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

**PRESENT:** **HON. DAVID B. COHEN** **PART 58**

***Justice***

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DAVID G. COTTON,

Plaintiff,

- v -

WILLIAM WINKLE, STATE OF NEW YORK, THE NEW YORK STATE OF ENVIRONMENTAL CONSERVATION (DEC), and BASIL SEGGOS

Defendants.

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**INDEX NO.** 159714/2020

**MOTION SEQ. NO.** 002 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 65, 66, 67, 72

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 68, 69, 70, 71, 73

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

In this interpleader action initiated by plaintiff David G. Cotton, defendant William Winkle ("Winkle") moves, pursuant to CPLR 3212, for an order directing plaintiff to dispense the funds of the interpleaded escrow fund to him. Defendants State of New York, The New York State Department of Environmental Conservation ("DEC") and Basil Seggos, as the Commissioner of Environmental Conservation (collectively, "the State"), also move, pursuant to CPLR 3212, for an order directing plaintiff to dispense the funds of the interpleaded escrow fund to it. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

## Factual and Procedural Background

Winkle owns property in the Neighborhood of Flushing, Borough of Queens, City of New York, Queens County along the coast of the East River ("the Beechhurst Property") (NYSCEF

Doc No. 35 at 1-2). In 2005, DEC brought an administrative enforcement action against him and his wife stemming from work performed by a neighbor that impacted their backyard (Doc No. 35 at 2). The work consisted of, among other things, dumping fill and installing a revetment along the shoreline, which violated various environmental laws (Doc No. 35 at 2). As a result of the administrative enforcement action, Winkle and DEC entered into an order on consent ("the 2015 order") requiring Winkle to, among other things, remediate the Beechhurst property to the condition it was in prior to the environmental law violations, submit a proposed engineering plan to DEC outlining steps to achieve such remediation, and pay a civil penalty of $100,000 — with $95,000 of such penalty suspended until Winkle complied with the order on consent (Doc No. 35 at 2-3; Doc No. 39).

Two years later, the State commenced an action against Winkle in Supreme Court, Queens County, alleging that he violated the terms of the 2015 order and seeking to enforce it (Doc No. 35 at 4). The court referred the matter to a referee, who concluded that Winkle had violated the terms of the order (Doc No. 41). The referee then ordered Winkle to remediate the Beechhurst property back to its "pre-violation condition," awarded a money judgment to the State for $95,000, plus interest, and awarded an additional money judgment consisting of a statutory penalty of $500,000 (Doc No. 41). Supreme Court adopted the referee's decision in 2016 and issued a judgment to that effect ("the 2016 judgment") (Doc Nos. 37, 42), which the State then docketed in Suffolk County (Doc No. 35 at 5).

Shortly thereafter, Winkle wanted to sell a second property located in the Town of Shelter Island, Suffolk County ("the Shelter Island property") (Doc No. 35 at 5). Due to the judgment docketed against him in Suffolk County, to facilitate the sale, he and the State entered into an agreement in September 2016 that created an escrow fund with plaintiff as the escrow agent (Doc

No. 35 at 5-6). Winkle deposited the proceeds from the sale of the Shelter Island property into the escrow fund (Doc No. 38). The escrow agreement provided, among other things, that Winkle would comply with the remediation requirements listed in the 2015 order and the 2016 judgment (Doc No. 38 at 1-2). Further, if Winkle failed to remediate the Beechhurst property in accordance with a DEC-approved engineering plan by December 31, 2020, all the money contained in the escrow fund would be paid to the State (Doc No. 38 at 4-5).

In April 2016, Winkel appealed the 2016 judgment to the Appellate Division, Second Department (Doc No. 35 at 7). Almost four years later, in January 2020, the Second Department modified the 2016 judgment by "deleting" the portion requiring Winkle to remediate the Beechhurst property to its pre-violation condition, and it remitted the matter to Supreme Court "for a new determination of the remediation actions necessary for . . . Winkle to perform consistent with current regulations" (Doc No. 4 at 1-2) (*State of New York v Winkle*, 179 AD3d 1121, 1122 [2d Dept 2020]). The court reasoned that forcing Winkle to return the Beechhurst property to its pre-violation condition "causes an inequitable result" because it inhibits his ability to develop a remediation plan in coordination with DEC (Doc No. 4 at 5) (*id.* at 1127). It noted further that current environmental and city regulations may make it impossible to implement the pre-violation conditions (Doc No. 4 at 5) (*see id.*).

In October 2020, plaintiff commenced this interpleader action seeking to have this Court direct him to pay the money in the escrow fund to either Winkle or the State (Doc No. 1). Winkle and the State now separately move, pursuant to CPLR 3212, for summary judgment and an order directing plaintiff to dispense the money to each of them, respectively (Doc Nos. 33, 53). Winkle argues, among other things, that he is entitled to the money in the escrow fund because the Second Department decision "voided" the escrow agreement, and it has become impossible for him to

perform under it (Doc No. 54). The State argues that it is entitled to the funds because the escrow agreement terms specified that the State would receive the money upon Winkle's failure to remediate his property by December 31, 2020 (Doc No. 34).

While these motions were pending in this Court, Supreme Court, Queens County issued an order in the remitted proceedings ("the 2021 order") directing Winkle to "submit a plan to DEC that permits him to remediate his property and provides for storm protection measures" within 60 days after service of a copy of the order and notice of entry (Doc No. 70 at 4). It also indicated that the parties should collaborate on a remediation plan if Winkle's submission is denied, and to do so "without the need for further [c]ourt intervention" (Doc No. 70 at 4). By letter dated December 12, 2022, the parties advised that discussions about the remediation required were on hold pending resolution of the instant summary judgment motions (Doc No. 74).

Legal Conclusions

*Winkle's Motion for Summary Judgment*

Although not expressly identified as such, Winkle's contentions are couched in the doctrines of impossibility and frustration of purpose (Doc No. 54 at 5-16). The doctrine of impossibility "excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible" (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]; *accord Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480, 480 [1st Dept 2022]). However, this doctrine "has been applied narrowly" (*Commercial Tenant Servs., Inc. v Northern Leasing Sys., Inc.*, 131 AD3d 895, 896 [1st Dept 2015] [internal quotation marks and citations omitted]), and performance will not be excused where there is merely financial difficulty or economic hardship (*see 407 E. 61st Garage v Savoy Fifth Ave.*

*Corp.*, 23 NY2d 275, 281-282 [1968]; *Valenti v Going Grain, Inc.*, 159 AD3d 645, 645-646 [1st Dept 2018]; *Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269, 270-271 [1st Dept 1990]).

Similarly, the doctrine of frustration of purpose excuses performance "'when a change in circumstances makes one party's performance virtually worthless to the other, frustrating [the] purpose in making the contract'" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [1st Dept 2011], quoting Restatement [Second] of Contracts § 265, Comment *a*). This doctrine is also "a narrow one," that "does not apply unless the frustration is substantial" (*Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004] [internal quotation marks and citations omitted]) and the purpose of the contract has been "completely thwarted" (*Valentino U.S.A., Inc.*, 203 AD3d at 480; *accord Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504 [1st Dept 2022], *lv dismissed* 39 NY3d 938 [2022]), i.e., "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (*Crown IT Servs., Inc.*, 11 AD3d at 265; *accord Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34, 42 [1st Dept 2020]).

Winkle fails to demonstrate how either doctrine is applicable here. It is not impossible for him to perform under the escrow agreement. Although the ultimate performance is remediating the Beechhurst property, the initial step of that performance begins with Winkle; he must submit an engineering plan to DEC for approval. That requirement has been a constant across the 2015 order, 2016 judgment, and 2021 order (Doc Nos. 37, 42, 70). Although drafting such a plan may be more difficult with no clear court directive on what exact remediation is required, it is not "objectively impossible" to draft and submit an engineering plan to DEC; and any difficulty or hardship is insufficient to excuse performance (*Valentino U.S.A., Inc.*, 203 AD3d at 480; *see 407 E. 61st Garage*, 23 NY2d at 281-282; *Gap, Inc.*, 206 AD3d at 504; *cf. Kolodin v Valenti*, 115

AD3d 197, 201 [1st Dept 2014] [finding performance of business contract "objectively impossible by law" where court order prohibited all contact between parties]).

Contrary to his contention that the escrow agreement has no purpose because the 2016 judgment "no longer exists" (Doc No. 54 at 5-6), the escrow agreement's purpose — ensuring that Winkle remediates the Beechhurst property — remains intact (Doc No. 38 at 2). At best, the purpose may have been temporarily frustrated while the parties awaited a new determination from Supreme Court on what specific remediation Winkle was required to perform. However, that temporary frustration was resolved when the 2021 order directed Winkle to submit an engineering plan to DEC and directed the parties to collaborate on the exact contours of remediation without court intervention. Thus, the purpose of the escrow agreement was not "completely thwarted" (*Valentino U.S.A., Inc.*, 203 AD3d at 480; *see PPF Safeguard, LLC*, 85 AD3d at 508-509; *Latipac Corp. v BMH Realty LLC*, 93 AD3d 115, 123 n 4 [1st Dept 2012], *lv dismissed* 19 NY3d 1099 [2012]). Therefore, Winkle fails to demonstrate, as a matter of law, that he is entitled to the money in the escrow fund because he is excused from performing under the escrow agreement (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

*The State's Motion for Summary Judgment*

"New York courts have repeatedly noted that '[a]n escrow agreement is a contract' like any other" (*H & H Acquisition Corp. v Financial Intranet Holdings*, 669 F Supp 2d 351, 363 [SD NY 2009], quoting *Egnotovich v Katten Muchin Zavis & Roseman LLP*, 18 Misc 3d 1120[A], *6 [Sup Ct, New York County 2008]). Thus, as with any other contract, if an escrow agreement "is complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *accord Beinstein v Navani*, 131 AD3d 401, 405 [1st Dept 2015]).

Although the instant escrow agreement indicates that the money in the escrow fund would be paid to the State if Winkle failed to remediate his property by December 31, 2020 (Doc No. 38 at 4), "[a] written agreement should be *read as a whole* to give effect to its general purpose" (*Fort v Haar*, ___ AD3d ___, 2022 NY Slip Op 05660 [1st Dept 2022] [emphasis added]; *see Tomhannock, LLC v Roustabout Resources, LLC*, 33 NY3d 1080, 1082 [2019]). Reading the escrow agreement as a whole, it also indicates that Winkle is to remediate his property "in accordance with" the 2015 order and the 2016 judgment (Doc No. 38 at 3).

That judgment, however, was modified in 2020 to the extent of directing Queens County to issue a new order regarding Winkle's obligation to remediate, which it did not do until September 2021 — after the escrow agreement's deadline of December 31, 2020 had passed. Thus, given the current situation, the terms of the escrow agreement are no longer clear and unambiguous, and the State has failed to satisfy its burden of demonstrating that the plain terms of the escrow agreement entitle it to judgment as a matter of law (*see Alvarez*, 68 NY2d at 324 [1986]).

A more apt description of the current situation is that a superseding judicial order rendered Winkle's ability to perform under the escrow agreement impracticable (Restatement [Second] of Contracts, §§ 261, 264); i.e., the time it took for the Queens County matter to proceed through appeal and remand prevented Winkle from being able to remediate before December 31, 2020. Generally, when a party's ability to perform becomes impracticable, such party's duty to perform is discharged (*see* Restatement [Second] of Contracts § 261; *Twin Holdings of Delaware LLC v CW Capital, LLC*, 26 Misc 3d 1214[A], *6-7 [Sup Ct, Nassau County 2010]). However, when "the circumstances indicate" that a party has agreed to perform despite the impracticablility,

discharging a duty may be avoided (Restatement [Second] of Contracts § 261; *Twin Holdings of Delaware LLC*, 26 Misc 3d at *6-7).

Here, the circumstances weigh against discharging Winkle's duty to remediate. There is still money in the escrow fund to support Winkle in remediating the Beechhurst property and both parties recently indicated that they are willing to continue discussions to determine the specific remediation required (Doc No. 74). The only obstacle to completing remediation is that the escrow agreement's deadline for Winkle to do so has passed. Since neither party has demonstrated entitlement to the money in the escrow fund as a matter of a law, a nonexistent deadline leaves the escrow agreement, the parties, and remediation of the Beechhurst property in limbo.

As this interpleader action is an action in equity (*see Manufacturer's & Traders Trust Co. v Reliance Ins. Co.*, 8 NY3d 583, 589 [2007]), this Court "will adapt its relief to the exigencies of the case" (*Doyle v Allstate Ins. Co.*, 1 NY2d 439, 443 [1956]). Therefore, to allow for the continued possibility of performance within a reasonable period of time, the deadline for Winkle to complete remediation is moved from December 31, 2020 to December 31, 2024.

The parties remaining contentions are either without merit or need not be addressed given the findings set forth above.

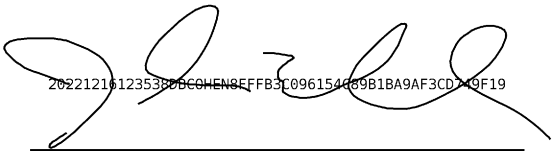
Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendants State of New York, The New York State Department of Environmental Conservation, and Basil Seggos, as the Commissioner of Environmental Conservation (Seq. 002) is denied; and it is further

ORDERED that defendant William Winkle's motion for summary judgment (Seq. 003) is denied; and it is further

ORDRERED that Winkle must complete remediation of the Beechhurst property by December 31, 2024; and it is further

ORDERED that the parties shall appear for an in-person status conference at 71 Thomas Street, Room 305, on February 7, 2023 at 10:00 a.m., unless a stipulation is provided beforehand in accordance with the Part rules.




12/16/2022
DATE

DAVID B. COHEN, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | X | NON-FINAL DISPOSITION | | |
| | | GRANTED | X DENIED | | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |