

Herman v 818 Woodward LLC
2021 NY Slip Op 32166(U)
November 3, 2021
Supreme Court, Kings County
Docket Number: Index No. 507850/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

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SHULEM HERMAN,

Plaintiff,

Decision and order

- against -

Index No. 507850/20

818 WOODWARD LLC and SUYDAM 1 LLC,

Defendants,

November 3, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3212 seeking summary judgement for an order requiring the plaintiff to return \$457,500 that was misappropriated by the escrowee. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, on January 10, 2020 the plaintiff and defendants entered into a contract whereby the plaintiff agreed to purchase two properties, one located in Brooklyn and the other located in Queens. Pursuant to the contract the plaintiff deposited \$457,500 as a down payment and such funds were placed in the escrow account of the attorney for the seller. Pursuant to the contract the closing was scheduled to take place sixty days following the effective date of the contract, namely March 10, 2020 (see, Contract ¶3.01). The closing did not take place on that date and ultimately this litigation followed wherein the plaintiff seeks specific performance, a declaratory judgement, breach of contract and

other claims. During the pendency of the litigation it was discovered that the escrowee, holding the down payment, former counsel for the defendants, misappropriated the funds and essentially stole them. The defendants now move seeking an order requiring the plaintiff to replenish the funds. The defendants argue that ownership of the deposit remained with the plaintiff and that therefore the plaintiff must replenish those funds. The plaintiff disputes that contention and argues there can be no summary determination in that regard.

Conclusions of Law

It is well settled that "when an escrow agent absconds with money he is holding in his capacity as depositary, the loss must fall upon the person as whose agent he is holding the money at the time" (Lechner v. Halling, 35 Wash2d 903, 216 P2d 179 [Supreme Court of Washington 1950]). This truism, known as the 'entitlement rule' is an equitable framework that places the loss on the party entitled to the funds at the time of the embezzlement. Entitlement and hence title is determined by whether the conditions for the deposit, namely the closing, have been satisfied (Johnson v. Schultz, 364 NC 90, 691 SE2d 701 [Supreme Court of North Carolina 2010]). Therefore, if the closing has not yet occurred then the buyer is entitled to the funds and the buyer must bear the loss. If the closing has already taken place or all the conditions necessary for the

closing have been satisfied then the seller must bear the loss (In re Brown, 28 Fed. Appx. 725 [9th Cir. 2002]). It is of no moment that a party may sustain substantial losses because of the misdeeds of a third party escrow agent (*id.*). New York has adopted the entitlement rule. Thus, in Asher v. Herman, 49 Misc2d 475, 267 NYS2d 932 [Supreme Court Queens County 1966] the court held that where escrow property is lost or embezzled by the escrow agent then the loss devolves upon the party that owned the property at the time of the embezzlement. Of course, the injured party may seek recourse against the dishonest escrow agent (Grinblat v. Taubenblat, 107 AD2d 735, 484 NYS2d 96 [2d Dept., 1985]). Therefore, to succeed upon a motion for summary judgement the moving party must present sufficient facts that will permit the court to find, as a matter of law, whether the risk of loss had passed to the seller before the funds were stolen (see, Tzertzelas v. Markatos, 118 AD2d 697, 500 NYS2d 43 [2d Dept., 1986]).

In this case the defendant seller seeks summary judgement the buyer maintained ownership over the funds when the embezzlement occurred. While the precise date of the embezzlement is unknown and can only be approximated, strong evidence indicates it occurred in March 2021. However, the defendant maintains that by that date a closing had already taken place. Indeed, the defendants conducted a closing, without the

plaintiff's participation, on April 20, 2020, almost a year prior to any embezzlement. Therefore, the defendant, in essence, is seeking the plaintiff to pay for the deposit which the defendant maintains they owned when the embezzlement occurred. By contrast, the plaintiff, who maintains no such closing occurred would then be the owner of the funds embezzled by the escrow agent. The issue whether the closing conducted on April 20, 2020 was valid has never been resolved. Therefore, there are factual questions which foreclose a summary determination at this time. Moreover, as noted, the movant defendant is arguing a position which is contrary to its entire position in this lawsuit. Thus, the resolution of this motion depends on whether a closing or the conditions for the closing occurred before the embezzlement. The anomalous positions taken by the parties which conflicts with their positions in the lawsuit overall might reflect a criticism of the rights under the entitlement rule which do not comport with the rights of the buyer and seller when other losses are sustained by the property (see, generally, A Comparison of the Rules and Rationales for Allocating Risks Arising in Realty Sales and Executory Sale Contracts and Escrows, by Robert Flores, 59 Missouri Law Review 307 [1994]). In any event, notwithstanding, there are clearly questions of fact concerning whether a closing took place, therefore, there can be no summary determination as to the ownership of the escrow funds.


Therefore, based on the foregoing, the motion seeking summary judgement is denied.

So ordered.

ENTER:

DATED: November 3, 2021

Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC