

**Ashikian v Cresco Labs LLC**

2023 NY Slip Op 31347(U)

April 24, 2023

Supreme Court, New York County

Docket Number: Index No. 656112/2021

Judge: Melissa Crane

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MELISSA A. CRANE** PART 60M

*Justice*

-----X

STEPHEN ASHEKIAN,

Plaintiff,

- v -

CRESCO LABS LLC, CRESCO LABS INC.

Defendant.

INDEX NO. 656112/2021

MOTION DATE N/A

MOTION SEQ. NO. 006

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 118, 119, 120, 121, 122

were read on this motion to/for DISMISS

By this motion, Defendants seek to dismiss the amended complaint. The court refers to its decision and order on motions 4 and 5, which were for summary judgment, for a full recitation of the facts.

This is an action primarily for breach of contract arising out of Plaintiff's sale of a medical marijuana business to Defendants that the parties effectuated via a Merger Agreement dated October 24, 2018. In connection with the Merger Agreement, the parties entered into an Escrow Agreement whereby contingent shares of Cresco were deposited with an Escrow Agent. If certain events occurred, the parties would direct the Escrow Agent to release the shares to Plaintiff.<sup>1</sup> If the events did not occur, the parties would direct the Escrow Agent to return the shares to Cresco for cancellation.

<sup>1</sup> The court notes that the Escrow Agreement refers to Plaintiff Stephen Ashekian as the "Equityholder Representative" who the Gloucester Equityholders appointed "to act on their behalf in connection with the Merger Agreement and [the Escrow Agreement]" (Escrow Agreement, NYSCEF Doc. No. 56, p. 1). The parties agreed that the Escrow Agent would release the contingent shares either to the Gloucester Equityholders or to Cresco for cancellation (Escrow Agreement, § 3). Stephen Ashekian has brought this action in his capacity as Equityholder Representative.

More specifically, 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).

Thus, according to the plain language of the Escrow Agreement, if the Escrow Agent were to release Dispensary Shares to Plaintiff at all, it would be on a schedule depending on “each such dispensary license awarded.”

After the parties entered into the Escrow Agreement, then-Governor Cuomo signed the Marijuana Regulation and Taxation Act (“MRTA”) into law on March 31, 2021, legalizing recreational adult use of marijuana. Instead of licenses for marijuana distribution, the MRTA created a procedure whereby the Cannabis Control Board (“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, NYSCEF Doc. No. 37, p. 10). On the prior motion for summary judgment, the court rejected Plaintiff's argument, that the MRTA satisfied the contingent condition for release of the Dispensary Shares because the legislation somehow approved their dispensary locations automatically, and without the need for any new license (*see* Decision and Order, NYSCEF Doc. No. 111, pp. 7-8). Plaintiff made this argument even though the Escrow Agreement called for licenses and explicitly referenced approval by the New York State Department of Health (Escrow Agreement, § 3.1).

In the amended complaint, Plaintiff has repackaged as mutual mistake this argument that the court has already rejected, and asserts a cause of action for reformation. The amended complaint is somewhat convoluted, as is Plaintiff's brief in opposition to this motion. As far as the court can discern, Plaintiff argues that the inclusion of the term “license,” a plain term, was a mistake. Instead, plaintiff claims what the parties meant was “the ability to have physical spaces that functioned, not a requirement that there be a separate ‘license’ or ‘certificate’ issued for each separate physical space.” (Am. Compl., NYSCEF Doc. No. 112, ¶ 155). Plaintiff argues further that the “references to ‘dispensary license(s)’ were intended to mean permission or authority, by legislative approval of new rights entailed in the existing RO approval, not individuated site approvals” (*id.*, ¶ 154). Then, in paragraph 157, Plaintiff

claims the term “license” meant “authority or permission based on Valley’s status as an RO” (*id.*, ¶ 157). In paragraph 158, Plaintiff alleges that “the term ‘awarded’ in Section 3.1 of the Escrow Agreement meant the parties had the authority or permission to open additional physical spaces” (*id.*, ¶ 158).

This is just a repackaging of the arguments on the original motions for summary judgment. Again, legislative approval was **not** the trigger for the Escrow Agent to release the Dispensary Shares to Plaintiff. Instead, the trigger was affirmative regulatory action by the New York State Department of Health to issue new dispensaries through **licensing** (*see* Escrow Agreement ¶ 3.1).

At no point does Plaintiff allege what actually happened--that the parties anticipated a regulatory framework different than what eventually occurred. The reason Plaintiff did not own up to this reality was calculated. This is because to allege mutual mistake, the mistake “must exist at the time the contract is entered into and must be substantial” (*Simkin v Blank*, 19 NY3d 46, 52 [2012], *citing Gould v Board of Educ. of Sewanhaka Cent. High Sch. Dist.*, 81 NY2d 446, 453 [1993]). Moreover, reformation based on mistake is “not available where the parties purposely contract based upon uncertain or contingent events” (*Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986]).

Here, at the time of contacting, the parties apparently anticipated a regulatory regime that never came to be. This is **not** a basis for mutual mistake (*see Trireme Energy Holdings, Inc. v Innogy Renewables US LLC*, No. 20-CV-5015 (VEC), 2021 WL 3668092, at \*14 [SDNY Aug 17, 2021] [holding that “the parties’ alleged failure to anticipate that the IRS might amend the tax-credit regime is also not a mutual mistake warranting reformation, even though the regulatory change seemed entirely unlikely at the time of contracting”]); *see*

also *Thor Properties, LLC v Chetrit Grp. LLC*, 91 AD3d 476, 478, (1st Dept 2012) [affirming dismissal of counterclaim for rescission based on mutual mistake, finding “[b]ecause it was always uncertain whether the City would permit or deny further development of the property, any assumption about the ability to develop property could not have existed at the time the parties entered into the agreement”)].

The failure to anticipate the regulatory scheme here is no different and cannot constitute mutual mistake.

Finally, it is clear the parties knew how to make the release of shares contingent on legislative action for they did so with respect to the “Rec Shares” in the same Escrow Agreement. 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). By tying “Recreational Approval” to the State of New York legalizing the adult sale of cannabis, the parties successfully made the shares contingent, in part, on that legislation coming to fruition. They could have done something similar for the Dispensary Shares. They did not do so.

Accordingly, the court grants the motion and dismisses Plaintiff's amended complaint. Therefore, the operative complaint will be the original complaint. To the extent Plaintiff desires to conform the pleadings to the proof without the reformation claim or any allegations having to do with mutual mistake, he has leave to do so. However, the amended

pleading as written is simply too wrapped up with the now dismissed mutual mistake allegations to be discernible or useful for the remainder of this action.

Accordingly, it is

**ORDERED**, that the court grants Defendants' motion to dismiss the causes of action related to recovery of the Dispensary Shares (first, third, and fifth causes of action) with prejudice; and it is further

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

**ORDERED** that the operative pleading in the case moving forward will be the October 22, 2021 complaint (NYSCEF Doc. No. 1) unless Plaintiff seeks to conform the pleadings to the proof in a second amended complaint (*see* CPLR 3025[c]), which Plaintiff has leave to do; and it is further

**ORDERED** that if Plaintiff desires to conform the pleadings to the proof or otherwise amend, Plaintiff must do so within twenty days of this decision and order; and it is further

**ORDERED** that the parties must appear before the court for a pre-trial conference via Microsoft Teams on August 7, 2023 at 10:00 AM.

04/24/2023  
DATE

  
MELISSA CRANE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE