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SHORT FORM ORDER

INDEX NUMBER: 24017-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 03-30-11; 04-2-12 & 4-16-12
Motion Submit Date: 09-10-2012
Motion Sequence No.: 001 MOTDCASEDISP
002 MOTDCASEDISP
003 MOTDCASEDISP
004 MOTDCASEDISP

[x] FINAL
[ ] NON FINAL

X

WILLIAM SCHOOLMAN,

Plaintiff,

-against-

U.S. BANK NATIONAL ASSOCIATION, MARY AMBRIZ-REYES (INDIVIDUALLY AND IN HER CAPACITY AS AGENT OF U.S. BANK NATIONAL ASSOCIATION) and SHUTTLE ASSOCIATES, LLC,

Defendants.
X

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Attorney for Defendant US Bank and Mary Ambriz-Reyes
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In April 2008, plaintiff, William Schoolman ("Schoolman" or Plaintiff") entered into an Asset Purchase Agreement ("Purchase Agreement") with defendant Shuttle Associates, LLC ("Shuttle"), pursuant to which Schoolman sold to Shuttle substantially all of the property and assets of four airport transportation companies ("Companies"). The Purchase Agreement required Shuttle to pay a purchase price to Schoolman in the amount of $3,500,000, consisting of (1) a cash payment of $2,815,000, and (2) a payment of $685,000 to be held in escrow pursuant to an Indemnification Escrow Agreement ("Escrow Agreement") between Shuttle, Schoolman, the airport transportation companies being sold, and defendant U.S. Bank National Association ("U.S. Bank") as escrow agent.

The Escrow Agreement, dated April 17, 2008, provides, in relevant part:

> Pursuant to Sections 2.2 and 9.13 of the Purchase Agreement, the parties hereto are entering into this Agreement in order to provide for the deposit with Escrow Agent of funds that will be held and disbursed, as hereinafter provided to make payments to Buyer pursuant to Article IX of the Purchase Agreement.

9/12/12

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* * *

2.3 Intention to Create Escrow over the Escrowed Payment. Buyer and Sellers intend that the Indemnification Escrow Payment shall be held in escrow by the Escrow Agent and released from escrow by the Escrow Agent only in accordance with the terms and conditions of this Agreement.

* * *

3.1 Claims Against the Escrow.

(a) Buyer shall give Escrow Agent written notice (a "Claim Notice"), of any claim for indemnification pursuant to the Purchase Agreement (or any document ancillary thereto) due to Buyer and/or any other Indemnified Person. Concurrently with the delivery of a Claim Notice to Escrow Agent, Buyer will deliver to Escrow Agent a letter . . . (a "Disbursement Letter"). Escrow Agent shall give written notice to Buyer and Sellers of its receipt of a Disbursement Letter not later than the second (2nd) Business Day following receipt thereof.

* * *

3.2 Release of Escrow Amount

(a) Subject to Section 3.2(c), Escrow Agent shall, on the first anniversary of the date hereof (the "First Anniversary") transfer from the Escrow Amount to Sellers . . . the sum of . . . ($342,500.00)(the "First Anniversary Amount") less (A) the sum of any amounts paid pursuant to a Disbursement Letter, (B) the sum of any amounts designated in Disbursement Letters received by Escrow Agent prior to 5:00 p.m. Phoenix, Arizona time on the Business Day immediately preceding the First Anniversary that have not been cancelled . . . and (C) any fees and expenses payable to Escrow Agent . . .

(b) Subject to Section 3.2(c), Escrow Agent shall, on the second anniversary of the date hereof (the "Second Anniversary"), transfer from the Escrow Amount to Sellers . . . the sum of . . .

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($342,500.00) (the "Second Anniversary Amount") less (A) the sum of any amounts paid pursuant to a Disbursement Letter during the period of time between the Business Day immediately succeeding the First Anniversary and the Business Day immediately preceding the Second Anniversary, (B) the sum of any amounts designated in Disbursement Letters received by Escrow Agent prior to 5:00 p.m. Phoenix, Arizona time on the Business Day immediately preceding the Second Anniversary that have not been cancelled . . . and (C) any fees and expenses payable to Escrow Agent . . .

(c) Notwithstanding Sections 3.2(a) and (b), if the judgment lien against Share-Ride in the amount of One Hundred Eighty Five Thousand Nine Hundred Eighty and 87/100 Dollars ($185,980.87) is unconditionally released by the New York Department of Labor prior to the First Anniversary, then Escrow Agent shall release One Hundred Eighty Five Thousand Dollars ($185,000) of the Indemnification Escrow Payment to Sellers . . . Thereafter, the Indemnification Escrow Payment shall be disbursed by Escrow Agent in accordance with Sections 3.2(a) and (b), provided that the First Anniversary Amount and the Second Anniversary Amount shall be reduced to Two Hundred Fifty Thousand Dollars ($250,000).

(d) If at any time after the Second Anniversary the entire balance of the Escrow Amount exceeds the sum at that time of the amounts designated in Letters of Disbursement received by Escrow Agent prior to the Second Anniversary that have not been cancelled . . . Escrow Agent shall promptly transfer to Sellers . . . the amount of such excess. At such time on or following the Second Anniversary as all Letters of Disbursement received by Escrow Agent prior to 5:00 p.m. Phoenix, Arizona time on the Business Day immediately preceding the Second Anniversary have been cancelled . . . Escrow Agent shall promptly transfer to Sellers . . . the balance of the Escrow Amount.

4.1 Duties and Responsibilities of the Escrow Agent.

* * *

(b) Buyer and Sellers acknowledge that the Escrow Agent is acting solely as a stakeholder at their request and that the Escrow Agent shall not be liable for any action taken by Escrow Agent in good faith and believed by Escrow Agent to be authorized or within the rights or powers conferred upon Escrow Agent by this Agreement. Buyer and Sellers hereby, jointly and severally, indemnify and hold harmless the Escrow Agent and any of Escrow Agent's partners, employees, agents and representatives from and against any and all actions taken or omitted to be taken by Escrow Agent or any of them hereunder and any and all claims, losses, liabilities, costs, damages and expenses suffered and/or incurred by the Escrow Agent arising in any manner whatsoever out of the transactions contemplated by this Agreement and/or any transaction related in any way hereto . . . except for such claims, losses, liabilities, costs, damages and expenses incurred by reason of the Escrow Agent's gross negligence or willful misconduct.

* * *

(e) The Escrow Agent shall not be liable for any action taken or omitted by it in good faith and reasonably believed by it to be authorized hereby or within the rights or powers conferred upon it hereunder, nor for any action taken or omitted by it in good faith, and in accordance with advice of counsel, and shall not be liable for any mistake of fact or error of judgment or for any acts or omissions of any kind except to the extent any such liability arose from its own willful misconduct or gross negligence.

* * *

4.2 Dispute Resolution; Judgments. Resolution of disputes arising under this Agreement shall be subject to the following terms and conditions:

(a) If any dispute shall arise with respect to the delivery, ownership, right of possession or disposition of the Escrow Amount, or if the Escrow Agent shall in good faith be uncertain as to its duties or

> rights hereunder, the Escrow Agent shall be authorized, without liability to anyone, to (i) refrain from taking any action other than to continue to hold the Escrow Amount pending receipt of a joint instruction from Buyer and Sellers . . . and/or (iii) deposit the Escrow Amount with any court of competent jurisdiction in the State of New York, in which event the Escrow Agent shall give written notice thereof to Buyer and Sellers and shall thereupon be relived and discharged from all further obligations pursuant to this Agreement.

The Escrow Agreement was executed by Schoolman individually and as President of the companies being sold. Defendant Mary Ambriz-Reyes ("Ambriz-Reyes"), Assistant Vice President of Defendant U.S. Bank, executed the Escrow Agreement on behalf of U.S. Bank.

Pleadings

In the Amended Verified Complaint dated January 18, 2011, Schoolman alleges, among other things, upon information and belief, that Shuttle notified and/or directed U.S. Bank and/or Ambriz-Reyes not to release the full Escrow Amount to Schoolman. Schoolman further alleges that despite not having received any Disbursement Letter(s) from Shuttle or any other party entitled to indemnification under the Purchase Agreement, U.S. Bank, as escrow agent, has not released the remaining balance of the Escrow Amount, believed by Schoolman to be $185,980.87, plus accrued interest. Schoolman also alleges, upon information and belief, that in other transactions involving Shuttle, U.S. Bank has improperly refused to release money held in escrow based upon, among other things, Shuttle's request and/or instruction not to release such funds from escrow.

The first cause of action, asserted against all Defendants, alleges that "[t]here exists a justiciable and ripe dispute between Plaintiff and Defendants, concerning the rights and obligations under the Escrow Agreement with respect to the release to Plaintiff of the remaining $185,980.87, plus accrued interest, of the Escrow Amount still being held . . ." and seeks a judgment declaring, among other things, that "Escrow Agents" must immediately release that amount to Plaintiff in accordance with the terms of the Escrow Agreement.

The second cause of action, asserted against U.S. Bank only, alleges, among other things, that U.S. Bank breached the Escrow Agreement by failing to pay to Plaintiff the final $185,980.87 plus interest, and by releasing $163,388.68 to Plaintiff on April 28, 2010, eleven days later than required by the Escrow Agreement.

The third cause of action, asserted against U.S. Bank only, alleges, among other things, that Shuttle, U.S. Bank, and Ambriz-Reyes, engaged in a scheme or acts of wrongdoing to improperly, unlawfully, and in violation of the Purchase Agreement and Escrow Agreement, deprive Plaintiff of the Escrow Amount. Plaintiff alleges that U.S. Bank had actual knowledge that (1) Shuttle had not provided U.S. Bank with a Disbursement Letter, (2) Shuttle was not required to pay any claim for which Shuttle would otherwise have been entitled to indemnification under the Purchase Agreement and Escrow Agreement, and (3) Shuttle had no lawful basis to object to the release of the full Escrow Amount to Plaintiff. Plaintiff alleges that in light of U.S. Bank's actual knowledge of the foregoing facts, its refusal to release the full Escrow Amount to Plaintiff constitutes bad faith and dishonesty. Plaintiff seeks the balance of the Escrow Amount of $185,980.87 plus accrued interest and $2,500.00 in fees paid to U.S. Bank plus interest, as well as damages equal to lost investment and other opportunities.

The fourth cause of action, asserted against Ambriz-Reyes individually and as agent of U.S. Bank, alleges that Ambriz-Reyes violated and breached her fiduciary duty of loyalty, good faith, and fair dealing to Plaintiff by failing to release the remaining $185,980.87, plus interest, of the Escrow Amount to Plaintiff, and by failing to release any of the Escrow Amount pursuant to paragraph 3.2(b) of the Escrow Agreement until April 28, 2010. Plaintiff seeks damages in the amount of at least $185,980.87.

The fifth cause of action, asserted against U.S. Bank, alleges that U.S. Bank converted Plaintiff's property by knowingly, intentionally, or with gross negligence interfering with Plaintiff's property by failing to release funds held in escrow to Plaintiff, in violation of the Escrow Agreement. Plaintiff seeks an order directing U.S. Bank to release the balance of the Escrow Amount of $185,980.87, plus interest.

The sixth cause of action, asserted against U.S. Bank and Ambriz-Reyes, individually and as agent of U.S. Bank, alleges that Defendants intentionally, maliciously, improperly, and unlawfully interfered in the performance of the Purchase Agreement between Plaintiff and Shuttle, without legal justification, by refusing to release the balance of the Escrow Amount to Plaintiff in accordance with the terms of the Escrow Agreement, thereby causing the failure of the Purchase Agreement and damages to Plaintiff including loss of income, loss of future earnings and profits.

The seventh cause of action, asserted against U.S. Bank and Ambriz-Reyes, individually and as agent of U.S. Bank, seeks an accounting of the Escrow Amount and any Disbursement Letters received from Shuttle, which Plaintiff claims is within Defendants' possession, custody and control.

The eighth cause of action, asserted against Shuttle, alleges that Shuttle, motivated solely out of malice, intentionally, maliciously, improperly and unlawfully interfered in the performance of the

Escrow Agreement between Plaintiff and U.S. Bank by directing U.S. bank and/or Ambriz-Reyes not to release the balance of the Escrow Amount to Plaintiff in accordance with the terms of the Escrow Agreement, causing the failure of the Escrow Agreement and damages to Plaintiff in the form of loss of income, loss of future earnings and profits and other damages.

Shuttle served an answer denying the material allegations of the Amended Complaint and asserting affirmative defenses and counterclaims. The first counterclaim seeks a judgment declaring that Plaintiff and the Companies (a) are obligated under the terms of the Purchase Agreement and/or Escrow Agreement to satisfy the tax lien in the amount of $185,980.87, (b) are obligated under the Purchase Agreement and/or the Escrow Agreement to indemnify and hold Shuttle harmless against any claims, judgments or liens asserted against Shuttle in connection with the tax lien, and (c) are not entitled to receive the balance of the purchase price being held in escrow by U.S. Bank unless and until the Companies and/or Plaintiff satisfies the tax lien. The second counterclaim alleges that Plaintiff breached the Purchase Agreement and Escrow Agreement by failing to pay the tax lien of $185,980.87, and seeks damages in that amount. The third counterclaim alleges that Plaintiff breached the implied covenant of good faith and fair dealing by willfully, intentionally, and in bad faith, refusing to satisfy the tax lien as was his obligation under the Purchase Agreement and Escrow Agreement.

Motions

In motion sequence # 001, U.S. Bank moves for an order pursuant to CPLR 2601 allowing it to deposit into Court the remaining Escrow Amount, less the attorneys' fees and costs it has incurred, discharging it from liability and dismissing the Amended Verified Complaint as asserted against it. Alternatively, U.S. Bank moves for an order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing the Amended Verified Complaint as asserted against it and awarding it attorneys' fees and costs. In support of the motion, U.S. Bank submits copies of the Amended Verified Complaint and the Escrow Agreement. It argues, among other things, that a dispute had arisen between Schoolman and Shuttle and that the Escrow Agreement allowed it to either hold the disputed funds pending receipt of joint instructions or a court order, or to deposit the funds into Court and be released from liability. U.S. Bank claims that Plaintiff concedes the existence of a dispute between Plaintiff and Shuttle by pointing to paragraph 33 of the Amended Verified Complaint which alleges, upon information and belief, that Shuttle notified and/or directed U.S. Bank and/or Ambriz-Reyes not to release the full Escrow Amount. Due to the existence of a dispute between Plaintiff and Shuttle, U.S. Bank claims that paragraph 4.2(a) of the Escrow Agreement gives it the right to deposit the remaining amount with the Court and be relieved and discharged from all further obligations under the Escrow Agreement. U.S. Bank cites to CPLR 2601 as allowing a party to pay money into court and be discharged from liability to the extent

of the payment. Additionally, U.S. Bank argues that pursuant to paragraph 4.1(b) of the Escrow Agreement it is entitled to deduct from the amount to be paid into Court the attorneys' fees and costs it has incurred in connection with this action.

