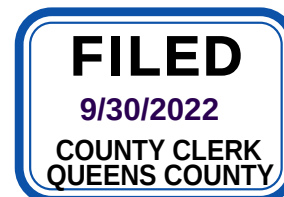


Hui Min Zhong v Crisostomo
2022 NY Slip Op 35070(U)
September 29, 2022
Supreme Court, Queens County
Docket Number: Index No. 714070/2019
Judge: Maurice E. Muir
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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



HUI MIN ZHONG

IAS Part – 42

Plaintiff,

Index No.: 714070/2019

-against-

Motion Date: 3/18/21

JOSEPHINE PAZ CLEMENTE CRISOSTOMO
a/k/a JOSEPHINE C. PETERSON and
CHRISTOPHER C. CRISOSTOMO and PATRICIA
M. CRISOSTOMO,

Motion Cal. No.

Motion Seq. No. 4

Defendants.

The following electronically filed (“EF”) documents read on this motion by Hui Min Zhong (“Mr. Zohong” or “plaintiff”) for an order: 1) granting plaintiff’s Motion for Summary Judgment and a monetary judgment of \$50,000.00 against defendants, jointly and separately, pursuant to the Escrow Agreement between the parties: 2) dismissing defendants Christopher C. Crisostomo and Patricia M. Crisostomo’s first counterclaim for a declaratory judgment for non-adverse encroachment; 3) dismissing defendants Christopher C. Crisostomo and Patricia M. Crisostomo’s second counterclaim for a declaratory judgment to reform the Escrow Agreement; and 4) granting such other and further relief as the Court may deem just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	EF 71 - 85
Peterson Affirmation in Opposition-Service.....	EF 87 - 88
James Horan Affirmation in Opposition-Exhibits.....	EF 89 - 101
Affirmation in Reply.....	EF 102

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover escrow funds for breach of an Escrow Agreement in connection with property located at 160-16 79th Avenue, Fresh Meadows, New York (“subject

premises"). On or about August 16, 2016, Mr. Zhong entered into a contract of sale with Josephine Paz Clemente Crisostomo a/k/a Josephine C. Peterson ("Peterson"), Christopher C. Crisostomo ("Christopher") and Patricia M. Crisostomo ("Patricia") (collectively, the "defendants") to purchase the subject premises. However, prior to closing, a survey disclosed that a neighbor of the subject premises encroached upon the subject premises. As a result, on or about March 29, 2017, as a condition for closing, the parties entered into an escrow agreement, wherein Stenger, Roberts, Davis & Diamond LLP ("Stenger" or "Escrow Agent") was designated as the escrow agent. Pursuant to the escrow agreement, it states, in relevant part, the following:

1. Sellers' attorneys James P. Horan, Esq. of Stenger Roberts Davis & Diamond LLP shall hold \$50,000 in escrow to cure the encroachment of the chain link fence onto the Premises.
2. Such cure shall be defined as removal of the fence by the neighbor voluntarily or by an order of the Court or the delivery of a Settlement Agreement with the neighbor parties which is consented to by the Sellers and Purchaser in writing.
3. Purchaser agrees that he will be named as a Plaintiff in any litigation for ejectment and to quiet title with regard to the above-referenced Premises and authorizes James P. Horan, Esq. of Stenger Roberts Davis & Diamond LLP to act as attorney in such litigation. All costs of such litigation will be born and paid solely by Sellers and shall not be extracted from the \$50,000 escrow and Purchaser shall not be responsible for any legal fees of such litigation.
4. Within three months from the date hereof, the \$50,000 escrow shall be released to the Purchaser in full satisfaction of any claims he has regarding the delivery of the Premises with the Encroachment unless litigation has been commenced to remove the encroachment and such litigation is being diligently prosecuted but has not reached its conclusion.
5. In the event that the litigation is not concluded within two years from the date hereof, the \$50,000 escrow shall be released to Purchaser unconditionally, unless he agrees otherwise in writing.

As a result of the above-describe escrow agreement, on or about February 1, 2017, the defendants commenced an action to remove the encroachment (i.e., fence) entitled *Crisostomo v. Gubin*, et al, Index #708989/17. However, there has not been any activity since the inception of said action.

As a result, on August 15, 2019, the plaintiff commenced the instant action; and on or about February 25, 2020, issue was joined. Now, the plaintiff argues that more than two years have passed since the signing of the Escrow Agreement; and the encroachment issue remains

unresolve. In opposition, the defendants argue that plaintiff relies upon ¶5 of the Escrow Agreement, which provides that the \$50,000.00 escrow deposit shall be released to the plaintiff if litigation is not concluded within two years, unless he agrees otherwise. However, pursuant to ¶4 of the Escrow Agreement, Plaintiff also agreed that "the \$50,000 escrow shall be released to the [Plaintiff]. . . unless litigation has been commenced to remove the encroachment and such litigation is being diligently prosecuted but has not reached its conclusion" (emphasis added). This paragraph evidently provides that Plaintiff has agreed to allowing the defendants to hold on to the escrow funds as the defendants continue to litigate matters as long as they are being diligently prosecuted, without any time limitation. This term of the contract contrasts with paragraph ¶5 which Plaintiff relies upon. Furthermore, the defendants, argue that "[p]ursuant to RPAPL § 543(1), "the existence of de minimus non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse." In reliance on *Hartman v. Goldman*, 84 AD3d 734 [2d Dept 2011], counsel argues that the Second Department has held that a party cannot rely on de minimis encroachments, such as fences, for an adverse possession claim as such encroachments are deemed permissive and non-adverse.

It is well settled law that 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. (*Takayama v. Schaefer*, 240 AD2d 21 [2d Dept 1998] [citations omitted]; *see also Baquerizo v. Monasterio*, 90 AD3d 587 [2d Dept 2011]). Therefore, an escrow agent may be held liable for breach of contract and breach of fiduciary duty as escrowee. (*Takayama v. Schaefer*, 240 AD2d 21 [2d Dept 1998]; *see Greenapple v. Capital One, N.A.*, 92 AD3d 548, 549 [1st Dept 2012]). Furthermore, an escrow agent has a duty not to deliver the deposit held in escrow to anyone except in "strict compliance with the condition imposed" in the escrow agreement. (*Takayama v. Schaefer*, 240 AD2d 21 [2d Dept 1998] [internal quotation marks omitted]; *see Farago v. Burke*, 262 NY 229, 233 [1993]). Moreover, in the event of a dispute, the escrow funds may not be released until the condition of the escrow agreement are fully performed and it is "clear that no factual issues or viable claims exist under the closely scrutinized terms of the escrow agreement". (*Takayama v. Schaefer*, 240 AD2d 25, citing and quoting *E.S.P. Adj. Servs. v. Asta Group*, 125 AD2d 849, 849-850 [3d Dept 1986]). An escrow agent may continue to hold the funds in escrow, or commence an interpleader action, to avoid liability while the dispute is resolved (*id* at 25-26).

Here, on July 16, 2019, the Law Firm of Stenger, Roberts, Davis & Diamond LLP commenced an action in Supreme Court State of New York, County of Dutchess, under Index No. 52674/2019, pursuant CPLR § 2601 seeking leave of Court to deposit into Court the \$50,000 it was holding in escrow pursuant to the Escrow Agreement. Furthermore, on September 10, 2019, the Honorable Maria J. Rosa, of the Dutchess County, Supreme Court issued an order directing Stenger, Roberts, Davis Diamond, LLP to deposit the sum of \$49,597.44 with the Dutchess County Clerk and said amount was paid over to the Commissioner of Finance of the County of Dutchess. In light of the fact that the escrow was paid into Court pursuant to CPLR § 2601, the proper relief for the plaintiff is not a monetary judgment against the defendants, but rather an order to pay a certain amount out of the court pursuant to CPLR § 2606.

As such, the Court finds that Law Firm of Stenger, Roberts, Davis & Diamond LLP is a necessary party and that this action should not proceed in its absence. Pursuant to CPLR § 1001(a), a necessary party is one who ought to be joined “if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action.” Where, as here, there is a dispute between a buyer and seller over escrow funds, the escrow agent is a proper party to the action so that it will be amenable to any judgment rendered after trial with respect to the disposition of those funds. (*Takayama v. Schaefer*, 240 AD2d 21 [2d Dept 1998]); that it may already be acting as attorney for a party does not obviate the need to join it as a party. (*Argersinger’s Dept Store v. Shapiro Bros. Co.*, 115 Misc.2d 850 [Fulton Co 1982]). “When a person who should be joined under CPLR § 1001(a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned.” (CPLR §1001(b)). “A court may always consider whether there has been a failure to join a necessary party.” (*City of New York v. Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469 [1979]; accord *Censi v. Cove Landings*, 65 AD3d 1066 [2009]; *Velez v. New York State Department of Corrections and Community Supervision*, 163 AD3d 1210 [3d Dept 2018]; *Deutsche Bank National Trust Company v. Banadalos*, 173 AD3d 1136 [2d Dept 2019]).

Accordingly, it is hereby,

ORDERED that the plaintiff shall, within 30 days after service of a copy of this order with notice of entry, serve and file a supplemental summons and amended complaint naming the Law Firm of Stenger, Roberts, Davis & Diamond LLP as a party defendant and stating causes of action against it; and it is further

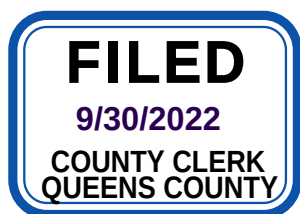
ORDERED that the plaintiff's motion for summary judgment, pursuant to CPLR § 3212, is denied, in its entirety, without prejudice to renewal upon the expiration of the time to answer or move with respect to the amended complaint; and it is further,

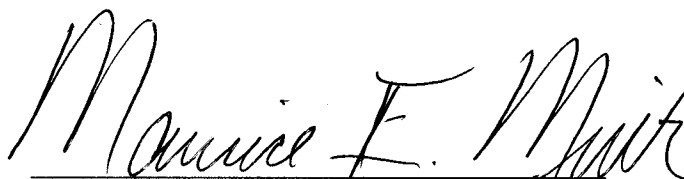
ORDERED that defendant shall serve a copy of this decision and order with notice of entry upon all parties, via certified mail an NYSCEF, on or before October 31, 2022; and it is further,

ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

The foregoing constitutes the Decision and Order of the court.

Dated: September 29, 2022
Long Island City, NY




MAURICE E. MUIR, J.S.C.