

Ashekian v Cresco Labs LLC
2023 NY Slip Op 30176(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 656112/2021
Judge: Melissa Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

-----X

STEPHEN ASHEKIAN,

Plaintiff,

- v -

CRESKO LABS LLC, CRESKO LABS INC.

Defendant.

-----X

INDEX NO. 656112/2021

MOTION DATE N/A, N/A

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 92, 94, 95, 96, 101

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 005) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 97, 98, 99, 100, 102, 103, 104, 105

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Plaintiff Stephen Ashekian (“Plaintiff” or “Ashekian”) and Defendants Cresco Labs LLC and Cresco Labs Inc. (“Cresco” or “Defendants”) have filed dueling summary judgment motions in this matter. This case arises out of Defendants’ failure to release shares of Cresco in accordance with an October 8, 2019 escrow agreement (Escrow Agreement, NYSCEF Doc. No. 56). Defendants’ summary judgment motion (MS 04) is granted in part and denied in part. Plaintiffs’ summary judgment motion (MS 05) is denied in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

This is an action for declaratory judgment and breach of contract arising out of Plaintiff’s sale of a medical marijuana business to Defendants. Plaintiff is the equity representative for the former members of Gloucester Street Capital, LLC (“Gloucester”), that in turn was the sole member of Valley Agriceuticals (“Valley”), a medical marijuana organization registered with the

New York State Department of Health (“NYDOH”) as of 2017. In 2018, in anticipation that New York would soon legalize recreational adult use marijuana, Cresco sought a merger with Gloucester to acquire use of Valley’s medical marijuana license (Complaint, NYSCEF Doc. No. 1, ¶¶ 22-23). Cresco effectuated this merger pursuant to an October 24, 2018 merger agreement that left Gloucester as the surviving entity with Cresco as the sole shareholder (Merger Agreement, NYSCEF Doc. No. 41, § 1.1).

In connection with the Merger Agreement, the parties entered into the Escrow Agreement, that states, upon the closing of the merger, the parties would deposit with an Escrow Agent 23,960 shares of Cresco that the Escrow Agent would hold and then either: (1) disburse as post-merger consideration or (2) return to Cresco for cancellation because particular conditions were not satisfied (Escrow Agreement). In particular, Section 3 of the Escrow Agreement directs the Escrow Agent to disburse to the Gloucester Equityholders or cancel two different classes of contingent shares: “Dispensary Shares” and “Rec Shares.” Under Section 3.1 of the Escrow Agreement, up to 13,333.335 Dispensary Shares would be allocated for release to the Gloucester Equityholders “based on whether and how many additional dispensaries are awarded to Valley Agriceuticals, LLC (‘VA’) . . . by the New York State Department of Health (‘NYDOH’) before December 31, 2021 (the ‘Deadline Date’)” (Escrow Agreement, § 3.1). Pursuant to Section 3.1.1, “[f]or each of the first four dispensary licenses awarded to VA before the Deadline Date, 3,333.335 Dispensary Shares [would] be released from Escrow to the Gloucester Equityholders for each such dispensary license awarded to VA” (Escrow Agreement, § 3.1.1). Under Section 3.1.2, any shares not released before the Deadline Date would be forfeited and returned to Cresco for cancellation (Escrow Agreement, § 3.1.2).

Under Section 3.2, up to 13,333.335 Rec Shares would be allocated for release “based on whether Recreational Approval is obtained prior to the Deadline Date” (Escrow Agreement, § 3.2).

The Escrow Agreement defines “Recreational Approval” as:

the State of New York (the “State”) legalizing adult sales of cannabis, with the then-serving Governor of the State signing the applicable **legislation** into law before the Deadline Date, provided, that such legislation must provide **commercially reasonable access** to the State’s adult use program to VA or the entity then holding the NY Cannabis License (as defined in the Merger Agreement) subject only to a **non-competitive application or approval process**, including, **without limitation**, if (A) existing registered organizations are given a preference in securing a recreational license or (B) there is an expedited process for which VA can receive a recreational License (Escrow Agreement, § 3.2 [emphasis added]).

Nowhere does the Escrow Agreement define the terms “commercially reasonable access” or “non-competitive application or approval process.” Moreover, during the drafting of the Escrow Agreement, the parties initially considered a definition of “Recreational Approval” that would have required that “such legislation must provide **automatic** access to the State’s adult use program . . . subject only to a nominal application or approval process” (Ashekian Affidavit, NYSCEF Doc. No. 52, ¶ 17; August 15, 2018 Gloucester-Cresco Email Chain, NYSCEF Doc. No. 85 [emphasis added]). However, the parties to the Escrow Agreement did not adopt that language (Ashekian Affidavit, ¶ 17; August 15, 2018 Gloucester-Cresco Email Chain). The Escrow Agreement continues that, if the State of New York does not legalize adult sales of cannabis (i.e., provide “Recreational Approval”) by the Deadline Date, 13,333.335 Rec Shares would be forfeited and returned to Cresco for cancellation (Escrow Agreement, § 3.2.3).

Further, in the event of any dispute under the Escrow Agreement, the Escrow Agent would be under no obligation to act except upon joint written instructions by Cresco and the Equityholder Representative or by order of a court (Escrow Agreement, § 6.7). The parties signed both the Escrow Agreement and Merger Agreement and the merger was completed.

The Marijuana Regulation and Taxation Act (“MRTA”) was subsequently signed into law on March 31, 2021. The MRTA legalized adult-use recreational marijuana and established an Office of Cannabis Management (“OCM”) and Cannabis Control Board (“CCB”) to regulate both the medical cannabis program that had been regulated directly by the NYDOH and the new adult-use program (Ashekian Affidavit, ¶ 36; MRTA, NYSCEF Doc. No. 57). The MRTA specifically transferred authority over the medical marijuana market from the NYDOH to the OCM (*see* MRTA, Art. 20-C, §§ 62-a-62-d [“For the purpose of succession of all functions, powers, duties and obligations transferred and assigned to, devolved upon and assumed by it pursuant to this act, the office of cannabis management shall be deemed and held to constitute the continuation of the department of health’s medical marijuana program”]).

Instead of licenses for medical marijuana distribution, the MRTA created a procedure whereby the CCB “shall” grant a registration if an applicant meets particular conditions, including that the applicant is “ready, willing and able to properly carry on the manufacturing or distributing activity” and that it “is in the public interest that such registration be granted” (MRTA, Art. 3, § 35[3][a]). The MRTA additionally stated that the CCB “shall have the authority to grant some or all of the registered organizations registered with the department of health and currently registered and in good standing with the office, the ability to obtain adult-use cannabis licenses pursuant to article four of this chapter subject to any fees, rules or conditions prescribed by the board in regulation” (MRTA, Art. 3, § 39).

It is undisputed that Defendants did not receive any additional medical or adult-use dispensary licenses by the Deadline Date of December 31, 2021 referenced in Section 3.1 of the Escrow Agreement (Memorandum of Law in Support of Cresco’s Motion for Summary Judgment [“Cresco’s Opening Memo”], NYSCEF Doc. No. 37, p. 10). However, in a somewhat strained

argument, Defendants suggested at oral argument that their dispensary locations have been approved and that the MRTA does not actually provide for them to ever receive facility-specific licenses (*see* November 14, 2022 Transcript, pp. 9, 24).

Plaintiff filed his complaint on October 22, 2021, alleging causes of action for (1) declaratory judgment for release of Dispensary Shares; (2) declaratory judgment for release of Rec Shares; (3) breach of Section 3.1 of the Escrow Agreement; and (4) breach of Section 3.2 of the Escrow Agreement (Complaint). Plaintiff alleged in the complaint that the passage of the MRTA satisfied the conditions in Sections 3.1 and 3.2 of the Escrow Agreement, requiring the release of the contingent Dispensary and Rec Shares (Complaint, ¶¶ 4-5, 62, 72). However, Cresco has refused to release the contingent shares, citing a potential fee for Valley to participate in the adult-use market and stating that Valley would be subject to a competitive application and approval process in derogation to the terms of the Escrow Agreement (Complaint, ¶¶ 76, 86). Plaintiff alleged that he has been damaged through the delay in the release of the contingent shares, because the value of the shares dropped substantially from the time they were allegedly due to the time of the complaint (Complaint, ¶ 91).

The parties have filed dueling summary judgment motions that each hinge on the same general arguments. Defendants argue that they are entitled to summary judgment dismissing the complaint, first, because Defendants were not awarded any dispensary licenses by the Deadline Date sufficient for release of Dispensary Shares and, second, because the MRTA did not provide Defendants commercially reasonable access required for release of Rec Shares (Cresco's Opening Memo, NYSCEF Doc. No. 37, pp. 12-18).

Plaintiff contends that Section 3.2 of the Escrow Agreement only requires enactment of legislation that would provide Valley with commercially reasonable access and that the MRTA,

which provides access subject to certain regulatory conditions, satisfies that requirement (Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment ["Plaintiff's Opening Memo"], NYSCEF Doc. No. 51, pp. 7-10). Therefore, Plaintiff contends he is entitled to summary judgment as to liability. Plaintiff argues that he is entitled to summary judgment as to the Section 3.1 Dispensary Shares, because Section 3.1 does not require the actual issuance of licenses, but merely the issuance of additional dispensary locations (Plaintiff's Opening Memo, pp. 19-22). Plaintiff argues further that it is irrelevant that the Escrow Agreement refers to the award of dispensaries by the NYDOH, because responsibility for issuance of licenses has transferred to the OCM (Plaintiff's Opening Memo, pp. 21-22). Plaintiff suggests that, because the function has been transferred to a new agency, the agreement should be reformed to account for the mutual mistake of fact in conditioning the release of shares on action by the NYDOH (Plaintiff's Opening Memo, p. 22). However, Plaintiff does not assert a cause of action in the complaint for reformation of the Escrow Agreement.

For the following reasons, Plaintiff's motion for partial summary judgment is denied in its entirety. Defendants' summary judgment motion is granted as to the causes of action related to the Dispensary Shares, but is otherwise denied. The dismissal of the causes of action related to the Dispensary Shares is without prejudice to Plaintiff filing an amended complaint asserting a cause of action for reformation of the Escrow Agreement.

DISCUSSION

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *DeCintio v Lawrence Hosp.*, 33 AD3d 329, 329 [1st Dept 2006]; *Orphan v Pilnik*, 66 AD3d 543, 544 [1st Dept 2009]). To prevail, the party seeking summary judgment must make a prima facie

showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]; *Branda v MV Public Transp., Inc.*, 139 AD3d 636, 637 [1st Dept 2016]). If the party seeking summary judgment fails to meet their burden, the court must deny summary judgment “regardless of the sufficiency of the opposition papers” (*O’Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]).

If the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Reif v Nagy*, 175 AD3d 107, 125 [1st Dept 2019]). The court views the motion in the light most favorable to the opposing party (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]); *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]).

1. Dispensary Shares

The court grants Defendants’ motion for summary judgment dismissing the causes of action relating to the Dispensary Shares. A contract should generally be interpreted based on the terms’ “plain and ordinary meaning” (*see DDS Partners v Celenza*, 6 AD3d 347, 348 [1st Dept 2004]; *Castlepoint Insurance Company v Southside Manhattan View LLC*, 179 AD3d 507, 508 [1st Dept 2020]). Moreover, each provision of a contract should be interpreted “with reference to the whole” (*see Conergics Corp. v Dearborn Mid-West Conveyor Co.*, 144 AD3d 516, 531 [1st Dept 2016]). Additionally, any express conditions precedent within a contract must be performed literally (*see MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]; *300 Park Ave., Inc. v Cafe 49, Inc.*, 89 AD3d 634, 634-635 [1st Dept 2011]).

Plaintiff’s contention that the Escrow Agreement only requires an award of dispensary locations, not licenses, and the Dispensary Shares are, therefore, due, is incorrect. Section 3.1 of

the Escrow Agreement, when read in the context of the surrounding provisions, requires the issuance of new recreational licenses as a condition before the Dispensary Shares are released. The main body of Section 3.1 states that the Dispensary Shares will be released “based on whether and how many additional dispensaries are awarded to [Valley] . . . by the New York State Department of Health (‘NYDOH’) before December 31, 2021” without reference to actual licenses (Escrow Agreement, § 3.1). However, Subsection 3.1.1 states, “For each of the first four dispensary **licenses** awarded to [Valley] before the Deadline Date, 3,333.335 Dispensary Shares will be released from Escrow” (Escrow Agreement, § 3.1.1 [emphasis added]). Subsection 3.1.1 goes on to state that if Valley is “awarded the first dispensary **license** before Recreational Approval is obtained, (i) only 667.67 Dispensary Shares will be released for such first dispensary **license** awarded” (Escrow Agreement, § 3.1.1 [emphasis added]). Under Subsection 3.1.2, “Any Dispensary Shares which have not been released . . . before the Deadline Date will be forfeited . . . and returned to Cresco for cancellation” (Escrow Agreement, § 3.1.2). Thus, while the main body of Section 3.1 does not reference licenses as part of the condition precedent, the subsections provide specific details about the actual execution of Section 3.1 and make clear that the Dispensary Shares will not be released absent actual licenses. Because it is undisputed that the state never issued additional dispensary licenses to Defendants, the express condition for releasing the shares never occurred.¹ Thus, Defendants have established that they have never been obligated under the Escrow Agreement to release the Dispensary Shares and that the Dispensary Shares should be returned to Cresco for cancellation.

¹ Because Section 3.1.1 of the Escrow Agreement requires the issuance of “licenses” **prior** to the release of Dispensary Shares and Section 3.1.2 requires the cancellation of any Dispensary Shares not released by the Deadline Date of **December 31, 2021** (Escrow Agreement, §§ 3.1.1 and 3.1.2 [emphasis added]), the express condition for release of the Dispensary Shares to the Gloucester Equityholders has not—and never will be—satisfied.

In response, Plaintiff failed to raise any triable issue of fact as to the claims related to the Dispensary Shares. Plaintiff's argument that Section 3.1's reference to "dispensaries" actually refers to a "space or location" (Plaintiff's Memorandum of Law in Opposition to Cresco's Motion for Summary Judgment ["Plaintiff's Opposition Memo"], NYSCEF Doc. No. 94, p. 10) simply cannot be squared with Subsection 3.1.1's explicit references to "licenses" as prerequisites to release shares. This would be contrary to the "basic principle that a contract should be interpreted to give full meaning and effect to all of its provisions" (*see Ronbet 366 LLC v Tobias*, 309 AD2d 602, 603 [1st Dept 2003] [emphasis added]). Therefore, the court grants Defendants' motion for summary judgment as to the claims related to the Dispensary Shares.

This conclusion is the same notwithstanding Plaintiff's argument that the agreement should be reformed for mutual mistake based on the parties' incorrect predictions about the contours of the recreational regulatory regime. In particular, Plaintiff argues that the condition precedent that the NYDOH award dispensaries should not be strictly enforced because the NYDOH no longer regulates the program—the OCM does (*see* Plaintiff's Opening Memo, p. 22). Accepting Plaintiff's argument, the Escrow Agreement should be reformed to account for the parties' incorrect assumptions made at the time of the agreement about how the market would eventually be regulated. It is not clear whether this constitutes mutual mistake (*see, e.g., Chimart Associates v Paul*, 66 NY2d 570, 574 [1986] ["[R]eformation based upon mistake is not available where the parties purposely contract based upon uncertain or contingent events."]). In any event, the court need not reach this issue because Plaintiff has not asserted a cause of action for reformation. Therefore, the causes of action related to the Dispensary Shares are dismissed without prejudice to Plaintiff amending the complaint to include a cause of action for reformation due to mutual mistake (*see McGarry v Miller*, 158 AD2d 327, 328 [1st Dept 1990] [dismissing complaint without

prejudice after the lower court “concluded that plaintiff may have a cause of action against Mutual Benefit for rescission or reformation”]).

