

N.Y. Times Sq. Hotel Group, LLC v Ocean King, LLC
2022 NY Slip Op 33819(U)
November 4, 2022
Supreme Court, New York County
Docket Number: Index No. 156205/2019
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36M

Justice

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 N.Y. TIMES SQUARE HOTEL GROUP, LLC, INDEX NO. 156205/2019
 Plaintiff, MOTION SEQ. NO. 001

- v -

OCEAN KING, LLC and S & P
 LAND SERVICE, INC., solely
 in the capacity as Escrow Agent,
 Defendants.

**DECISION + ORDER ON
MOTION**

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 The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53
 were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff commenced this action against defendant OCEAN KING, LLC (“OCEAN KING”) to recover \$55,000.00, a portion of which is being held in escrow by nominal defendant S&P LAND SERVICE, INC. (“S&P”). (NYSCEF Doc. No. 1, *summons and complaint*). By this action, plaintiff seeks a declaratory judgment that defendant OCEAN KING owes plaintiff \$55,000.00, that S&P be ordered to turn over its escrow funds to plaintiff and that a monetary judgment for any remaining amount up to \$55,000.00 be issued to plaintiff. Plaintiff also seeks interest, costs, disbursements and attorney’s fees. In its answer, defendant OCEAN KING counterclaims for a declaratory judgment that the escrow funds held by S&P should instead be paid to defendant, with interest, and that the court grant defendant OCEAN KING attorney’s fees, costs, plus statutory costs and disbursements. (NYSCEF Doc. No. 15, *verified answer*).

Plaintiff now moves for summary judgment seeking a declaration that defendant OCEAN KING owes plaintiff \$55,000.00 and ordering that escrowee S&P turn over to plaintiff the \$51,779.94, plus interest being held in escrow funds and that a monetary judgment for the remaining \$3,220.86 be awarded to it (NYSCEF Doc. No. 11 *notice of motion*).

The undisputed facts are as follows. Defendant OCEAN KING operated a hotel located at 233-235 West 35th Street, New York, New York, pursuant to a franchise agreement with Wingate/Wyndham. In July 2015, defendant OCEAN KING sold the property to Ina Irene Clement, LLC (“ILLC”). On October 23, 2015, ILLC sold the hotel to plaintiff as purchaser. That closing took place on November 5, 2015. As part of its purchase, plaintiff agreed to continue the franchise agreement for at least one year and assumed the rights and obligations of OCEAN KING as franchisee. Plaintiff had the right to terminate the agreement within a year, by November 5, 2016. (NYSCEF Doc. No. 1, *summons and complaint*).

Shortly before or at the closing, plaintiff learned that in 2004 OCEAN KING borrowed \$275,000.00 from the franchisor, Wingate/Wyndham. That loan was evidenced in a Development Incentive Note ("note"). The note was for a 15-year term. The note stated that 1/15th of the loan principal (\$275,000.00, the "loan") would be forgiven on each anniversary of the hotel's opening date until the principal was entirely forgiven (*i.e.*, 15 years after its opening), but if the franchise agreement were to be terminated before the principal is entirely forgiven, any owed principal still remaining at that time would be paid to the franchisor. (NYSCEF Doc. No. 2, *Development Incentive Note, dated 3-26-04*).

At the time of closing, over eleven years had elapsed since the signing of the note and as plaintiff agreed to operate as a Wingate/Wyndham franchisee for at least one more year, plaintiff believed that twelve fifteenths of the note obligation would be forgiven leaving three fifteenths remaining; to wit: \$55,000.00. Accordingly, \$50,000.00 of the purchase price due to OCEAN KING was placed in escrow with S&P to cover the three-year liability that would remain. However, the language in the note states that 1/15th of the loan would be forgiven on the anniversary of the hotel's opening date, not the anniversary of the signing of the note and insofar as the OCEAN KING did not open until three years after the note was signed, a six-year liability remained rather than a three-year liability (\$110,000.00 rather than \$55,000.00).

Plaintiff opted to terminate the franchise agreement, after one year of the buy-sell date. However, plaintiff sought and received franchisor extensions totaling three years. Thus, reducing the note liability back to three/fifteenths or \$55,000.00. Upon final termination, Wingate/Wyndham deducted the \$55,000.00 balance owed to it from plaintiff's hotel rental proceeds. According to plaintiff, OCEAN KING remained liable for the note thus, plaintiff demanded reimbursement from the \$50,000.00 held in escrow but OCEAN KING declined to give S&P permission to release the funds. Plaintiff argues that the purpose of the escrow was to secure the potential liability and that it is entitled to the \$50,000.00 in escrow, along with the \$1,779.94 in interest which has accrued.

Defendant OCEAN KING opposes the motion and cross-moves for summary judgment seeking dismissal of the complaint and a declaration that it is entitled to the \$55,000.00 held in escrow (NYSCEF Doc. No. 27, *notice of cross-motion*). Defendant OCEAN KING argues that plaintiff is a dissolved limited liability company and thus, lacks standing to commence the proceeding; that plaintiff assumed any debt under the terms of its purchase agreement, including the note executed by OCEAN KING; and that the escrowed monies were to be held until September 2016 for plaintiff's use in paying off the note and, that if plaintiff renewed the franchise thereafter, the amount would be reduced on a year by year basis until 2019 and OCEAN KING would be entitled to a return of the money.

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. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851 (1985). If such a showing is made, however, the burden shifts to an examination as to whether the opposing party's submission is sufficient to defeat summary judgment. *Zuckerman*, 49 NY2d at 563.

Summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-25 (1986). The non-movant is entitled to the benefit of every favorable inference. *Cetindogan v Schuyler*, 95 AD3d 577, 578 (1st Dep't 2012).

For the following reasons, the court grants summary judgment in plaintiff's favor.

As a preliminary matter, the court finds that plaintiff has standing to pursue its claims. Plaintiff's managing member offers in his supporting affidavit that while plaintiff's corporation has dissolved, it is in the process of winding down, including, in fact, by the pursuit of this action which involves "the last remaining asset of the company." (NYSCEF Doc. No. 46, *affidavit*, ¶ 6) (See *Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243 [2007]) (plaintiff is permitted to pursue a breach of contract claim that occurred prior to its dissolution).

Turning to the crux of the motions for summary judgment, plaintiff argues that it believed the purpose of placing the \$50,000.00 into escrow was "to cover Ocean King's liability to the franchisor" as of November 2016, when three more years of 1/15th of the loan, or \$55,000.00, would remain owed to the franchisor pursuant to the note. (NYSCEF Doc. No. 13, *affidavit in support*, ¶ 15). Plaintiff also avers that "the intention [for the \$50,000.00] was that Ocean King would receive the entire \$50,000.00, if and when, the \$275,000.00 note obligation was completely satisfied, or a *pro rata* amount if the remaining obligation was only partially satisfied." (NYSCEF Doc. No. 13, *affidavit in support*, ¶ 13).

On the other hand, defendant believed September 2016 would be the expiration of the franchise agreement because "Plaintiff ... informed Ocean King, prior to the closing, that Plaintiff would terminate the Wingate franchise within a year of purchase and turn the Building into an ALOFT hotel, which meant that three payments would be owed to Wingate which would be the subject of the escrow." (*Id.*, at ¶ 34). Defendant further points to footnote 10 of the closing statement, which states that \$50,000.00 was "agreed to be held in escrow pending the termination of the Franchise Agreement with Wyndam [*sic*] [September 2016]." (*Id.*, at ¶ 28). However, defendant admits that the "Escrowed Monies were to be held until September 2016 for Plaintiff's benefit so that it could use said moneys to pay Wingate what was believed to be the remaining debt on the Note." (*Id.*, at ¶ 31).

However, at the time the note was discovered and discussed, closing attorneys for both plaintiff and defendant OCEAN KING appear to have been ignorant of either the date the hotel opened, or that the calculation of the fifteen (15) year term would run only upon the hotel's opening. Seemingly relying only on the date of the note's execution (2004), instead of the actual opening date of the hotel (2007), the attorneys believed that as of November 15, 2016, the earliest date on which plaintiff could terminate the franchise agreement, the loan would have ran for twelve years, and thus, all but three of the fifteen years of the note's principal would have been forgiven. (NYSCEF Doc. No. 13, *affidavit in support*, ¶¶ 12, 13; NYSCEF Doc. No. 29, *affidavit in support of cross-motion*, ¶ 29). This led the parties to believe that as of November 2016, \$55,000.00 would still be owed under the note. The parties accordingly agreed to place \$50,000.00 in escrow to account for that amount, instead of coming up with an arrangement that might have accounted for \$110,000.00, the amount that would be owed for six more years of the

principal (given the hotel's opening in 2007). (NYSCEF Doc. No. 13, *affidavit in support*, ¶ 15). While the parties do not now dispute this apparent mutual mistake, they each seek to be paid the \$50,000.00 held in escrow by nominal defendant S&P. The court notes that defendant's motion lacks support from an affidavit by someone with personal knowledge of the underlying events. Plaintiff's motion and its opposition to the cross-motion is accompanied by affidavits from Ki Young P. Choe, who describes his personal involvement at the closing in question, where the escrow at issue here was negotiated. (NYSCEF Doc. No. 48, *affidavit*). On the other hand, defendant's supporting affidavit from Mr. Ching Sau Cheung, does not attest to Cheung's role in the escrow negotiation or at the closing, and in fact, it appears from same that Mr. Cheung was not present at the closing. (NYSCEF Doc. No. 29, *affidavit*; NYSCEF Doc. No. 36, *closing statement*).

Upon careful consideration of the arguments advanced herein, the court finds that plaintiff has demonstrated its entitlement to judgment as a matter of law. It is undisputed that the \$50,000.00 placed in escrow was intended by both parties to account for the debt that they believed would be owed under OCEAN KING's franchise agreement one year from the closing date. Despite that both parties were mistaken at the closing as to the amount of the outstanding debt, it is clear that they intended for this \$50,000.00 to cover said outstanding debt. They intended to essentially give plaintiff a discount on the contract price because of this anticipated debt that plaintiff was taking on with the purchase. It is of no moment that OCEAN KING believes that the drafting of the closing note about this escrow, in a footnote, required that this \$50,000.00 be held "pending the termination of the franchise agreement with Wynd[h]am" which it deemed to take place in September 2016. Nor is the court convinced that this term unequivocally referred to the anticipated termination of *defendant's* franchise agreement with Wyndham and could not be read to mean the termination of *plaintiff's* assumed franchise agreement with Wyndham, which did not occur until 2019. What is important is that defendant admits that it intended for the escrow funds to cover debt still owed under the note one year from the closing. Moreover, plaintiff's extensions of its termination, which totaled three years, benefitted OCEAN KING such that rather than \$110,000.00 of the note becoming due, \$55,000.00, the amount anticipated, became due. To grant defendant's request to pay it the escrow funds instead of plaintiff, would defeat the parties' clear intent of accounting for OCEAN KING's outstanding loan debt at the time of the closing and would lead to an unjust result when plaintiff has unquestionably received \$55,000.00 less of its proceeds from the franchisor than it otherwise would have received.

Furthermore, all arguments not addressed herein have been considered and are either denied or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff N.Y. TIME SQUARE HOTEL GROUP, LLC's motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that plaintiff is entitled to receive the \$50,000.00, plus any interest held in escrow pursuant to the purchase agreement; and it is further

ORDERED that defendant S&P LAND SERVICE, INC., shall forthwith turn over the \$50,000.00, plus interest, if any, being now held in escrow, to plaintiff N.Y. TIME SQUARE HOTEL GROUP, LLC; and it is further

ORDERED that defendant OCEAN KING, LLC's cross-motion for summary judgment is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for N.Y. TIME SQUARE HOTEL GROUP, LLC shall serve a copy of this order, with notice of entry, upon defendants OCEAN KING, LLC and nominal defendant S&P LAND SERVICE, INC. in this action, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that the claim for attorney's fees is denied, without prejudice.

November 4, 2022

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE