers, not the plaintiffs and are earmarked for a specific purpose. Once plaintiffs have obtained a certificate of occupancy, the question of what reimbursement of those expenses from the remaining funds held for that purpose should be applied to those expenses will be addressed by the Court. See, ***Fischbein, Badillo, Wagner v. Tova Realty, Co.***, 193 AD2d 442, 597 NYS2d 676 (1<sup>st</sup> Dept 1993). The plaintiffs' motion is denied.

Powers' cross-motion to pay the escrowed funds into Court is granted and Powers is discharged as escrow agent. The escrowed funds belong to the sellers which required them to use said funds to obtain the required certificate of occupancy of the building sold with the business which has not occurred. Powers is a mere stakeholder and charged with releasing the escrowed funds for payment of expenses associated with obtaining the certificate of occupancy. Powers' application for discharge is granted upon deposit of the escrowed funds into Court.

Finally as to Powers' motion for summary judgment and dismissal of the plaintiffs' action pursuant to CPLR §3212 as against him, that motion is granted and the plaintiffs' action against Powers is dismissed.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*DiMenna & Sons v. City of New York*, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App. Div. 1019), or where the issue is 'arguable' (*Barnett v. Jacobs*, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727)."

On a motion for summary judgment, the Court must consider all the facts in a light most favorable to the party opposing the motion, *Thomas v. Drake*, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. *S.J. Capelin Assoc., v. Globe*, 34 NY2d 338, 357 NYS2d 478 (1974). Finally, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the movant fails to make such a showing, then the motion must be denied, regardless of the sufficiency of the opposing papers. However, once a showing has been made, as in this case, the burden then shifts to the party opposing the motion to produce evidentiary proof, *in admissible form* sufficient to establish or raise the existence of material issues of fact which would require a trial of the action and preclude summary disposition. *Romano v. St. Vincent's Medical Center of Richmond*, 178 AD2d 467, 577 NYS2d 311 (2nd Dept. 1991); *Barrett v. General Electric Company*, 144 AD2d 983, 534 NYS2d 632 (4th Dept. 1988); *McCormack v. Graphic Machinery Services, Inc.*, 139 AD2d 631, 527 NYS2d 271 (2nd Dept. 1988).

After viewing the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as required, [*Robinson v. Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 (4<sup>th</sup> Dept. 1983)], the Court finds Powers has met his burden but that the plaintiffs have failed in their burden of establishing by admissible evidence that Powers owed them a duty or violated some duty owed to them with reference to the escrowed funds. Putting aside the issue of the standing of the plaintiffs to bring this action, Powers noted that he did not represent the plaintiffs, that the plaintiffs were represented by counsel of their own choosing, that the escrowed funds were placed in escrow by the defendant/sellers pursuant to a purchase and sale agreement for the premises and that his duties as the stakeholder of these escrowed funds was to release said funds to pay for expenses related to the necessity of obtaining a certificate of occupancy. Upon request of the sellers, he released escrow account funds to an expediter, Ernest Hoffstaetter, for expenses related to attempts to get a certificate of occupancy. However after institution of the present lawsuit in August 2005, no further funds were expended. Thus, Powers' claims to be a mere stakeholder and claims to owe no fiduciary duty to the plaintiffs nor may the plaintiffs contend that Powers committed legal malpractice since he never represented the plaintiffs.

In opposition to Powers's motion, the plaintiffs submit a six (6) page affirmation by their counsel attorney which states the general rule of law about the Court's obligations of fact finding in denying the motion and in conclusory terms claims there are factual issues which warrant denial of the Powers's motion. In this regard, the plaintiffs state the general law that the escrow agent can be held liable for breach of an escrow agreement and breach of fiduciary duty as an escrowee citing to *Takaayama v. Schaefer*, 240 AD2d 21, 669 NYS2d 656 (2<sup>nd</sup> Dept. 1998), yet then state

"It is the contention of plaintiffs in this action that the strict terms and conditions of the subject escrow agreement were that defendant Powers was only authorized to permit funds to be released from the escrow account if those funds were in furtherance of the sellers' obligations under the purchase and sale agreement."

However, the plaintiffs never produce proof to substantiate that Powers in any manner violated his obligations as escrow agent under the agreement to release escrowed funds. The plaintiffs claim such violations of the escrow agreement occurred but produce no evidentiary proof to establish the claimed violations by Powers. They merely state that such funds were expended "not in furtherance of any obligation of the sellers under the purchase and sale agreement." The fact that the funds were the defendants/sellers' funds escrowed for the sole purpose of furthering obtaining a certificate of occupancy for the property being sold and not the plaintiffs' funds seems lost on the plaintiffs who argue they own, control and or have the right to exercise some dominion or rights over these escrowed funds.

The Court finds that the plaintiffs have stated mere conclusory claims not supported by any facts or evidentiary material and therefore have failed in their burden to show a triable issue of fact to preclude the grant of summary judgment to the escrow agent/stakeholder Powers. Powers, having made a proper showing, the burden shifted to the plaintiffs to produce "evidentiary proof in admissible form" sufficient to require a trial on the issue of fact raised; the plaintiffs having failed to do so warrants the Court in granting summary judgment to Powers.

As has been stated so many times in the past, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a party's request for summary disposition. *V. Savino Oil and Heating Co. Inc. v. Rana Management Corp.*, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); *Dabney v. Ayre*, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, *Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.*, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987).

As the Court noted in *Andre v. Pomeroy*, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Millerton Agway Co-op v. Briarcliff Farms*, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Accordingly, the co-defendant Powers' motion for summary judgment and dismissal of the plaintiffs' action as against him is granted and the plaintiffs' action is dismissed as to Powers, and the action is severed and continued as against the remaining defendants. The Court need not reach the issue of standing raised by Powers that the plaintiffs no longer own the premises, though the issue may be problematic depending on the facts

The foregoing constitutes the decision of the Court.

Dated: December 29, 2009

  
\_\_\_\_\_  
J.S.C.