

Jordan v Dixon

2010 NY Slip Op 31102(U)

April 28, 2010

Supreme Court, New York County

Docket Number: 106636/07

Judge: Joan A. Madden

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

PRESENT: Joan A. Madden, J
Justice

PART 11

Kathryn Jordan

INDEX NO. 106636107

MOTION DATE ~~04/28~~ 12/10/09

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -

John W. C. Dixon

The following papers, numbered 1 to _____ were read on this motion to/for reject Referee's
reprt.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision & Order.

FILED
MAY 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 28, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
KATHRYN JORDAN,

Plaintiff,

Index No. 106636/07

- against -

JOHN C. DIXON,

Defendant.

-----X
JOAN S. MADDEN, J.:

FILED
MAY 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Kathryn Jordan ("Jordan"), who is appearing pro se, moves for an order rejecting the report of Special Referee Lancelot B. Hewitt dated April 9, 2009 ("the Report"), denying the motion for summary judgment by defendant John C. Dixon ("Dixon"), and imposing sanctions against Dixon (motion seq. no. 003).¹ Dixon opposes the motion and separately moves for an order confirming the Report, granting his motion for summary judgment and imposing sanctions against Jordan (motion seq no. 004).² Jordan opposes the motion and cross moves to reject the Report.

Background

In this action, Jordan alleges that Dixon, who is her former boyfriend, breached an agreement to support her for life. The complaint alleges that in 1994 and 1999, the parties entered into an oral agreement which provided in part, that Dixon would provide Jordan "with lifetime support in the style in which they had been living..." The complaint alleges that "in or

¹While Jordan was represented by counsel at the hearing before the Special Referee, she is appearing pro se in connection with the motion and cross motion.

²Motion seq. nos 003 and 004 are consolidated for disposition.

about mid-2001...Dixon and Jordan reaffirmed and agreed again to the terms of their agreement..." While no written agreement is alleged in the complaint, during discovery, an undated "Partnership Agreement" was produced by Jordan, which Jordan maintains was given to her by Dixon in or about July 2001.

The Partnership Agreement provides that proceeds from a "Fund" or future investment activities would be divided equally between Jordan and Dixon, and that "if for some reason the Fund is not launched or successful, that [Dixon] will provide [Jordan] with an equal share of any income [Dixon] receive[s] and recognize[s] that this is in consideration for [Jordan's] significant contributions to the advancement of [Dixon's] career and the sacrifices [Jordan] ha[s] asked [Jordan] to make."

Dixon moved for summary judgment on various grounds, including that signature from the Partnership Agreement is a reproduction of a signature from another agreement. Dixon argued that since an agreement to support another person for life must be in writing and signed by the party charged to be enforceable (General Obligations Law § 5-701(a)(1); Melwani v. Jain, 281 AD2d 276 (1st Dept 2001)), a finding that Partnership Agreement was not signed by Dixon would bar Jordan's claim. In his decision and order dated July 30, 2008, Justice Michael Stallman referred the issue of whether Dixon "affixed or caused his signature to be affixed to the Partnership Agreement" to a Special Referee noting that the resolution of this issue "would dispose of the entire controversy." Justice Stallman also referred any discovery issues related to the issue to the Special Referee.³

³After Justice Stallman referred the matter to the Special Referee he recused himself and the matter was assigned to this court.

On November 3, 2008, counsel for Jordan made an application for the production of certain documents demanded in discovery, and the Referee denied this application, and the hearing was adjourned to November 20, 2008. At the hearing, Dixon called John Osborn (“Osborn”) to testify as an expert witness on his behalf. After Osborn gave testimony with regard to his education, training and professional experience which included his work in the field of forensic document examination for 26 years and his certification by American Board of Forensic Document Examiners, Dixon’s application to have Osborn qualified as an expert was granted.

Osborn testified that the Dixon’s signature of the Partnership Agreement and the signature on a June 30, 2001 agreement⁴ signed by Dixon are identical, noting that “the two signatures were remarkably consistent with another” except that the signatures were different sizes (Transcript from Referee hearing, at 12-16). According to Osborn, when the signature on the June 30, 2001 document was reduced by 68%, the “two signatures were a proportional match.” (Id. at 15-16). Osborn testified that his conclusion that the two signatures were identical was based not only on his finding that they were proportionally consistent but also “because of several more subtle characteristics found in the signature line and among the components of the letters appearing within the signature.” (Id. at 16). He further testified that “[a]ny reproduction will or has the potential of slight distortion, but many of the subtle characteristics appearing in what purport to be two signatures satisfy me well beyond any reasonable degree of certainty that these signatures are the same signature.” (Id.). During cross examination, Osborn answered “yes”

⁴The June 30, 2001 agreement was in the form of a letter to Jordan from Dixon and listed various conditions that Dixon was to agree to in order to continue living with Jordan in her apartment. Dixon testified during the hearing that he did not recall signing this agreement.

when asked whether the signatures on the two relevant documents were reproductions of the same signature. (Id., at 20). When asked which was the manipulated signature, he stated that if the signature on the smaller signature on the Partnership Agreement had been enlarged and reproduced on the June 30, 2001 document “the increase in size would have significantly diminished the quality of the reproduction to a noticeable degree and that is not the case. So while I can’t opine without an original, which is the manipulation, certainly the evidence would suggest it was [the Partnership Agreement].” (Id., at 20-21).

Dixon also testified at the hearing and denied any recollection of drafting or signing the Partnership Agreement. Jordan testified that Dixon gave her a copy of the Partnership Agreement and asked her to sign it and that Dixon signed it later and gave her a copy of the agreement

During the hearing, Jordan sought to put into evidence another signature page to the Partnership Agreement which she testified that she recently located in a storage facility after her lawyer asked her to continue to look for documents. While it was marked as Plaintiff’s Exhibit 1 for identification, the Referee did not permit Jordan to put it into evidence.

On April 9, 2009, the Referee filed his report together with a transcript and evidence introduced during the proceeding. In his report, the Referee wrote that:

I have considered all of the relevant evidence; and I find that the defendant established, by a fair preponderance of the evidence that he did not affix his signature nor cause his signature to be affixed to [the Partnership Agreement] which [Jordan] purports bears [Dixon’s] signature on the second page....I also find that Osborn testified credibly with regard to his conclusion that the signature appearing on the such document was a reproduction of [Dixon’s] genuine signature....I find that the various documents admitted into evidence corroborate Osborne’s testimony.

Moreover, I find that [Dixon] testified credibly that he co-habited with [Jordan] “off and on” during the summer of 2001 but that he did not recall ever drafting or signing such document. Conversely, I find that [Dixon] was not credible with regard to her testimony that [Dixon] drafted and signed [the Partnership Agreement]

Report, at 9-10.

Dixon seeks to confirm the Referee’s report and granting him summary judgment dismissing the complaint and sanctions. Jordan, on the other hand, argues that the report should be rejected, summary judgment denied and sanctions awarded against Dixon. Jordan argues that the Report should be rejected on various grounds including that the Referee was biased, the Referee erred in refusing to permit discovery relevant the credibility of the parties and in refusing to permit Jordan to produce evidence regarding Dixon’s addictions and psychological status and history of domestic violence which would have impacted on the Referee’s determination as to Dixon’s credibility. Jordan also argues that Osborne’s testimony did not definitively establish that the signature on the Partnership Agreement was taken from another document, and that the Referee erred in refusing to permit her to put into evidence the newly discovered signature page to the Partnership Agreement.

Discussion

“It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility...since the Special Referee is considered to be in the best position to determine the issues presented.” Nager v. Panadis, 238 AD2d 135, 136 (1st Dept 1997). In this connection, when, as here, issues of fact are presented to the Special Referee, it is the Referee’s function”to resolve conflicting testimony and issues of credibility.” Rezzadeh v. Lucas, 253 AD2d 698, 698 (1st Dept 1998). In this case, there is nothing in the record which

would warrant disturbing the factual or credibility determinations of the Referee.

Specifically, the record supports the Referee's finding that the Dixon established by a preponderance of the evidence that he did not affix his signature or caused his signature to be affixed to the Partnership Agreement. The Referee's finding is supported by Osborn's testimony that the signature on the Partnership Agreement and that on the June 30, 2001 letter are identical reproductions. Moreover, while Osborn testified that he could not opine without the original which signature was manipulated he testified that the evidence suggested that the smaller signature of the Partnership Agreement was the manipulation given that the enlargement of the smaller signature for the June 30, 2001 document would have significantly diminished the quality of the reproduction which was not the case here. In addition, Osborn's testimony was supported by Dixon's denial of any recollection of drafting or signing the Partnership Agreement. The Referee found Dixon's testimony denying any recollection of signing the Partnership Agreement to be credible while Jordan's testimony was not. In addition, contrary to Jordan's position, discovery was not needed to explore Dixon's character and psychological condition.

With respect to Jordan's claim that the Referee was biased, Jordan waived any such claim by raising it only after the Referee prepared his report and Dixon moved to confirm it. Shen v. Shen, 21 AD3d 1078, 1079 (2d Dept 2005). In any event, the record does not support any claim of bias which is based solely on Jordan's disagreement with the Referee's interpretation of the evidence.

Furthermore, the court finds no reason to disturb the Referee's decision to refuse to admit Jordan's Exhibit 1 into evidence, particularly given that the signature page was not attached to the first page of the Partnership Agreement and was not provided to the defense until the hearing.

The Report should thus be confirmed.⁵

Next, as the purported agreement to support Jordan for life is not evidenced by a writing signed by Dixon as the party charged, its enforcement is barred by the Statute of Frauds since by its terms it could not be fully performed prior to the end of Jordan's lifetime. GOL § 5-701(a)(1); See Williams v. Lynch, 245 AD2d 715, 717 (3d Dept 1997), appeal dismissed, 91 NY2d 957 (1998)(alleged oral contract between home owner and long time co-habitant under which home owner purportedly promised co-habitant that she could use the home for the rest of her life was barred by the Statute of Frauds). Accordingly, Dixon's motion for summary judgment dismissing the complaint is granted.

Finally, the court finds that the circumstances here do not warrant the imposition of sanctions against either party.

Conclusion

In view of the above, it is

ORDERED that motion to confirm the April 9, 2009 Report of Special Referee Lancelot B. Hewitt is granted (motion seq no. 004); and it is further

ORDERED the motion to reject to Report (motion seq no. 003) is denied; and it is further

⁵In a supplementary affidavit in support of her cross motion to reject the Report, and in connection with a Notice of Motion to vacate Justice Stallman's refusal to consider her sur-reply, Jordan attaches a copy of a March 24, 1998 letter sent from Dixon and Jordan to the managing agent or landlord of a building in which Jordan and Dixon resided, concerning permitting a broker to come up to their apartment at an inconvenient time. The letter contains a note apparently from Dixon asking Jordan to sign the letter on his behalf and also Dixon's signature after Jordan apparently refused to do so. Contrary to Jordan's position, the letter is insufficient to prove that she and Dixon were partners or that she is more credible than Dixon, and thus does not provide a basis for rejecting the Report.

ORDERED that Dixon's motion for summary judgment dismissing Jordan's claims as barred by the Statute of Frauds (motion se. no. 004) is granted; and it is further

ORDERED that Clerk of the Court is directed to enter judgment dismissing the complaint in its entirety.

ORDERED that the parties' requests for sanctions are denied.

DATED: April 28, 2010

J.S.C.

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