

Hahn v Raffone

2012 NY Slip Op 31297(U)

March 27, 2012

Supreme Court, Richmond County

Docket Number: 101876/10

Judge: John A. Fusco

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ANTHONY JOSEPH HAHN,

Plaintiff(s),

-against-

KAREN RAFFONE and JAMES RAFFONE,

Defendant(s).

-----X

DCM Part 4

Present:
Hon. John A. Fusco

DECISION AND ORDER

Index No.: 101876/10

Motion No.: 542-001

The following papers numbered 1 to 4 used on this 27th day of March, 2012:

Papers	Numbered
Notice of Motion by Defendant(s) <i>Pro Se</i> with supporting Papers and Exhibits (dated February 14, 2012).....	1
Affirmation In Opposition by Plaintiff(s) with Exhibits (dated February 26, 2012).....	2
Affirmation In Reply by Defendant(s) <i>Pro Se</i> (dated March 26, 2012).....	3
Transcript of an Examination before Trial of Anthony Hahn Taken January 13, 2012.....	4

Upon the foregoing papers, the motion of the defendants is granted in part and otherwise denied.

Plaintiff brought this action to recover monies allegedly due by defendants to plaintiff for payments on mortgages taken at the alleged request of his sister, defendant Karen Raffone, secured by their jointly-owned property. Defendants *pro-se* have moved to dismiss the action on

the basis that plaintiff does not have a promissory note to evidence the obligation, and any monies given to defendant Karen Raffone by plaintiff were to satisfy her inheritance, not as a loan.

The motion by defendants, although presented as a motion to dismiss, more appropriately reflects the relief requested by a motion for summary judgment pursuant to CPLR 3212. Further, plaintiff has opposed the defendant's motion as though it was a CPLR 3212 motion for summary judgment. Thus, since plaintiff has opposed the motion as a summary judgment motion and defendant request summary relief, the motion will be treated as such.

Procedurally, the motion by defendants suffered three defects. First, defendants failed to append the pleadings to their motion as required for a motion pursuant to CPLR 3212. Defendants attempted to cure that error by appending their answer to their reply. Second, the motion papers contain only one affidavit from defendant James Raffone. There is no affidavit or deposition transcript from defendant Karen Raffone attached to the motion. Finally, defendants' reply affirmation, which should be an affidavit, is only signed by one defendant, whose name is not identified. Furthermore, the document introduction does not assist in the identification since it begins with "we the defendants" yet ends with only one unidentified signature. This document is therefore inadmissible. Although these errors alone should cause dismissal of the motion, in the interest of judicial economy, the court reviewed the motion and exhibits, without the unidentifiable reply affirmation and the annexed deposition transcript to decide the matter.

The parties' contentions arose some time after plaintiff and defendant Karen Raffone's mother passed in 2001. As a result of her passing, her residence passed jointly to her remaining descendants, plaintiff and Karen Raffone. For a period of time after 2005, plaintiff and defendant and her family lived together in the residence. Defendants then purchased another residence in New Jersey and left the shared residence. Plaintiff claims, that around that point in time his sister

Karen Raffone requested that he take out a note and mortgage on the residence in the sum of \$146,000 for her benefit. Plaintiff alleges that the defendants agreed to pay back the note and mortgage with him. Plaintiff then alleges that on August 18, 2006, he executed a note and mortgage in the amount of \$424,000.00 which paid off the initial note and mortgage and defendants' loan to Wells Fargo. Further, plaintiff alleges that he later took another loan in the amount of \$52,000.00 at the request of defendants. It was after this loan, that Karen Raffone assigned her rights to the property to plaintiff. Plaintiff alleged that the defendants had agreed to pay plaintiff the amount of \$1000.00 per month toward the debt, and defendants did not follow through on that obligation and now owe him \$248,461.68.

Defendants *pro-se* answered and asserted that any monies given to them by plaintiff were freely given by plaintiff to satisfy Karen Raffone's inheritance and not as a loan. Defendants assert that the plaintiff cannot prove that any monies given were not a loan as there is no documentation, such as a note or contract, to prove plaintiff's contentions.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see* Rotuba Extruders v. Ceppos, 46 NY2d 223; Herrin v. Airborne Freight Corp., 301 AD2d 500). On a motion for summary judgment, the function of the court is issue finding, not issue determination (*see* Weiner v. Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65 NY2d 732). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (*see* Glennon v. Mayo, 148 AD2d 580). To prevail upon the motion, the moving party must present *prima facie* evidence of its entitlement to judgment as a matter of law (Alvarez v. Prospect Hosp., 68 NY2d 320, 324). Upon its failure to do so, the motion will be denied.

Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (Zuckerman v. City of New York, 49 NY2d 557, 562). In this regard, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue (*id.* at 562). Thus, summary judgment is only appropriate where the movant’s initial burden of proof has been satisfied, and the opposing party has failed to adduce competent evidence demonstrating the presence of a genuine issue of material fact (Persaud v. Darbeau, 13 AD3d 347).

Defendant moves for summary judgment on the basis that plaintiff has no documentary proof of defendants’ indebtedness. *See* Hahn Transcript pp. 45-46. Furthermore, defendants claim that there is no proof because Karen Raffone was simply paid her inheritance, the monies were not a loan.

Plaintiff in opposition asserts that the monies which defendants were given were used to buy their new home in New Jersey. Further, plaintiff testified that the mortgage of August 18, 2006 was given to defendants to pay off the mortgage on defendant’s property. Plaintiff cites the closing documents as evidence, but did not append any such documents to his affidavit in opposition.

The only evidence submitted by the parties is the transcript of plaintiff. In the transcript, defendants *pro-se* questioned plaintiff, and at times the deposition is a conversation between plaintiff and his sister. In the conversation, plaintiff contends that he entered into certain loans at the request of his sister and testified as to the allegations in his complaint. *See* Hahn Transcript pp. 34-35. Although this was not the depositions of Karen Raffone, she admits to making payments between January and May 2009 to her brother for the mortgages. *See* Hahn Transcript

pp. 84-85. Reading further into the transcript, it could also be interpreted from the questioning and statements by Karen Raffone, that prior to her transfer of her interest in the property, she felt she held a financial interest in the residence as well. *See* Hahn Transcript p. 119:10. These two facts coupled with the statements of her brother, the plaintiff, could lead a fact finder to find the evidence in favor of plaintiff.

Thus, from the motion papers, it is not apparent what the intentions of the parties were at the time they entered into the notes. The parties only submitted their statements for review. Neither party appended any of the mortgage documents to their papers to show the allocation of the funds or provided any contact or other documentation to evidence their intent at the time of these transactions.. Essentially, plaintiff claims the notes were at the behest of his sister, while Karen Raffone claims that the note allowed her brother to purchase her interest in the residence. It is also not apparent what the true intentions of the parties were at the time the mortgages were given, or at the time that Karen Raffone deeded the property to her brother, the plaintiff, alone. Whether this was the conclusion of an earlier agreement to pay off her inheritance, or it was a new agreement to save the residence which was headed toward foreclosure. These are all issues of fact, issues for the fact finder to decided, issues which require denial of this motion as to defendant Karen Raffone.

Conversely, there is no evidence presented by plaintiff in his transcript or papers which satisfies his claims against defendant James Raffone. Therefore, the motion as it pertains to defendant James Raffone is granted and plaintiff shall reimburse defendant James Raffone his cost and disbursements upon the filing of a affidavit by James Raffone on notice to all parties.

Accordingly, it is hereby

ORDERED, that the motion of defendants for an order of summary judgment is granted as

to defendant James Raffone and otherwise denied; and it is further

ORDERED, that the caption shall be read as: Anthony Joseph Hahn v. Karen Raffone.

Dated: May , 2012

E N T E R

Hon. John A. Fusco
Justice of the Supreme Court

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