

Scrivener v Scrivener
2010 NY Slip Op 32067(U)
August 4, 2010
Sup Ct, Wayne County
Docket Number: 65401/2009
Judge: Dennis M. Kehoe
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

EDWARD SCRIVENER,
Plaintiff

-vs-

ALAN C. SCRIVENER,
Defendant

DECISION
AND
ORDER

Index No. 65401

2009

DeValk, Power & Lair, P.C.
Richard L. DeValk, Esq.
Attorney for Plaintiff

Michael E. Rosenhouse, Esq.
Attorney for Defendant

The Plaintiff Edward Scrivener has commenced an action against the Defendant Alan C. Scrivener for a judgment permitting access to the Defendant's property for the purpose of retrieving 260 bales of hay, together with a hay binder #779069, or in the alternative, granting a money judgment against the Defendant in an amount equal to the value of the hay (\$13,000.00) and the binder. The Defendant subsequently served an Amended Answer and Counterclaims seeking an Accounting by the Plaintiff as to monies and property belonging to the Defendant, which were handled by the Plaintiff during the period in which he controlled the Defendant's assets pursuant to a Power of Attorney. The Defendant's

Answer also seeks a judgment directing the Plaintiff to return to the Defendant the property he allegedly converted and/or a money judgment against the Plaintiff for the value of any unreturned property.

The Plaintiff and the Defendant are brothers. On May 16, 2006, the Defendant was involved in an accident in his barn, resulting in a traumatic head injury. He was hospitalized until his release on July 19, 2006. At that time, he went to stay with the Plaintiff and his wife at their residence, where he remained for approximately ten months. As a result of his injury, the Defendant was awarded Social Security Disability Benefits and the Plaintiff was appointed the Representative Payee. The Plaintiff was also appointed the Defendant's attorney-in-fact by a Power of Attorney dated July 20, 2006, which was prepared by the Defendant's then attorney, and signed the day after the Defendant's release from the hospital. The Power of Attorney was subsequently terminated by the Defendant, by a document dated September 26, 2007, and the Plaintiff's status as Representative Payee was cancelled.

During the ten month period, the Plaintiff and his wife cared for the Defendant, providing him with daily home services and transporting him to his doctors' appointments. The Plaintiff also traveled from his home in

Lyons, New York (or from various work locations) to his brother's home in Canandaigua, New York numerous times every week, in order to tend the Defendant's farm. The Plaintiff testified that he fed and otherwise cared for the Defendant's cows and horses. He baled hay (or, otherwise procured hay) for the animals' consumption. He also testified that he performed repairs to the Defendant's barn and constructed a fence for the horse paddock (with some assistance from friends). He performed these duties while also tending to his own farm, in addition to his general contracting business.

A non-jury trial was held before this Court on June 14 and 15, 2010. At the commencement of the trial the parties entered into a stipulation as to the division of numerous items of personal property. The list of property was received as Court Exhibit 1. While there was some discussion as to the condition of the items in question, the parties ultimately agreed that the property was to be accepted "as is". During the trial, the Defendant attempted to testify on direct examination as to other personal property alleged to be missing and either in the possession of his brother or sold by him. He submitted to the Court a list he had recently prepared setting forth those items, together with their "estimated value". On the second day of

trial, the Defendant's attorney attempted to "refresh the Defendant's recollection" by use of that list, which was allegedly compiled from other lists. While the Court permitted some testimony by the Defendant relative to the items on the list, ultimately the testimony was found to be based on hearsay and speculation. Moreover, the Defendant did not produce any proof in admissible form as to the value of the items. Therefore, no further division of personal property is supported by the evidence.

The Plaintiff submitted to the Court and to the Defendant an Accounting of his financial dealings on his brother's behalf pursuant to the Power of Attorney. This Accounting was supplemented at trial by bank documents and other records which were admitted into evidence, as well as the Plaintiff's own testimony. The Defendant objected several times during the proceedings as to the sufficiency of the Accounting. However, the Court finds that the Plaintiff has satisfied his obligation to account for his actions as attorney-in-fact, and the Accounting is hereby accepted as adequate.

As part of the Accounting, the Plaintiff set forth the proceeds from the sale of various items of farm equipment belonging to the Defendant, as well as from the sale of livestock. The proceeds obtained from the

auctions were documented by invoices introduced into evidence on the first day of trial and supplemented by the written statements issued by the livestock auctioneer on the second day. The testimony of the respective parties was replete with discrepancies as to the number of cows and their alleged market value. For example, during his testimony, the Defendant claimed that he had been deprived of 144 "potential beef cows", with an alleged future value of \$288,000.00. The Court finds that the testimony of the Defendant is not supported by the evidence, and further finds the testimony of the Plaintiff regarding the livestock, as to number and value, to be credible. Moreover, other "losses" allegedly sustained by the Defendant, which were set forth in Exhibit I, labeled a "partial summary" prepared by or on behalf of the Defendant, were not supported by the evidence, except as indicated below.

The Accounting also indicates that the Plaintiff wrote a number of checks during the period in question for his own purposes. These checks, which are attached to a summary sheet admitted as Plaintiff's Exhibit II, include:

- a) \$2,000.00 check to Fuccillo Hyundai, which Plaintiff admitted was used as a down payment on an automobile he himself

purchased;

- b) \$979.01 check to Mack's Body Shop, in payment for damage accidentally done to the Defendant's vehicle by the Plaintiff;
- c) \$85.97 check to Verizon Wireless.

The Plaintiff also wrote three checks to himself from the Defendant's bank account:

- a) \$3,500.00 check on October 26, 2006;
- b) \$1,300.00 check on April 5, 2007;
- c) \$1,000.00 check on May 15, 2007.

These checks total \$5,800.00. There is nothing in the Accounting or Exhibit II which indicates the reason for the issuance of these checks.

The checks themselves show nothing on their face as to the purpose for which the checks were written. There was no testimony during the trial concerning the checks, other than the fact that the Plaintiff admitted writing them. Therefore, the Court is left without any means of determining the use of the funds other than the conclusion that they were written for the Plaintiff's own benefit.

As to the Plaintiff's requested relief, during the course of the trial the Plaintiff testified as to the months of care which he and his wife provided to

the Defendant during the period he lived at their residence. In Exhibit B, attached to his Accounting, the Plaintiff claims that he is entitled to be reimbursed by the Defendant at the rate of \$600.00 per month for the services he rendered. In that same statement, he maintains that he should be reimbursed for mileage in the amount of \$1,208.00, representing payment for the numerous trips made by the Plaintiff to the Defendant's farm. Finally, he maintains that he should be paid for his labor in connection with the hay baling performed in 2006 (\$3750.00) and 2007 (\$3900.00).

As to the Plaintiff's request for reimbursement for home care and mileage, the Court finds that it is unable to grant the relief requested. It is conceded that there was no agreement between the parties that the Plaintiff would be reimbursed for his services. Numerous appellate courts have held that, where the parties are related, "... it is presumed that such services were rendered in consideration of love and affection, without expectation of payment." (Matter of Estate of Naumoff, 301 AD2d 802 (3rd Dept, 2003)). Absent evidence of intent, the services of an attorney-in-fact to a principal to whom he or she is related have been held to have been rendered without expectation of compensation. (See, e.g. Mantella v

Mantella, 268 AD2d 852 (3rd Dept, 2000)).

Therefore, the Court is left with the Plaintiff's original claim for the value of the bales of hay (the issue of the hay binder having been resolved as part of the personal property stipulation). At the beginning of the trial, the parties stipulated that the retail value of a bale of new hay is \$50.00. They further stipulated the value of labor for baling hay is \$15.00 per bale. The Plaintiff's Complaint states that he is entitled to reimbursement for 260 bales of hay, which the Defendant failed to return.

However, after proof was closed, counsel for the Plaintiff conceded during summations that the proof supports a finding that 100 bales of hay were acquired by the Plaintiff from the successor attorney-in-fact for a token payment. Therefore, the Court finds that the Plaintiff is entitled to reimbursement from the Defendant in the amount of \$8,000.00 representing the value of 160 bales of hay at the stipulated amount of \$50.00 per bale.

Having found that the Plaintiff is entitled to the value of 160 bales of hay, there is no need to consider the Plaintiff's request for compensation for his baling labor in 2007 as the cost of baling is included in the value of the hay. However, the Plaintiff maintains that he is entitled to an award of

\$3,750.00 as compensation for the baling of the hay used to feed the Defendant's livestock during 2006. The Court acknowledges that this relief was not requested in the Complaint, and that there was no motion to amend the pleadings to conform to the evidence (although CPLR §3025(c) provides that such amendment may be permitted before or after judgment). Moreover, the claim for the 2006 baling costs is set forth in Exhibit B of the Plaintiff's Accounting, which has been admitted into evidence and accepted by the Court. Therefore, the Court may consider the claim as part of the Accounting.

As stated above, the parties stipulated that the cost of baling is \$15.00 per bale of hay. The Plaintiff testified at trial that all the hay that he baled during the 2006 season was used to feed the Defendant's livestock. The Court is aware that there was no contract - written or oral - regarding payment for the Plaintiff's labor. However, the Court finds that the Plaintiff is entitled to be paid for his services under the theories of quantum meruit and/or unjust enrichment.

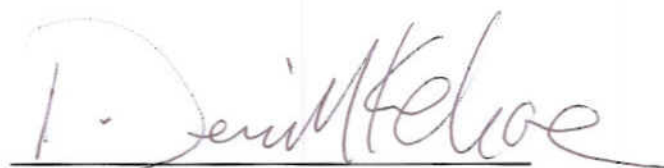
Based on the above findings, the Court makes the following calculations:

Amount due to Defendant from Plaintiff as reimbursement for checks written	\$8,864.98
Amount due to Plaintiff from Defendant as reimbursement for baling labor in 2006	\$3,750.00
Amount due to Plaintiff from Defendant for 160 bales of hay	\$8,000.00
Total due Plaintiff	\$11,750.00
Total due Defendant	\$ 8,864.98
Net amount due to Plaintiff:	\$2,885.02

The Plaintiff is therefore awarded a money judgment against the Defendant in the amount of \$2,885.02.

This Decision constitutes the Order of the Court.

Dated: August 4, 2010
Lyons, New York


Honorable Dennis M. Kehoe
Acting Supreme Court Justice