Rosado v Livingstone
2007 NY Slip Op 33061(U)
September 26, 2007
Supreme Court, Nassau County
Docket Number: 0854-04/
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

VIC ROSADO and VIC ROSADO, doing business as ROSADO TOWING, FREEPORT TOWING, INC. and ROSADO COLLISIION AND SALES, INC.,

Plaintiffs,

-against-

ROBERT LIVINGSTONE, CHRIS MIGNONE, STEVEN PODLAS, CPA and MARK SILVERMAN,

Defendants.

INDEX No. 010854/04

MOTION DATE: Sept. 6, 2007
Motion Sequence # 002, 003

The following papers read on this motion:

Notice of Motion.. X
Cross-Motion... X
Affirmation in Opposition.......................... X
Reply Affirmation X

This motion, by plaintiffs, for an order pursuant to CPLR 3126 striking the defendant Mark Silverman's answer for failing to respond to plaintiff's Demand for Discovery and Inspection, and for such other and further relief as to the Court may deem just and proper, together with the costs of this motion, is **granted** unless the defendant Silverman responds to the plaintiff's discovery and inspection requests within 10 days of

being served with this decision. The cross motion, by defendant Chris Mignone, for an order directing the plaintiffs' attorney, Robert A. Baumann, Esq. to deliver to the defendant, Chris Mignone, the sum of $10,000 being held in escrow by him, and for such other and further relief as may be just, proper and equitable, is determined as hereinafter set forth.

FACTS

The plaintiff was the owner and operator of Rosado Collision and Sales, Rosado Towing, and Freeport Towing. In 2002 the plaintiff decided to sell his businesses, and subsequently retained the defendant Silverman to represent him in the transaction.

The defendant informed the plaintiff that two parties, Livingstone and Mignone (co-defendants), were interested in purchasing the plaintiff's businesses, and the sales contract would be signed simultaneous to the closing. Prior to the closing the plaintiff was informed by the defendant of a tax lien on his assets, as well as judgments against his businesses.

A closing was scheduled for May 20, 2003. On May 19, 2003, NYS Tax Department field agents advised the defendants Mignone and Livingstone that the plaintiff's assets would be seized to satisfy his tax arrears. Before learning of the tax problems associated with the plaintiff's property, Mignone and Livingstone deposited a total sum of $10,000.00 with the plaintiff's attorney, Mark Silverman. There is a dispute as to the purpose of the funds. The closing scheduled for May 20th never took place. On January 14, 2004, the $10,000.00 held in defendant Silverman's escrow account was transferred to the plaintiff' s new counsel, Robert A. Baumann, Esq. (Baumann). After May 20th the defendants Mignone and Livingstone entered into a lease for the plaintiff's property with the plaintiff's landlord. The defendants have been running the plaintiff's towing and repair facilities since the aforementioned lease was executed. Subsequently, the plaintiff initiated an action against defendants Mignone and Livingstone for conversion of business assets and punitive damages. The plaintiff also initiated an action against the defendants Silverman and Podlas for negligence, malpractice, breach of trust, breach of fiduciary responsibilities, and punitive damages.

DEFENDANT'S CONTENTIONS

The defendant requests that this court order the $10,000.00 held in escrow by Baumann be transferred to the defendant. The defendant argues that there exists a valid

escrow agreement, signed by Silverman, stating, "[i]f for any reason, the proposed contract is not signed, Mark Silverman shall return the said sum of $10,000.00 on demand" (defendants affirmation, page 2, also see defendants Exhibit A). Furthermore, the defendant avers that Baumann, in response to a letter dated January 20, 2006, refused to return the money being held in escrow.

PLAINTIFF'S CONTENTIONS

The plaintiff argues that the $10,000.00 being held in escrow was not a good-faith deposit, but rather partial payment for the plaintiff's flatbed tow truck. The plaintiff attempts to support this contention by referring to the deposition testimony of Mignone. The plaintiff claims that Mignone testified that the $10,000.00 was paid to the plaintiff as partial payment for the aforementioned truck. The deposition transcripts have not been produced for this court's review. Furthermore, Baumann, the plaintiff's attorney, argues that he cannot release the escrow money since there is a conflict as to its rightful owner.

DEFENDANT'S REPLY

The defendant's reply simply restates their original position: There exists a valid escrow agreement, signed by Silverman, warranting the return of the $10,000.00 to the defendant in the event that a contract between the defendant and the plaintiff is not executed.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a

> triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

Applying those principles to the facts in the case at bar has warranted an examination of the record as presented by the parties. Every possible inference that can be reasonable drawn from the evidence will be viewed in the light most favorable to the plaintiff. For the case at bar to proceed, that is for the defendant's cross motion to be defeated, there must exist a material issue of fact as to the true ownership of the $10,000.00 being held in escrow by the plaintiff's attorney.

In his affirmation in opposition to the defendant's cross motion, the plaintiff attempts to raise such an issue by asserting that, during depositions, the defendant testified that the $10,000.00 in question was partial payment for the plaintiff's truck. However, the allegations set forth in the affirmation are unsupported by documentary evidence, such as the deposition transcripts. "Such an affirmation by counsel is without evidentiary value and thus unavailing" (**Zuckerman v. City of N.Y.**, 49 NY2d 557, 427 NYS2d 595, 1980).

In the current action the defendant offers documentary evidence in the form of a signed, albeit hand written, escrow agreement between the plaintiff's former counsel, Silverman, and the defendant. This agreement calls for the return of the defendant's $10,000.00, "[i]f for any reason the proposed contract is not signed" (defendant's notice of cross motion, Exhibit A). Furthermore, the agreement states that the money will be turned over "on demand" so long as a contract between the parties was not consummated.

The defendant has provided this court with a copy of the aforementioned escrow agreement, as well as a letter demanding the return of the escrow money held by the plaintiff's attorney.

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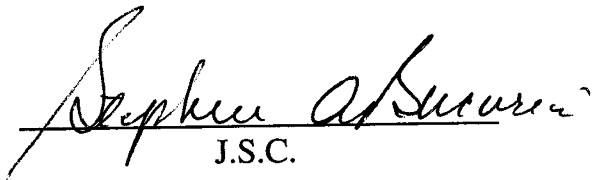
CONCLUSION

This court holds that the plaintiff has not offered any evidence to indicate the existence of a material question of fact. The defendant's motion is **granted**, and the plaintiff's attorney is hereby ordered to return the $10,000.00 he holds in escrow to the defendant.

Dated SEP 2 6 2007



J.S.C.