Alternatively, U.S. Bank argues that the Amended Verified Complaint should be dismissed as asserted against it, pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(1). With regard to the second cause of action alleging breach of contract, U.S. Bank contends that it fails to allege a breach of the Escrow Agreement and that paragraph 4.2(a) of the Escrow Agreement authorized to it to act precisely as it did. With respect to the third cause of action, U.S. Bank contends that the complaint fails to state a cause of action for commercial bad faith because it fails to describe the "scheme" and "relationships" between U.S. Bank and Shuttle and only consists of conclusory allegations. Also, it argues that the claim for commercial bad faith is flatly contradicted by paragraph 4.2(a) of the Escrow Agreement, which it claims allowed it to hold the remaining funds in escrow because of the dispute between Plaintiff and Shuttle regarding the disposition on the funds, and paragraph 4.1(a) which provided that U.S. Bank was not required to inquire into whether Shuttle, Plaintiff or any other party was entitled to receipt of any portion of the Escrow Amount. With regard to the fifth cause of action for conversion, U.S. Bank argues that it should be dismissed because it merely restates Plaintiff's claim for breach of contract and because the Escrow Agreement allowed it to act is it did. U.S. Bank argues that the sixth cause of action for tortious interference with contract should be dismissed because there is no allegation in the Amended Verified Complaint that U.S. Bank induced any party to the Purchase Agreement to do anything. With regard to the first cause of action seeking a declaratory judgment and the seventh cause of action for an accounting, U.S. Bank contends that these claims should be dismissed because they are based upon U.S. Bank's purported breach of contract, which claim has not been properly pled.

In opposition to U.S. Bank's motion, Schoolman argues that in accordance with Article 3 of the Escrow Agreement, absent the receipt of a Claim Notice or a Disbursement Letter from Shuttle, U.S. Bank was obligated to release the full amount remaining in escrow to Plaintiff on April 17, 2010. Because Shuttle did not provide U.S. Bank with a Claim Notice or Disbursement Letter, it was without authority to retain the remaining escrow funds and thus violated the Escrow Agreement in doing so. Schoolman argues that there is no provision in the Escrow Agreement which allowed U.S. Bank to retain any amount after April 17, 2010, which was not the subject of a Disbursement Letter from Shuttle to U.S. Bank with notice of such letter from U.S. Bank to Schoolman. He notes that the Amended Verified Complaint alleges that Shuttle either wrongfully notified and/or directed U.S. Bank and/or Ambriz-Reyes not to release the remaining funds to him in contravention of the Escrow Agreement or U.S. Bank and/or Ambriz-Reyes on their own accord have wrongfully refused to release the remaining funds. Schoolman claims that the Amended Verified Complaint specifically alleges that U.S. Bank breached the Escrow Agreement causing him to sustain damages. Because it breached the Escrow Agreement,

Schoolman contends that U.S. Bank cannot now invoke the provisions of Article 4 of the Escrow Agreement and pay the remaining escrow funds into Court and escape liability for its breach, since U.S. Bank's liability and the amount of Schoolman's damages have not been determined. Schoolman seeks damages above and beyond the amount of the remaining funds in escrow. Schoolman contends that U.S. Bank has provided no evidence of a "dispute" between Schoolman and Shuttle and has not produced a Claim Notice or Disbursement Letter with regard to the remaining funds. He claims that there was no "dispute" with Shuttle with regard to the remaining funds, but that the dispute is between Schoolman and U.S. Bank and Ambriz-Reyes as to Schoolman's rights to the remaining funds and U.S. Bank's and Ambriz-Reyes' obligations under the Escrow Agreement to release the funds. Additionally, Schoolman argues that he has properly pled claims for a declaratory judgment, breach of contract, commercial bad faith, tortious interference with contract and for an accounting.

In reply, U.S. Bank submits an affirmation from counsel stating that there was correspondence between Schoolman and Shuttle in April 2010 reflecting a dispute over the distribution of the remaining funds in escrow, as well as conflicting instructions to U.S. Bank from Shuttle and Schoolman about releasing the funds. However, copies of the alleged correspondence are not annexed to U.S. Bank's papers nor does U.S. Bank submit any evidence regarding the alleged conflicting instructions. Nevertheless, U.S. Bank contends that the allegations in the Amended Verified Complaint amount to a concession that a dispute existed between Schoolman and Shuttle with regard to the disposition of the remaining escrow funds. U.S. Bank also argues that Schoolman has failed to point to damages he claims he has suffered beyond the funds remaining in escrow.

In motion sequence # 002, Ambriz-Reyes moves to dismiss the Amended Verified Complaint as asserted against her pursuant to CPLR 3211(a)(8) or, alternatively, pursuant to CPLR 3211(a)(1) and (7). In support of the motion, Ambriz-Reyes submits an affidavit stating that she signed the Escrow Agreement while she was in the State of Arizona, on behalf of U.S. Bank in her capacity as an Assistant Vice President. Additionally, she avers that she is a resident of Glendale, Arizona, that she has lived in Arizona her entire life, that she has never transacted business in New York nor has she ever visited New York. Accordingly, she argues, among other things, that the Court lacks personal jurisdiction over her because she is not a party to the Escrow Agreement. She contends that the fact that she signed the Escrow Agreement on behalf of U.S. Bank does not provide jurisdiction over her individually. Ambriz-Reyes also argues that because she did not owe Schoolman any duty in her individual capacity, and no such duty is alleged by Schoolman, the fourth cause of action for breach of fiduciary duty must be dismissed. She contends that the sixth cause of action for tortious interference with contract should be dismissed because the Amended Verified Complaint fails to allege that Ambriz-Reyes induced a third-party to breach a contract between Schoolman and that third-party. Finally, Ambriz-Reyes argues that the claims for a declaratory judgment and an accounting as asserted against her should be dismissed

because they are based upon the Escrow Agreement, which she signed solely in her capacity as U.S. Bank's employee.

In opposition, Schoolman argues, among other things, that Ambriz-Reyes, as a signatory to the Escrow Agreement, is a party to the Escrow Agreement which specifically provides that the parties thereto consented to jurisdiction in New York. Further, Schoolman argues that jurisdiction is proper over Ambriz-Reyes because she committed torts causing injury to Schoolman in New York.

In reply, Ambriz-Reyes argues, among other things, that the Escrow Agreement is clear that U.S. Bank alone is the escrow agent and that the Court does not have jurisdiction over her under CPLR 302(a)(3).

By order dated November 17, 2011, this Court advised counsel for all parties that, pursuant to CPLR 3211(c), the Court would treat the defendants' motions to dismiss as motions for summary judgment, and invited counsel to submit supplemental affidavits and other available proof to the Court.

Ambriz-Reyes submitted a Supplemental Affidavit sworn to on January 12, 2012, to which she annexed copies of e-mail correspondence between counsel for Schoolman and Shuttle exchanged between April 23, 2010 and April 29, 2010. Ambriz-Reyes contends that the e-mails demonstrate that Schoolman and Shuttle were asserting contrary positions regarding the release of the escrow funds such that U.S. Bank acted in good faith in refusing to release the funds to Schoolman in light of the dispute. The first of the e-mails from Schoolman's counsel to Shuttle on April 23, 2010, copied to Ambriz-Reyes at U.S. Bank, states, in relevant part:

> We are demanding an immediate release of the escrow funds that are at this point improperly being withheld. There has been no notice of claim filed by you. Putting aside the lack of courtesy of not including Mr. Schoolman on any e-mails between you and the escrow agent, there could be no valid notice of claim filed by you because has [sic] been no claim made by anyone against Super Shuttle that would entitle you to be indemnified under the April 17, 2008 [Escrow] Agreement. Thus your allegation that the general indemnity agreement entitles these funds to be withheld past the release date is without any merit. Additionally, any purported notice given to the escrow agent is defective and untimely, and makes the withholding of funds by them at this point improper as well.

U.S. Bank and Ambriz-Reyes argue that because there was a dispute between Schoolman and Shuttle concerning the disposition of the remaining escrow funds, the Escrow Agreement authorized them, without liability to anyone, to hold the disputed funds pending receipt of joint instructions from Schoolman and Shuttle or a court order, or to deposit the funds into court. Thus, U.S. Bank requests an order pursuant to CPLR 2601 permitting it to pay into court the remaining funds in escrow, less it attorneys' fees and costs, discharging it from any further liability, and granting it summary judgment dismissing the complaint as asserted against it. Ambriz-Reyes requests an order granting summary judgment dismissing the complaint as asserted against her.

In motion sequence # 003, Schoolman cross-moves for (1) summary judgment against all defendants on his first cause of action for a judgment declaring that he is entitled to immediate possession of the funds remaining in escrow and directing the immediate release and delivery of those funds to him plus interest, and (2) summary judgment on his remaining causes of action and setting the matter down for an inquest on damages. In opposition to the motions by U.S. Bank and Ambriz-Reyes, and in support of his cross-motion, Schoolman submits an affidavit in which he states, among other things, (a) that the release of the funds remaining in escrow was not conditioned upon satisfaction of the tax lien, (b) that the Escrow Agreement required the release of the funds remaining in escrow as of April 17, 2010, and (3) that pursuant to the Purchase Agreement, he agreed to indemnify Shuttle against claims, including any claim in connection with the tax lien, in consideration for the full release of all funds remaining in escrow no later than April 17, 2010. He points out that Shuttle admits that as of April 17, 2010, no claim had been made against it for payment of the tax lien, nor had Shuttle submitted a Claim Notice and a Disbursement Letter pursuant to the Escrow Agreement. Therefore, he contends that on April 17, 2010, U.S. Bank and Ambriz-Reyes were required, pursuant to sections 3.1 and 3.2 of the Escrow Agreement, to remit to him $185,980.87 that remained in escrow as of that date, plus accrued interest. Schoolman provides a copy of a purported Disbursement Letter dated April 26, 2010, nine days after the Second Anniversary of the Escrow Agreement, from Shuttle to U.S. Bank regarding the tax lien and argues that it was invalid because it was untimely and because Shuttle admitted that no claim was ever made against it to pay the tax lien. He further points out that the indemnification provisions of the Purchase Agreement protect Shuttle in the event that any claim is ever made against it for payment of the tax lien.

In opposition to Schoolman's cross-motion, U.S. Bank and Ambriz-Reyes argue, among other things, that Schoolman has failed to demonstrate, as a matter of law, that there was no dispute between him and Shuttle as "dispute" is not defined in the Escrow Agreement in the way Schoolman claims. U.S. Bank and Ambriz-Reyes reiterate their contention that because the evidence demonstrates that there was a dispute between Schoolman and Shuttle, they are entitled to summary judgment pursuant to section 4.2 of the Escrow Agreement.

In motion sequence # 004, Shuttle cross-moves for summary judgment on its counterclaims asserted against Plaintiff and dismissing Plaintiff's eighth cause of action asserted against Shuttle for tortious interference with contract. Thomas Lavoy, Chief Financial Officer of Shuttle, submits an affidavit in support of Shuttle's cross-motion and in opposition to Plaintiff's cross-motion for summary judgment. Lavoy states, among other things, that Plaintiff is obligated under the Purchase Agreement to satisfy the tax lien in the amount of $185,980.87 and, because it is undisputed that the tax lien has not been satisfied, Plaintiff is not entitled to receive the escrow funds, which are required to remain in escrow until Plaintiff satisfies the tax lien. Lavoy claims that prior to the closing of the Purchase Agreement, Plaintiff admitted that he was responsible for the tax lien. He states that the parties agreed to increase the amount of the purchase price that was to be held in escrow to reflect the tax lien, to be held in escrow pending Plaintiff's satisfaction of the tax lien. By closing on the transaction without satisfying the tax lien, Shuttle claims that Plaintiff breached the representation and warranty under the Purchase Agreement that Shuttle would acquire title to the purchased assets free and clear of any encumbrances and free and clear of any and all liens. Shuttle also contends that the Purchase Agreement requires Schoolman to defend, indemnify and hold Shuttle harmless in connection with the tax lien. Lavoy further states that Shuttle was not required to provide a Notice of Claim pursuant to the Escrow Agreement with regard to the tax lien because the tax lien was a "known claim" by the parties.

Lavoy provides copies of e-mails exchanged with Ambriz-Reyes on April 19, 2010. In the first e-mail, Ambriz-Reyes advises Lavoy that it is the Second Anniversary of the Escrow Agreement, that U.S. Bank is preparing to transfer funds as required in the Escrow Agreement, and to let her know if he had any questions. Lavoy responded as follows:

> "Mary, we [Shuttle] are going to make a claim that relates to a lien filed against Classic's DOT permit in Long Island. The claim is outstanding and they need to get it released. It was identified at purchase and we have asked the owners if it is removed. They have indicated that it is not and we need to maintain the escrow for this lien until it is released."

In response, Ambriz-Reyes questioned whether the tax lien was an outstanding claim for which U.S. Bank had received notice. Lavoy responded that the claim was noticed two years earlier and that he wanted to make sure no payments were made from escrow until the lien was satisfied. Ambriz-Reyes responded that U.S. Bank would not disburse any funds at that time. Schoolman was not copied on any of the e-mails exchanged on April 19, 2010.

In an e-mail sent on behalf of Schoolman to Ambriz-Reyes on April 23, 2010, an inquiry was made as to when Schoolman could expect to receive the balance of the funds held in escrow. Ambriz-

Reyes responded:

> At this time, we have a notice from the Buyer's attorney . . .
>
> "The claim is referenced in Section 9.2(e) of the Asset Purchase Agreement and cross-referenced to Schedule 3.12–it is a matter that seller specifically indemnified the buyer against and there is no requirement to file an indemnity claim notice regrading the same."
>
> So we are waiting a letter of release. They mentioned the claim under the Asset Purchase Agreement was
>
> SuperShuttle advised:
> $185,980.67 in the escrow account until the IRS Tax levy has been cleared
>
> I'm still awaiting formal notice.

Lavoy, on behalf of Shuttle, issued a Disbursement Letter dated April 26, 2010, pursuant to section 3.1(a) of the Escrow Agreement, to U.S. Bank instructing it to pay Schoolman the amount remaining in escrow less $185,980.87, the amount of the tax lien. On or about April 28, 2010, U.S. Bank released $164,138.68 to Schoolman but withheld $185,980.87, the amount of the tax lien.

Finally, Lavoy concedes that no proceedings have been taken by New York State against Shuttle to collect the tax lien.

In opposition to Shuttle's cross-motion, Schoolman contends, among other things, that the provisions of the Purchase Agreement regarding indemnification, representations and warranties, do not change the fact that the Escrow Agreement unambiguously required the release of the escrow funds on April 17, 2010, and that there is no provision in any agreement requiring Schoolman to pay the tax lien as a condition to the release of the escrow funds. Therefore, Schoolman argues that he is entitled to summary judgment on his claims asserted against Shuttle and dismissing Shuttle's counterclaims. Schoolman states that he did not agree to satisfy the tax lien as part of the Purchase Agreement. Schoolman further contends that the indemnification provisions of the Purchase Agreement would be available to Shuttle if any future claim were made against it in connection with the tax lien.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). "[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant" (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

> "'A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties. To determine whether a writing is unambiguous, language should not be read in isolation because the contract must be considered as a whole. Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence may be considered only if the agreement is ambiguous. Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable interpretation' (*Brad H. v City of New York*, 17 NY3d 180, 185-186 [citations and internal quotation marks omitted])."

(*Critelli v Commonwealth Land Title Ins. Co.*, ___ AD3d ___, 949 NYS2d 487 [2d Dept. 2012]).

Here, upon examination of the relevant provisions of the Escrow Agreement, the Court finds that it is clear, complete and subject to only one reasonable interpretation. Section 2.3 of the Escrow Agreement explicitly states that funds held in escrow "shall . . .[be] released from escrow by the Escrow Agent ***only*** in accordance with the terms and conditions of this Agreement" (emphasis added). This clear language prohibits reference to the provisions of any other agreements, including the Purchase Agreement, with regard to the procedures for the release of funds held pursuant to the Escrow Agreement. Section 3.2 of the Escrow Agreement clearly and unambiguously delineates the manner and

timing of the release of the escrow amount. Pursuant to the plain language of section 3.2(b), on April 17, 2010, U.S. Bank was required to transfer $342,500.00, less its fees and expenses and plus any earnings on the escrow funds, to Schoolman, as it is undisputed that (1) there were no amounts paid pursuant to Disbursement Letters from April 18, 2009 through April 16, 2010, and (2) there were no amounts designated in Disbursement Letters received by U.S. Bank prior to 5:00 p.m. on April 16, 2010, that were not cancelled. Contrary to the Defendants' contention, the provisions of section 3.2(c) were never triggered because it is undisputed that the condition precedent to the applicability of that section, i.e. unconditional release of the judgment (tax) lien by the New York Department of Labor prior to April 17, 2009 (the First Anniversary), never occurred.

U.S. Bank's contention that a dispute had arisen between Schoolman and Shuttle with regard to the release of the escrow funds which allowed it, pursuant to section 4.2(a) of the Escrow Agreement, without liability to anyone, to continue to hold the escrow funds and/or deposit the escrow funds with the Court, is without merit. The record clearly reflects that U.S. Bank did not become aware of the dispute between Schoolman and Shuttle until April 19, 2010, two days after its obligation to transfer the funds to Schoolman pursuant to section 3.2(b) was triggered.

Accordingly, those branches of Plaintiff's cross-motion seeking summary judgment on his first (declaratory judgment) and second (breach of contract) causes of action are granted, and those branches of U.S. Bank's motion to dismiss, treated as a motion for summary judgment pursuant to CPLR 3211(c), seeking dismissal of those causes of action are denied.

With regard to the third cause of action asserted against U.S. Bank for commercial bad faith, the Plaintiff failed to present evidence of "out-and-out dishonesty" or "complicity by principals of the bank in alleged confederation with the wrongdoers" (*Prudential-Bache Sec. v. Citibank*, 73 NY2d 263, 276 [1989], and thus failed to raise a triable issue of fact (*Diamore Realty Corp. v. Stern*, 50 AD3d 621 [1st Dept. 2008]). Rather, this cause of action is premised solely on Schoolman's conclusory assertions (*see Josephs v. Bank of New York*, 302 AD2d 318 [1st Dept. 2003]). Accordingly, that branch of U.S. Bank's motion seeking dismissal of the third cause of action is granted and that branch of Plaintiff's cross-motion seeking summary judgment on the third cause of action is denied.

With regard to the fourth cause of action asserted against Ambriz-Reyes for breach of fiduciary duty, it is well settled that there is no claim for breach of fiduciary duty when it is based on the same facts and theories as a breach of contract claim (*Brooks v. Key Trust Co. Natl. Assoc.*, 26 AD3d 628 [3rd Dept. 2006]). In order to be actionable, the claim for breach of fiduciary duty must be separate, distinct, and independent of the contract itself (*Sally Lou Fashions Corp. v. Camhe-Marcille*, 300 AD2d 224 [1st Dept 2002]). Here, the Plaintiff's fourth cause of action is based on the same facts and theories as

Plaintiff's breach of contract claim. Specifically, Plaintiff claims that Ambriz-Reyes breached her fiduciary duty to Plaintiff by failing to comply with the provisions of the Escrow Agreement. Thus, the claim is not separate, distinct, and independent of the Escrow Agreement. Accordingly, that branch of Ambriz-Reyes' motion seeking dismissal of the fourth cause of action is granted and that branch of Plaintiff's cross-motion seeking summary judgment on the fourth cause of action is denied.

"To establish a cause of action in conversion 'the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights'" (*Castaldi v. 39 Winfield Assocs.*, 30 AD3d 458 [2d Dept. 2006]). Here, Plaintiff's conversion claim fails to state a cause of action because it is based upon an alleged contractual right to payment where Plaintiff never had ownership, possession, or control of the disputed funds (*see Id.; Daub v. Future Tech Enter., Inc.*, 65 AD3d 1004 [2d Dept. 2009]). Accordingly, that branch of U.S. Bank's motion seeking dismissal of the fifth cause of action is granted and that branch of Plaintiff's cross-motion seeking summary judgment on the fifth cause of action is denied.

The elements of the tort of interference with contract are (1) the existence of a valid contract, (2) defendant's knowledge of that contract, (3) defendant's intentional procuring of the breach, and (4) damages (*White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 NY3d 422, 426 [2007]). There must be a breach of contract in order for there to be actionable interference with contract (*NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614, 621 [1996]). Here, Plaintiff's sixth cause of action must be dismissed as there is no evidence of any breach of the Purchase Agreement by Shuttle (*see J.C. Klein, Inc. v. Forzley*, 289 AD2d 79, 80 [1st Dept. 2001]). Accordingly, those branches of the motions by U.S. Bank and Ambriz-Reyes' seeking dismissal of the sixth cause of action are granted and that branch of Plaintiff's cross-motion seeking summary judgment on the sixth cause of action is denied.

With regard to the seventh cause of action, Plaintiff has not demonstrated an entitlement to an accounting because, contrary to his contention, Plaintiff has an adequate remedy at law, i.e. money damages, as the amount he seeks to recover from U.S. Bank is $185,980.87 plus interest. Moreover, U.S. Bank admits that it continues to hold $185,980.87 in escrow. Therefore, there is no need for an accounting and those branches of the motions by U.S. Bank and Ambriz-Reyes' seeking dismissal of the seventh cause of action are granted and that branch of Plaintiff's cross-motion seeking summary judgment on the seventh cause of action is denied.

With regard to the eighth cause of action asserted against Shuttle for tortious interference with contract, only a stranger to a contract can be liable for tortious interference with contract (*Kassover v. Prism Venture Partners, LLC*, 53 AD3d 444, 449 [1st Dept. 2008]). It is undisputed that Shuttle is not

a stranger to the Escrow Agreement. In fact, it is a party to it. Therefore, Shuttle cannot be liable for tortious interference with the Escrow Agreement and that branch of Shuttle's cross-motion for summary judgment seeking dismissal of the eighth cause of action is granted and that branch of Plaintiff's cross-motion seeking summary judgment on the eighth cause of action is denied.

Shuttle's cross-motion seeking summary judgment on its counterclaims is denied and, pursuant to CPLR 3212(b), upon searching the record summary judgment is granted to Plaintiff dismissing Shuttle's counterclaims. Contrary to Shuttle's contention, the clear and unambiguous provisions of the Purchase Agreement and the Escrow Agreement do not require Schoolman to satisfy the tax lien prior to the release of the funds held in escrow on the Second Anniversary. Thus, Shuttle is not entitled to a declaration to that effect and does not have valid counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing since both such claims are premised on Schoolman's non-existent obligation under the Purchase Agreement and/or Escrow Agreement to satisfy the tax lien. While Schoolman acknowledges that he may be obligated under the Purchase Agreement to indemnify Shuttle for any claim made against it in connection with the tax lien, it is undisputed that no such claim against Shuttle has ever been made. Thus, a declaration that Schoolman is obligated to indemnify and hold Shuttle harmless against any claims, judgments or liens associated against Shuttle in connection with the tax lien would be premature and that branch of the first counterclaim is dismissed without prejudice.

In light of the foregoing, the Court need not reach the issue of personal jurisdiction raised by Ambriz-Reyes.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Settle judgment.

Dated: September 10, 2012
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.

[X] FINAL
[ ] NON FINAL