

Goth v Tremble

2008 NY Slip Op 31665(U)

June 18, 2008

Supreme Court, Greene County

Docket Number: 0020071/6010

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE
ESTATE OF GEORGE L. GOTH, Deceased,

Plaintiff,

DECISION and ORDER
INDEX NO. 07-0160
RJI NO. 19-07-3161

-against-

TODD N. TREMBLE,

Defendant.

Supreme Court Greene County All Purposes Term, April 2, 2008

APPEARANCES:

McNamee, Lochner, Titus & Williams, P.C.
Attorneys for Plaintiff
(Kenneth L. Gellhaus, Esq. of Counsel)
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Albany, New York 12207

Law Offices of Daniel J. Pershing, Esq.
Attorneys for Defendant
(Susan Narkewicz, Esq. of Counsel)
350 Northern Boulevard
Albany, New York 12204

TERESI, J.:

The plaintiff moves for summary judgment pursuant to CPLR 3212 and seeks an order directing payment by the defendant of two promissary notes made to the late George L. Goth to his estate. The defendant opposes the motion.

The decedent, George I. Goth died on October 8, 2006 a resident of Round Top, County

of Greene, State of New York. Upon his death, his children discovered two promissory notes from the defendant. The first promissory note dated December 5, 2003 was drafted by defendant's attorney. The note was for \$58,700.00 for a period of fifteen years with interest at eight per cent. The note included a prior loan and note for \$18,000.00. The second promissory note is dated January 14, 2006 and was drafted by the defendant. The note was for \$146,800.00 for an unspecified term with interest payments only at eight percent. The plaintiff alleges no portion of the promissory notes have been paid by the defendant. Plaintiff offered an affidavit from attorney Harry Miller who stated that he met with the decedent and his family on September 19, 2006 in order to assist the family with financial and estate planning for George L. Goth and Medicaid planning for his wife, Margaret. Mr. Miller maintains Mr. Goth acknowledged receipt of the promissory notes from the defendant and considered them to be assets of his estate. Mr. Goth allegedly stated that the defendant would repay the notes.

The defendant claims he and the decedent had been close friends over the last several years. In response to the complaint, the defendant asserted two counterclaims. The first counterclaim alleges the defendant provided farming assistance to the plaintiff at his request and direction which had a value of \$120,000.00. The second counterclaim alleges the defendant provided renovation and rehabilitation services to decedent's residence which had a value of \$120,000.00.

The defendant alleges he satisfied the first promissary note with payments in cash and providing services to the decedent. The defendant alleges he regularly purchased material and supplies for the decedent and his garden. The defendant claims the decedent was agreeable to the exchange of services in lieu of regular payments on the notes. The defendant alleges he and the

decedent entered into a oral agreement after the notes were signed. In addition, the defendant alleges parole evidence does not preclude the affirmative defense of novation. The defendant maintains the decedent made gifts to him and his children. The defendant alleges he wrote the second promissory note under the influence of alcohol as a means of expressing his gratitude to the decedent.

Plaintiff contends summary judgment is justified as the defendant failed to provide any documents or written records to support his counterclaims and failed to establish a contract existed between the decedent and the defendant for labor, services and materials. The plaintiff also alleges conversations the defendant had with the decedent are barred pursuant to the Dead Man's Statute (CPLR 4519).

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. See, Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Gilbert Frank Corp. v Federal Insurance Co., 70 NY2d 966 (1988). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. See, Zuckerman v City of New York, 49 NY2d 557 (1980). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. See, Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957), and all evidence must be viewed in the light most favorable to the opponent to the motion. See, Crosland v. New York City Transit Auth., 68 NY2d 165 (1986).

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. See, Zuckerman v City of New York, supra, 562. It is incumbent upon

the non-moving party to lay bare her proof in order to defeat summary judgment. See, O'Hara v Tonner, 288 AD2d 513 (3rd Dept. 2001). Mere conclusory assertions, devoid of evidentiary fact, are insufficient to raise a genuine triable issue of fact on motion for summary judgment as is reliance upon surmise, conjecture or speculation. See, Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381 (2004).

Plaintiff's motion for summary judgment is denied as he has not sustained his burden of proof. The defendant does not deny that he excuted the two promissory notes. From the facts presented, this Court cannot determine as a mater of law that the decedent and the defendant did not have an understanding whereby the defendant would work or provide services to the decedent to reduce the amount due on the promissory notes. Questions of fact preclude summary judgment. The selected portions of defendant's deposition testimony submitted by the plaintiff are not sufficient for the Court to decide as a matter of law that plaintiff is entitled to summary judgment. In addition, the Court is also unable to ascertain the facts relating to the role the decedent's children played in this scenario for over six years when they lived on the same street or nearby.


The underlying purpose of the Dead Man's Statute is to protect the estate of the deceased from claims of the living, who, through their own assertions, could make factual assertions which the decedent could not refute. See, Poslock v. Teachers' Retirement Bd. of Teachers' Retirement System, 88 NY 2d 146 (1996)). The defendant alleges he repaid the loan or provided services during the decedent's lifetime. Even though the defendant's testimony would be excluded at trial upon objection under the Dean Man's Statute, such proof may be considered in opposition to a motion for summary judgment. See, Phillips v. Kantor & Co., 31 NY 2d 307 (1972). Invocation

of the Dead Man's Statute is expressly limited by statute to "the trial of an action or the hearing upon the merits of a special proceeding", since further evidence may be revealed prior to the trial through disclosure or otherwise and the statutory objection may be waived. See, Silvestri v. Iannone, 262 AD 2d 387 (2nd Dept. 1999)). The Court cannot anticipate the defense the defendant will offer at trial. The motion for summary judgment is denied. This Court will defer to the trial court to make the appropriate rulings relating to the application of the Dead Man's Statute in this proceeding.

All papers, including this Decision and Order are being returned to the attorney for the defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section respecting to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
June 18, 2008


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion January 31, 2008;
2. Affirmation of Kenneth L. Gellhaus, Esq. dated January 31, 2008 with attached exhibits A-N;
3. Affidavit of Samuel Adrezin dated January 30, 2008 with attached exhibits A & B;
4. Plaintiff's Memorandum of Law dated January 31, 2008;
5. Affidavit of Susan Narkewicz, Esq. undated with attached exhibits A-C;
6. Defendant's Memorandum of Law;
7. Affirmation of Kenneth L. Gellhaus, Esq. dated April 1, 2008 with attached exhibits A-B;
8. Plaintiff's Reply Memorandum of Law dated April 1, 2008.