

Rothmann's 54th St. LLC v 3 E. 54th N.Y., LLC

2015 NY Slip Op 31207(U)

July 8, 2015

Supreme Court, New York County

Docket Number: 650503/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ROTHMANN'S 54TH STREET LLC,

Plaintiff,

- v -

3 EAST 54TH NEW YORK, LLC and HARWOOD
REIFF LLC, as Escrowee/Stakeholder,

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Index No.
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**DECISION
and ORDER**

Mot. Seq. #001,
#002

This is an action for declaratory relief and attorney's fees based on an escrow agreement (the "Escrow Agreement") between plaintiff, Rothmann's 54th Street LLC ("Plaintiff" or "Rothmann's"), and defendants, 3 East 54th New York, LLC ("3 East") and Harwood Reiff LLC ("Harwood"), as Escrowee/Stakeholder. Plaintiff claims to have entered into the Escrow Agreement in connection with a commercial landlord/tenant dispute between Plaintiff and 3 East, which concerned a commercial lease agreement (the "Lease") between Plaintiff, as tenant, and 3 East, as landlord. Plaintiff claims that, pursuant to the Escrow Agreement, Plaintiff deposited the sum of \$30,000 (the "Escrow Funds") into Harwood's escrow account. Plaintiff seeks a declaration that Plaintiff is not liable for any alleged defects or breaches under the Lease and that Plaintiff is entitled to the return of the Escrow Funds.

Harwood now moves (Mot. Seq. #001) for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff's complaint as against Harwood on the basis of documentary evidence and failure to state a cause of action; and, granting Harwood its costs, disbursements, and reasonable attorney's fees incurred in this proceeding pursuant to Paragraph 4(c) of the Escrow Agreement.

3 East now moves (Mot. Seq. #002) for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff's complaint as against 3 East on the basis of documentary evidence and failure to state a cause of action; and, granting 3 East

its costs, disbursements, and reasonable attorney's fees incurred in this proceeding pursuant to Paragraph 4(i) of the Escrow Agreement.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep’t 2007] [citation omitted]). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep’t, 2003] [internal citations omitted]; CPLR § 3211[a][7]).

Pursuant to CPLR § 3001, “[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” (CPLR § 3001). Additionally, “[a] declaratory judgment serves a legitimate purpose only when all interested persons who might be affected by the enforcement of rights and legal relations are parties.” (*White v. Nationwide Mut. Ins. Co.*, 228 A.D.2d 940, 941 [3d Dep’t 1996]; citing *Matter of J-T Assocs. v Hudson Riv.--Black Riv. Regulating Dist.*, 175 A.D.2d 438, 440 [3d Dep’t, 1991]; CPLR § 1001).

Plaintiff's complaint alleges that, "[i]n or about September 2014, in connection with the resolution of a dispute between Rothmann's and 3 East relating to a lease agreement between said two parties, Rothmann's, 3 East and [Harwood] entered into an Escrow Agreement (hereinafter the 'Escrow Agreement')", and that, "[p]ursuant to the terms of the Escrow Agreement, Rothmann's deposited the sum of \$30,000 (the 'Escrow Funds') into [Harwood's] escrow account." (Compl. ¶¶ 5-6). Plaintiff's complaint alleges that, "[p]rior to the execution of the Escrow Account, the parties disputed whether Rothmann's fully performed under the terms of the parties' lease and Stipulation of Settlement of a commercial landlord tenant action to which they were parties, and also disputed the reasonable cost of curing any defaults under the lease, if any." (*Id.* ¶ 7). Plaintiff's complaint further asserts:

Despite the passage of over three months since the execution of the Escrow Agreement and the deposit of the Escrow Funds, 3 East has failed to provide Rothmann's with any documentation or proof of (a) any breach of the terms of the Lease or the Stipulation of Settlement by Rothmann's or (b) proof of the cost to cure any alleged breach.

(*Id.* ¶ 8).

Plaintiff's complaint alleges that "[t]he Escrow Agreement provides that the Escrow Funds are only to be released upon the agreement of the parties or via a determination of a court of competent jurisdiction as to entitlement to all or part of the Escrow Funds." (*Id.* ¶ 9). Plaintiff's complaint asserts that, as a result of the foregoing, Plaintiff is entitled to a declaration that, "(a) Rothmann's has no liability for any alleged defects or breaches alleged by 3 East and (b) Rothmann's is entitled to the return of the entirety of the Escrow Funds from defendants, plus interest." (*Id.* ¶¶ 14-15). In addition, Plaintiff's complaint "requests a judgment declaring the rights and legal relations of the parties, directing that defendants return the down payment to plaintiff and declaring that defendants are not entitled to any damages or relief as against plaintiff." (*Id.* ¶ 16).

Turning first to Harwood's motion, Harwood argues that the Escrow Agreement expressly provides:

The Parties acknowledge that Escrow Agent is acting as attorney for E [sic.] [3] East. In the event of a dispute involving this Agreement or any other matter, Escrow

Agent may continue to serve as the attorney for 3 East in connection with said dispute. The Parties agree that the Escrow Agent shall not be named in any action relating to the disposition of the Escrow Fund.

(Compl. Exh. A., Escrow Agreement, ¶ 4[g]). As a result, Harwood contends, Harwood, the Escrow Agent, is not properly named in this action.

Harwood further argues that paragraphs 4¹ and 5² of the Escrow Agreement contain mandatory notice and counter-notice provisions that constitute conditions precedent to the return of the Escrow Funds. Harwood argues that Plaintiff's complaint fails to allege that such conditions precedent were met. Harwood further asserts that the conditions precedent did not occur. As a result, Harwood contends, Plaintiff's complaint as against Harwood must be dismissed for failure to comply with contractual preconditions to bringing a lawsuit to determine the disposition of Escrow Funds under the Escrow Agreement.

Plaintiff, in turn, argues that Plaintiff's complaint does not assert a claim against Harwood. Plaintiff further argues that Plaintiff's complaint names Harwood solely in Harwood's capacity as Escrowee/Stakeholder. Plaintiff argues that, as such, Plaintiff's complaint does not improperly name Harwood in this action in contravention of the Escrow Agreement.

¹ Specifically, Harwood points to paragraph 4 of the Escrow Agreement, which provides: "4. If at any time prior to the determination by a court of competent jurisdiction as to the Parties' entitlement to a portion or the entirety of the Escrow Funds, either Party claim[s] it is entitled to any portion of the Escrow Funds then held by Escrow Agent (the respective Party so believing being hereinafter called the "Claimant"), the Claimant shall promptly give to the Escrow Agent and to the other of the Parties a notice (the "Claim Notice") directing the Escrow Agent to deliver the claimed portion of the Escrow Funds to the Claimant and setting forth the basis of the claim thereto. If, within 5 days after the delivery of the Claim Notice to the Escrow Agent, the Escrow Agent receives a notice (the "Counter Notice") from the other Party (who shall send a copy of the Counter Notice to the Claimant concurrently with sending it to the Escrow Agent) denying that the Claimant is entitled to the claimed portion of the Escrow Fund, such dispute shall be resolved as hereinafter provided.

'a. If, following the Counter Notice, the Parties resolve the dispute between them, they shall jointly notify the Escrow Agent, in writing, of such determination (the "Joint Notice") and the Escrow Agent shall follow the directions set forth in the Joint Notice.

'b. As promptly as may be practical after either (i) the 10th day following the giving of a Claim Notice as to which no timely Counter Notice has been given pursuant to clause (a), (ii) receipt by Escrow Agent of a Joint Notice pursuant to clause (b), or (iii) receipt by Escrow Agent of an order of a court of competent jurisdiction of the Escrow Agent or portion thereof (an "Order"), Escrow Agent will deliver the Escrow Fund or the applicable portion thereof in accordance with the directions set forth in said undisputed Claim Notice, Joint Notice or Order." (Escrow Agreement, Compl. Exh. A ¶ 4).

² Paragraph 5 of the Escrow Agreement provides that any notices "required *or permitted* to be given hereunder, shall be given by Federal Express overnight delivery or similar service or by in hand personal delivery." (Compl. Exh. A, Escrow Agreement, ¶ 5) (emphasis added).

Additionally, Plaintiff argues that the Escrow Agreement does not require a notice of claim as a precondition to commencing an action to recover the Escrow Funds. Plaintiff argues that paragraph 4 of the Escrow Agreement only speaks to procedures for determining entitlement to the Escrow Funds absent a court order or judicial decision, and does not provide that those same procedures are necessary as conditions precedent to suit. To this end, Plaintiff points to paragraph 3 of the Escrow Agreement, which provides that the Escrow Funds will not be released:

until the Parties either (a) stipulate to the disposition of the Escrow Funds; or (b) a determination is made by a court of competent jurisdiction as to whether Rothmann's is responsible for the alleged breach(es) or default, and, if so liable, the amount of said liability; or (c) a determination is made by a court of competent jurisdiction that Rothmann's has no liability.

(Compl. Exh. A, Escrow Agreement, ¶ 3). Plaintiff argues that this provision clearly contemplates that any party to the Escrow Agreement may bring a suit to determine the rights and responsibilities of the parties thereto, and that the Escrow Agreement does not precondition any such suit upon the sending of notices or counter-notices to the Escrow Agent.

Here, accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Harwood fails to demonstrate that Plaintiff's complaint as against Harwood should be dismissed. As Escrow Agent, Harwood is a necessary party to Plaintiff's action to determine the disposition of Escrow Funds pursuant to the Escrow Agreement. (*See Plaut v. HGH Partnership*, 398 N.Y.S.2d 671 [1st Dep't 1977]). To the extent that Harwood wishes to be relieved of its status as a stakeholder who will be affected by a judicial determination respecting Plaintiff's entitlement to Escrow Funds, Harwood may seek to deposit the Escrow Funds with the Clerk of the Court pursuant to CPLR § 1006.

In addition, Harwood fails to demonstrate that the Escrow Agreement flatly contradicts the factual allegations or legal conclusions asserted in Plaintiff's complaint. Read as a whole, the Escrow Agreement, which is annexed to Plaintiff's complaint, does not clearly require notices or counter notices as contractual preconditions to an action to determine a party's entitlement to the Escrow Funds.

Similarly, with respect to 3 East's motion to dismiss, 3 East argues that Plaintiff's complaint must be dismissed because Plaintiff fails to allege that Plaintiff satisfied the conditions precedent to the Escrow Agent's obligation to return Escrow Funds, pursuant to paragraphs 4 and 5 of the Escrow Agreement. 3 East argues that the notice provisions set forth in paragraphs 4 and 5³ of the Escrow Agreement constitute contractual preconditions to bringing "any lawsuit at all", and that, as a result, Plaintiff's complaint as against 3 East must be dismissed for failure to comply with contractual preconditions to suit.

Accordingly, in light of the foregoing, 3 East's motion to dismiss Plaintiff's complaint fails.

Wherefore, it is hereby

ORDERED that Harwood's motion (Mot. Seq. #001) is denied; and it is further

ORDERED that 3 East's motion (Mot. Seq. #002) is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 8 2015


EILEEN A. RAKOWER, J.S.C.

³ Paragraph 5 of the Escrow Agreement provides that any notices "required or permitted to be given hereunder, shall be given by Federal Express overnight delivery or similar service or by in hand personal delivery." (Compl. Exh. A, Escrow Agreement, ¶ 5).