2. Rec Shares

However, the court denies Defendants’ summary judgment motion as to the causes of action related to the failure to release the Rec Shares because Defendants have not established as a matter of law that the Escrow Agreement did not require the release of the Rec Shares. A contract is ambiguous if “on its face” it is “reasonably susceptible of more than one interpretation” (*Schulte Roth & Zabel LLP v Metropolitan 919 3rd Avenue LLC*, 202 AD3d 641, 641 [1st Dept 2022] [internal quotation marks and citations omitted]). If a court finds that a contract is ambiguous, the court may “look to extrinsic evidence to resolve the ambiguity” (*id.*). However, if the determination of the parties’ intent “depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact” (*Chen v Yan*, 109 AD3d 727, 729 [1st Dept 2013] [internal citation and quotation marks omitted]; *see also Yizheng Zhao v Evans*, 154 AD3d 624, 626 [1st Dept 2017]).

Section 3.2 allows for up to 13,333.335 contingent Rec Shares to be released “based on whether Recreational Approval is obtained prior to the Deadline Date” (Escrow Agreement, § 3.2). Section 3.2 further defines “Recreational Approval” as the “State of New York (the ‘State’) legalizing adult sales of cannabis . . . before the Deadline Date, *provided*, that such legislation must provide **commercially reasonable access** to the State’s adult use program to [Valley] . . . subject only to a **non-competitive application or approval process**” (Escrow Agreement, § 3.2 [emphasis added]). However, nowhere does the Escrow Agreement define “commercially reasonable access.” While the Escrow Agreement does provide theoretical examples of “non-competitive application or approval process[es],” the term is not limited to those examples (*see*

Escrow Agreement, § 3.2 [“. . . subject only to a non-competitive application or approval process, including, **without limitation** . . .”] [emphasis added]).

The terms “commercially reasonable access” and “non-competitive application or approval process” are ambiguous because they are reasonably susceptible to multiple interpretations. Therefore, the court needs extrinsic evidence to discern the intent of the parties (*see Schulte Roth & Zabel LLP v Metropolitan 919 3rd Avenue LLC*, 202 AD3d 641, 641 [1st Dept 2022]). Also, there is conflicting evidence in the record as to the parties’ understanding of these terms. During his deposition, John Sullivan, the Executive Vice President of Public Relations at Cresco, testified that he defined the term “commercially reasonable” as “the ability to compete in a marketplace and be profitable” (John Sullivan Deposition Transcript, NYSCEF Doc. No. 63, p. 177). In contrast, Ashekian testified that he understood the phrase “noncompetitive application or approval process” to mean that as long as the organization is “in good standing and abides by the regulations, they receive an adult license,” and that the process would be “mostly administrative” (Ashekian Deposition Excerpts, NYSCEF Doc. No. 42, pp. 107-108).

Notably, Plaintiff argued that “commercially reasonable access” is not synonymous with “automatic” based on how the word “automatic” was “intentionally removed from a prior draft of the earn-out language” (Plaintiff’s Opposition Memo, p. 17). In support of this claim, Plaintiff attached to his motion papers an email from Gloucester to Cresco stating, “Section 2(d)(ii) – need a different word than ‘automatic’ – maybe ‘commercially reasonable’ while retaining the subject to language” (August 15, 2018 Gloucester-Cresco Email Chain). This email would suggest that the parties drafted the final Escrow Agreement with the intent that Recreational Approval would definitively **not** require “automatic” access to the market for Valley for the Rec Shares to be released. The conflicting extrinsic evidence creates an issue of fact regarding what the parties

intended in drafting Section 3.2's condition of Recreational Approval (see *Yizheng Zhao v Evans*, 154 AD3d 624, 626 [1st Dept 2017]). Therefore, Defendants' motion for summary judgment and Plaintiff's motion for partial summary judgment as to the claims related to the Rec Shares are denied.

Accordingly, it is


ORDERED that Defendants' motion for summary judgment is granted dismissing Plaintiff's first cause of action (declaratory judgment for release of Dispensary Shares) and third cause of action (breach of Section 3.1 of the Escrow Agreement), without prejudice to Plaintiff filing an amended complaint within thirty days of this order; and it is further

ADJUDGED, DECREED, and DECLARED that Defendant has no current obligation to release the Dispensary Shares to Plaintiff or to instruct the Escrow Agent to do so; and it is further

ORDERED that Defendants' motion for summary judgment is otherwise denied; and it is further

ORDERED that Plaintiff's motion for partial summary judgment is denied in its entirety.

1/9/2023
DATE


MELISSA CRANE, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
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<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: