

Triantafillakis v Madden
2022 NY Slip Op 33973(U)
November 22, 2022
Supreme Court, New York County
Docket Number: Index No. 652319/2018
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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JOHN TRIANTAFILLAKIS, ATHANASIOS
TRIANAFILLAKIS,

Plaintiff,

- v -

JENNIFER MADDEN, LAKI KOKOTAS, HOWARD
ROSENBLUTH, HR POM POM, LLC, TRIAN WEST, LLC
D/B/A POM POM DINER, ROBERT J. GANS, METRO
LUMBER HARDWARE & BUILDING SUPPLIES,
INC., PETER MARC, STERN, ESQ. AS ESCROW AGENT
AND STAKEHOLDER

Defendant.

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INDEX NO. 652319/2018
MOTION DATE 08/19/2022,
08/19/2022
MOTION SEQ. NO. 006 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for ORDER TO PAY MONIES INTO COURT.

BACKGROUND

Plaintiffs commenced this action to collect proceeds from the sale of a family dinner which they had an interest in but were never paid the proceeds for.

ALLEGED FACTS

This action arises from the sale of plaintiffs’ family owned and operated business, the Pom Pom Diner (“the Diner”), and defendants’ alleged failure to split the proceeds of the sale with the plaintiffs as they had promised to do. In 2014, defendant Howard Rosenbluth (Rosenbluth) through his and Robert J. Gans’ (Gans) shell company, HR Pom Pom, LLC (“HR

Pom Pom”), purchased the Diner from Trian West, LLC (Trian). Trian was the official owner of the Diner; that is, the owner on “paper.” The sole member of Trian is Jennifer Madden (Madden). She came to be the owner of Trian/Diner by agreement with the plaintiffs. Years earlier, plaintiffs had transferred the Diner to Madden/Trian with the understanding that plaintiffs would retain their ownership interests in the Diner and, upon the sale of the Diner, the proceeds of any such sale would be divided equally between plaintiffs and Defendant Laki Kokotas (Kokotas). At the time, Kokotas was engaged to Madden. He is plaintiffs’ cousin and nephew.

By agreement, Kokotas and plaintiffs retained their respective 1/3 interest in the Diner as well as their respective 1/3 interest in the proceeds of any sale of the Diner. In 2013, Gans approached plaintiff John Triantafillakis (JT) to purchase the Diner. Gans owns Metro Lumber with his partner Rosenbluth. They also own HR Pom Pom which was ultimately used as the vessel to purchase the Diner. Gans actively participated in the negotiations and sale of the Diner to HR Pom Pom. The Purchase Agreement for the Diner, with a purchase price of \$1.5 mil, was drafted as between Trian and HR Pom Pom. The Purchase Agreement was signed on behalf of HR Pom Pom by Rosenbluth as “member”. Metro Lumber paid the purchase price for the sale. Mr. Stern acted as the Escrow Agent for the sale of the Diner.

As a result of the defendants entering into the Purchase Agreement without the plaintiffs’ consent, plaintiff John Triantafillakis filed suit against the defendants to try to stop the sale. The case was *entitled John Triantafillakis v. Trian West, LLC, et al.* Index No: 650120/2015 in New York County, Supreme Court (“the First Lawsuit.”) As a result of the First Lawsuit, Trian West and HR Pom Pom, LLC entered into an Escrow Agreement on December 15, 2016. The preamble of the Escrow Agreement states that it was entered into because of the First Lawsuit and was for the purpose of setting up a fund of \$250,000 to indemnify the Buyer for any claims

arising therefrom or from other claims. Moreover, during the course of the First Lawsuit, Defendants promised the Court that the purchase funds would be deposited in an escrow account to protect the plaintiffs' interest in the proceeds.

PENDING MOTIONS

On August 19, 2022, Mr. Stern moved for an order permitting him to deposit disputed escrow funds with the New York County Clerk's Office pursuant to CPLR §1006(f); an order pursuant to CPLR §2601(a) discharging him from liability upon the payment of the subject funds into Court; and an order dismissing this action as against him.

On the same date plaintiffs cross-moved for an order directing Mr. Stern, to pay a New York State tax bill related to the subject matter from the funds in his escrow account and to deposit all remaining proceeds that are in his escrow account with the Court.

Finally, on August 19th, defendants Howard Rosenbluth, HR Pom Pom, LLC, Robert Gans and Metropolitan Lumber, Hardware & Building Supplies, Inc. cross-moved for an order compelling attorney Mr. Stern to provide a full accounting of funds that he is holding in escrow and compelling his deposition.

On October 24, 2022, the motions were fully briefed, marked submitted and this court reserved decision.

The motions are determined as set forth below.

DISCUSSION

Mr. Stern's Motion Is Granted to The Extend of Directing Him to Deposit The Remaining Escrow Funds with The New York County Clerk's Office and Is Otherwise Denied and Defendant's Cross-Motion Seeking a Full Accounting and Compelling Mr. Stern To Appear For A Deposition Is Granted

The one thing all the parties to the litigation agree on is that the remaining funds being held in escrow by Mr. Stern should be deposited with the court.

CPLR §1006(g) provides:

Where a stakeholder is otherwise entitled to proceed under this section for the determination of a right to, interest in or lien upon a sum of money, whether or not liquidated in amount, payable in the state pursuant to a contract or claimed as damages for unlawful retention of specific real or personal property in the state, he may move, either before or after an action has been commenced against him, for an order permitting him to pay the sum of money or part of it into court

In this action, Mr. Stern has already disbursed most of the funds which had been held in escrow, and all of the parties agree that the sum remaining should be deposited into court.

All of the parties want and are entitled to a more detailed accounting than what Mr. Stern has provided in his motion papers, and Mr. Stern has yet to be deposed or provide relevant documentation regarding the disbursements in this action.

An escrow agent not only has a contractual duty to follow the escrow agreement, but additionally becomes a trustee of anyone with a beneficial interest in the trust (see, *Farago v. Burke*, 262 N.Y. 229, 186 N.E. 683; *Oppenheim v. Simon*, 57 A.D.2d 1006, 394 N.Y.S.2d 500) with the “duty not to deliver the escrow to anyone except upon strict compliance with the conditions imposed” (*Farago v. Burke, supra*, at 233, 186 N.E. 683). Thus, an escrow agent can be held liable for breach of the escrow agreement and breach of fiduciary duty as escrowee (see, *Grinblat v. Taubenblat*, 107 A.D.2d 735, 484 N.Y.S.2d 96).

Takayama v. Schaefer, 240 A.D.2d 21, 25 (1998).

An accounting must provide sufficient information to apprise the parties entitled to the accounting of exactly what proceeds were received and how they were distributed and whether or not certain terms of the escrow arrangement were met/complied with.

According to Paragraph 5 of the Escrow Agreement, Mr. Stern was required to deposit the funds in his attorney trust account. N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.1.15 governs attorney trust accounts. It requires attorneys to maintain for seven years records concerning the funds deposited in their trust account including: records of deposits and receipts; copies of bills and receipts; copies of all statements to clients or other persons showing the disbursement of

funds to them or on their behalf; copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed; and all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips, among other things. (22 NYCRR § 1200.1.15d.)

Mr. Stern has submitted an Affidavit attesting to the receipts and disbursements of the subject Escrow Account. However, he has failed to submit any documentation to evidence his disbursements.

The Parties are entitled to examine the relevant financial records and bank statements associated with the Escrow Account, and to take Mr. Stern's deposition.

Mr. Stern argues that Plaintiffs do not have standing to demand an accounting. However, plaintiffs are claimants to the funds of which Mr. Stern is the stakeholder. They do not necessarily have to be in privity with him or parties to the Escrow Agreement to demand an accounting.

Additionally, HR Pom Pom has standing to demand a complete accounting from Mr. Stern. There is privity and a fiduciary relationship between Mr. Stern, as escrowee, and HR Pom Pom, as the purchaser of the Diner. HR Pom Pom is a party to the escrow agreement.

Moreover, while pursuant to CPLR § 3211(a)(5), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that payment was made. Herein, even if Mr. Stern deposits the escrow funds with the Court, this does not constitute payment under CPLR § 3211 (a)(5).

Given the above dismissing Mr. Stern from this action at this point in time would be premature, and the cross-motion for an accounting and a deposition is appropriate.

Plaintiff's Cross-Motion for an Order Directing Mr. Stern to Pay a Tax Bill from the Escrowed Monies is Denied

Plaintiffs seek an order directing Mr. Stern to pay off the tax liability of Chris Triantafillakis the principal of an entity that used to own the diner. Mr. Triantafillakis is not a party to this action and said payment would not be proper under the Escrow Agreement governing Mr. Stern. Additionally, while plaintiffs allege they are the only parties entitled to the escrowed funds this has yet to be determined in this action. Based on the foregoing the cross-motion is denied.

WHEREFORE it is hereby:

ORDERED Peter Marc Stern's motion to deposit sums being held into escrow is granted and said deposit shall be made within thirty days of entry of this order; and it is further

ORDERED that the balance of relief sought by Mr. Stern is denied as premature and that Mr. Stern shall provide a full accounting to the parties herein and appear for a deposition within 60 days of the date of this order at a time and place to be arranged by parties and their counsel; and it is further


ORDERED that plaintiff's cross-motion for an order directing Mr. Stern to pay a New York State tax bill is denied; and it is further

ORDERED that, within 20 days from entry of this order, plaintiffs shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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11/22/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: