E 115 Harlem L.P. v Pedrez
2019 NY Slip Op 30273(U)
January 22, 2019
Supreme Court, New York County
Docket Number: 651363/2018
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** — *Justice*

PART **IAS MOTION 7EFM**

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E 115 HARLEM L.P.,

Plaintiff,

- v -

DIANE PEDREZ & CHARLES MESTER

Defendants.

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INDEX NO. 651363/2018

MOTION DATE 08/09/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for JUDGMENT - SUMMARY.

Jacobowitz Newman Tversky LLP, New York (Evan M. Newman and Aviva Francis of counsel) for plaintiff.
Charles L. Mester, Esq., Brooklyn, for defendants.

Gerald Lebovits, J.S.C.

Plaintiff, E 115 Harlem L.P., moves for summary judgment under CPLR 3212, granting plaintiff's claims and dismissing the counterclaims against it. Defendants, Diane Marrero Pedrez, as Executor of the Estate of Philip Marrero and Charles L. Mester, Esq., oppose the motion and cross-move under CPLR 2215 for summary judgment, requesting an order dismissing plaintiff's complaint and granting judgment on the counterclaims.

Background

Plaintiff commenced this action to enforce an escrow agreement with defendant Pedrez in connection with the sale of property located at 335-337 East 115th Street, New York, New York (Property).

According to the complaint, Pedrez owned 50% of the Property. On April 5, 2017, Pedrez signed a contract to sell her share of the Property to Madison Development LLC (Madison). On August 25, 2017, Madison assigned its rights to purchase the Property to plaintiff. On the same date, plaintiff and defendants entered into a post-closing escrow arrangement, in which they agreed that (i) Pedrez would deliver unit 2B of the Property fully vacant within six months of the date of the escrow agreement; and (ii) the vacancy deposit of $75,000 in escrow would be released to plaintiff if the apartment were not vacated by the agreed-upon date and if plaintiff

delivered written notice according to the escrow agreement. Unit 2B was occupied by Bertha Marrero, Pedrez's mother, who is not a party to this lawsuit.

On January 26, 2018, plaintiff's counsel, Jeffrey Fleischmann, Esq., sent defendants written notice demanding that the vacancy deposit be released to plaintiff because Unit 2B was not vacant (First Notice). On March 7, 2018, plaintiff's counsel, Evan M. Newman, Esq., sent defendants a second written notice (Second Notice). On March 16, 2018, Pedrez issued a notice of dispute under the escrow agreement, and defendant Mester, the escrow agent, refused to release the vacancy deposit to plaintiff.

Plaintiff now seeks to recover the vacancy deposit under the escrow agreement. Plaintiff asserts three causes of action against defendants: breach of contract, specific performance, and declaratory judgment. Plaintiff claims that Pedrez breached the escrow agreement by failing to deliver Unit 2B vacant within the six-month time limit and by refusing to release the vacancy deposit.

On May 16, 2018, defendants filed an answer and counterclaims. In their counterclaims, defendant Pedrez seeks judgment (i) declaring that she is the party entitled to the escrow payment, and (ii) directing the escrow agent to release the deposit to Pedrez. Defendant Mester seeks judgment declaring that, as escrow agent, he be awarded a money judgment paid out of the vacancy deposit to reimburse him for all attorney fees, costs, and expenses incurred in this action according to paragraph 6 of the escrow agreement.

On June 15, 2018, plaintiff moved for summary judgment requesting an order (i) declaring that defendants breached the escrow agreement and plaintiffs are entitled to the vacancy deposit, (ii) enforcing the escrow agreement and awarding plaintiffs compensatory damages in an amount not less than the vacancy deposit plus prejudgment interest, (iii) directing the vacancy deposit be delivered to plaintiff with costs and disbursements of this action, (iv) specific performance of the escrow agreement requiring Pedrez to deliver Unit 2B fully vacant, and (v) dismissing defendants' counterclaims with prejudice.

On July 30, 2018, defendants opposed the motion and cross-moved for summary judgment requesting an order (i) dismissing the complaint, and (ii) granting judgment on defendants' counterclaims. Plaintiff and defendants have filed replies in further support of their respective motions.

I. Plaintiff's Motion for Summary Judgment

Plaintiff's motion for summary judgment is granted in part for a declaration that defendants breached the escrow agreement and the remainder of the motion is denied.

Under CPLR 3212 (b), a motion for summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court, as a matter of law, in directing judgment in favor of any party." The movant must make a prima facie showing of entitlement to judgment as a matter of law and show sufficient evidence that there are no material issues of fact. (*Winegrad v New York Univ. Med. Center*, 64

NY2d 851, 853 [1985].) A summary-judgment motion must be denied if the non-movant demonstrates, by admissible evidence, the existence of a factual issue requiring a trial. On summary judgment, "the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference." (*O'Brien v Port Auth. of NY & New Jersey*, 29 NY3d 27, 37 [2017].)

Plaintiff has provided documents demonstrating a breach of contract. Plaintiff has provided the original contract of sale (NYSCEF Doc #10), the assignment, (NYSCEF Doc #11), the escrow agreement signed by Pedrez (NYSCEF Doc #12), and plaintiff's Second Notice (NYSCEF Doc #13). Further, breach of contract is shown given that Pedrez concedes that the apartment has not yet been vacated because her "mother [Bertha Marrero] refuses to move from Apartment 2B until she has been provided with the $200,000 in funds promised by Joseph..." (NYSCEF Doc #23, at 5).

Pedrez does not deny that she did not comply with the terms of the escrow agreement. Rather, she disputes the validity of the contract. Defendants allege that plaintiff, as the assignee of the contract of sale, is bound by the commitment made by Joseph, owner of Madison, the assignor corporation. According to Pedrez, Joseph had multiple meetings with her family as part of a settlement negotiation involving the Property's sale. She states that Joseph agreed to find a new home for her mother in the neighborhood and promised to pay up to $200,000 toward the purchase or rental of a replacement apartment for her mother, Marrero. Pedrez claims that she relied on Joseph's assurances when she signed the escrow agreement with plaintiff. She explains that her mother refuses to vacate unit 2B until Joseph provides the $200,000 as promised.

In support of her allegations, Pedrez adduces a document signed by Joseph, in which he agreed to pay $200,000 to relocate Bertha Marrero (NYSCEF Doc #33). That evidence, however, is inadmissible.

When "parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990].) The written language of an agreement "is deemed to be clear and unambiguous where it is reasonably susceptible of only one meaning." (*Rosen's Café, LLC v 51st Madison Gourmet Corp.*, 117 AD3d 512, 513 [1st Dept 2014].) "Extrinsic and parol evidence are not admissible to create an ambiguity in a written agreement which is complete, clear and unambiguous on its face." (*Gladstein v Martorella*, 71 AD3d 427, 429 [1st Dept 2010].)

The escrow agreement is clear, complete, and unambiguous. The language of the escrow agreement does not suggest a second plausible interpretation. Defendants may not rely on oral or written evidence of a promise made by Joseph to establish that the promise was part of, or a condition for selling the Property and the resulting escrow agreement. Defendants' alleged agreement with Joseph is separate from the escrow agreement that is the subject of this action.

Accordingly, the escrow agreement is fully enforceable. Pedrez failed to perform her obligations under the escrow agreement, and in her moving papers, she does not deny this fact.

Plaintiff's affirmation in support of its motion is based on documentary evidence, which is "sufficient to comply with the requirement that a motion for summary judgment be supported by an affidavit from a person having personal knowledge." (*See First Interstate Credit Alliance, Inc. v Sokol*, 179 AD2d 583, 584 [1st Dept 1992].)

Defendants' remaining arguments are unpersuasive.

Defendants' affirmative defenses do not compel a trial. Defendants' answer raises nine affirmative defenses. The first and third affirmative defenses allege that plaintiff's notice of default was defective because it was not served by plaintiff or plaintiff's counsel, and there was never written notice to defendants advising of a change in plaintiff's counsel. The second affirmative defense asserts that the First Notice was defective because it was never withdrawn as the operative notice. The fourth affirmative defense asserts that the First Notice was defective because it was served prematurely in violation of paragraph 2 of the escrow agreement. The fifth affirmative defense asserts that plaintiff breached the escrow agreement because the owner of Madison made a number of promises which were not kept. The sixth affirmative defense asserts that the escrow agreement is void as against public policy. The seventh affirmative defense asserts that it is impossible for defendant Estate to perform under the escrow agreement because the Estate does not have authority to remove Marrero from the property. The eight affirmative defense asserts that it is impossible for the Estate to perform due to mutual mistake, because the Estate cannot have a "mother," as defined in the escrow agreement. The ninth affirmative defense is that on January 17, 2018, Pedrez, Marrero, and other beneficiaries of the Estate expressly instructed Mester not to release the vacancy deposit. The tenth affirmative defense is that the Estate reserves its right to amend its pleading subject to discovery.

Defendants' first and third affirmative defenses are identical and stricken. That the Second Notice was signed and delivered by counsel, who had not been named in the escrow agreement does not violate the agreement's terms. Specifying a method "by which a notice of default is to be given is, fundamentally, to ensure that the putative defaulter has actual notice and an opportunity to protest the claim of default or, if so provided, to avail itself of an opportunity to cure the default, if any." (*Gucci Am, Inc. v Sample Sale Wholesalers, Ltd.*, 39 AD3d 271, 272-273 [1st Dept 2007].) And that opportunity was provided in this case; defendants relied on plaintiff purchaser's Second Notice and sent a notice of dispute to the same address provided in the Second Notice.

Defendant's second and fourth affirmative defenses are stricken. Defendants' First Notice was ineffective because it was not delivered within the time frame specified in the escrow agreement. Therefore, the First Notice was not operative, and there was no need for defendants to withdraw the First Notice before issuing the Second Notice.

Defendants' fifth affirmative defense is stricken for the reasons explained above.

Defendants' sixth affirmative defense is stricken because plaintiff does not adduce any evidence indicating that Marrero is a rent-controlled tenant.

Defendants' seventh affirmative defense is stricken because the escrow agreement does not compel defendant to remove Marrero from the apartment. The escrow agreement provides that, if the apartment is not vacant by a certain date, plaintiff is entitled to the vacancy deposit.

Defendants' eighth affirmative defense is stricken because Marrero is identified in the escrow agreement as the tenant who must vacate Unit 2B.

As to defendants' ninth and tenth affirmative defenses, defendants do not raise these defenses in their opposition to plaintiff's motion for summary judgment. And the ninth and tenth defenses are stricken.

Plaintiff is granted summary judgment for a declaration that defendants' breached the escrow agreement. Plaintiff is entitled to the vacancy deposit plus prejudgment interest, subject to a deduction for payment to defendant Mester as explained below. Mester will deliver to plaintiff the vacancy deposit minus costs, attorney fees, and expenses that he incurred from this lawsuit, as will be determined at a hearing.

Plaintiff does not present arguments or authorities for specific performance of the escrow agreement. Plaintiff asserts that defendants' counterclaims should be dismissed but does not address this issue nor provide any supporting authority. As a result, these aspects of plaintiff's motion are denied.

Plaintiff's motion to dismiss defendants' counterclaims is denied for the reasons set out below.

II. Defendants' Cross-Motion for Summary Judgment

Defendants' cross-motion to dismiss the complaint is denied for the reasons outlined above.

Defendants' cross-motion for summary judgment on its first counterclaim on behalf of the Estate is denied. Plaintiff is entitled to the vacancy deposit for the reasons explained above.

Defendants' cross-motion for summary judgment on its second counterclaim on behalf of Mester is granted to the extent that a hearing is ordered to determine the costs, attorney fees, and expenses arising from this lawsuit that Mester is entitled to for those costs, attorneys fees, and expenses that result from the defense of Mester as an escrow agent.

Generally, an escrow agent "has no lien on property entrusted to it as compensation for services or expenses in connection with the escrow." (*In re Cohn*, 118 AD2d 15, 33 [1st Dept 1986].) There may be "no disposition ... of the funds in the hands of the escrow-agent except as authorized by the escrow agreement." (*Gershen v Gershen*, 6 AD2d 862, 862 [1st Dept 1958].)

Paragraph 7 of the escrow agreement provides that

> "[i]n case of any suit or proceeding regarding this Agreement, to which the Escrow Agent is or may be at any time a party, it shall have a lien on the contents hereof for any and all costs, attorney's and solicitor's fees whether such attorney(s) or solicitor(s) shall be regularly retained or specially employed ... and it shall be entitled to reimburse itself therefor out of the Vacancy Deposit, and the undersigned jointly and severally agree to pay to the Escrow Agent upon demand all such costs, fees and expenses so incurred." (NYSCEF Doc #12.)

The escrow agreement does not provide payment to Mester for his work as the escrow agent. Rather, the agreement authorizes Mester, as escrow agent, to be reimbursed for costs, attorney fees, and expenses from the vacancy deposit should the escrow agent be a party to a lawsuit related to the escrow agreement. Accordingly, Mester is entitled to a hearing to determine the costs, attorney fees, and expenses arising from this lawsuit, to the extent that such costs, attorney fees, and expenses result from the defense of Mester as escrow agent.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted in part for a declaration that defendants breached the escrow agreement and that plaintiff's are entitled to the vacancy deposit plus 9% prejudgment interest from March 16, 2018 to the date judgment is entered, subject to a deduction for payment of costs, attorney fees, and expenses to defendant Mester as determined by a Special Referee and the remainder of this motion is denied; and it is further

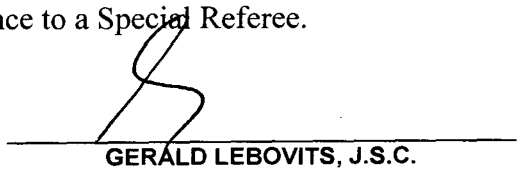
ADJUDGED and DECLARED that defendants breached the escrow agreement and that plaintiffs are entitled to the vacancy deposit plus 9% prejudgment interest from March 16, 2018 to the date judgment is entered in the action of *E 115 Harlem L.P. v Diane Marrero Pedrez, as Executor of the Estate of Philip Marrero a/k/a Felip Marrero, and Charles L. Mester, Esq.*, index No. 651363/2018, New York County subject to a deduction for payment of costs, attorney fees, and expenses to defendant Mester as determined by a Special Referee; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted as to defendant Mester's counterclaim and denied as to defendant Estate's counterclaim; and it is further

ORDERED that this matter is referred to a Special Referee to assess the amount of the costs, attorney fees, and expenses defendant Mester is entitled to on his second counterclaim. Any money from the vacancy deposit that the Special Referee does not award to defendant Mester will be returned to plaintiff; and it is further

ORDERED that defendant Mester shall serve a copy of this decision and order with notice of entry on the Special Referee Clerk in the General Clerk's Office, and the Special

Referee Clerk is directed to arrange a date for the reference to a Special Referee.



1/22/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	X CASE DISPOSED		NON-FINAL DISPOSITION	
APPLICATION:	GRANTED	DENIED	GRANTED IN PART	X OTHER
	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	X REFERENCE