

Bischoff v Bischoff

2014 NY Slip Op 32497(U)

September 17, 2014

Sup Ct, Suffolk County

Docket Number: 12-24745

Judge: Peter H. Mayer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-6-14 (#001)
MOTION DATE 6-3-14 (#002)
Mot. Seq. # 001 - MD
002 - XMD

-----X		
ANITA BISCHOFF, as Executor of the Estate of	:	SPIZZ & COOPER, LLP
PAUL BISCHOFF,	:	Attorney for Plaintiff
	:	114 Old Country Road, Suite 644
Plaintiff,	:	Mineola, New York 11501
	:	
-against-	:	MARK A. MACRON, ESQ.
	:	Attorney for Defendant
THERESA BISCHOFF,	:	491 Bard Avenue
	:	Staten Island, New York 10310
Defendant.	:	
-----X		

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated April 8, 2014, and supporting papers (including Memorandum of Law dated April 8, 2014); (2) Notice of Cross Motion by the defendant, dated May 16, 2014, and supporting papers (including Memorandum of Law dated May 16, 2014); (3) Affirmation in Reply by the plaintiff, dated May 23, 2014, and supporting papers (including Reply Memorandum of Law dated May 27, 2014); (4) Reply Memorandum by the defendant, dated May 31, 2014; (5) Other (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor is denied; and, it is further

ORDERED that the cross motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

This action was commenced to recover a money judgment in favor of the Estate of Paul Bischoff for the alleged breach of a settlement agreement between defendant and decedent, Paul Bischoff. Plaintiff, Anita Bischoff, as executor of the estate of Paul Bischoff ("plaintiff Anita Bischoff"), is the first wife of decedent Paul Bischoff, having married him in June 1966 and divorced in April 1984. They had one son, allegedly the sole surviving beneficiary of Paul Bischoff's estate. Defendant, Theresa Bischoff, was the second wife of decedent Paul Bischoff, having married him on May 19, 1984 and divorced him on October 27, 2003. Pursuant to their judgment of divorce which was filed in the New York County Clerk's office on December 8, 2003, a settlement agreement dated December 2, 2002, between defendant and decedent, was to be incorporated, was to survive, and was not to be merged into the judgment of divorce. Paul Bischoff deceased on April 27, 2007.

DB.

Pertinent provisions of the December 2, 2002 settlement agreement (“the agreement”) between defendant and decedent stated as follows:

ARTICLE VIII

Waiver of Support by the Wife and Allowance for the Support and Maintenance of the Husband

4. The Wife covenants and agrees to pay to the Husband, as and for his maintenance the sum of One Hundred Eighty Thousand Dollars (\$180,000.00) per year, in equal monthly installments of Fifteen Thousand Dollars (\$15,000.00) per month, payable in advance, commencing with the first day of the month immediately following the date of the execution of this Agreement and on the first day of each succeeding month until terminated as hereinafter set forth.

...

5. The Husband’s allowance shall cease and terminate upon:
- a. the Wife’s death; or
 - b. the Husband’s death; or
 - c. the wife’s payment to the Husband of the one-hundred twentieth (120th) monthly installment of the Husband’s Allowance; whichever event shall first occur.

ARTICLE XIV

Releases

...

6. Nothing contained in this Article XIV or elsewhere in this Agreement shall be deemed a waiver of, or limitation upon, a party’s right to prosecute, perfect, and satisfy any claims which he or she may have against the estate of the other by virtue of the other’s default in the payment of any and all sums or in the performance of any and all obligations provided for or assured as specifically set forth in this Agreement, to be paid, met or performed by a party hereto.

ARTICLE XV

Default

1. In the event that either party defaults with respect to a payment or other obligation provided under this Agreement, and said default is not remedied or redressed within fifteen (15) days after receipt of a written notice by certified mail to such defaulting party specifying the default, then the noticed party agrees to indemnify the notifying party against, and shall reimburse such party for, any and all expenses, costs and attorneys’ fees resulting from, or made necessary by, the bringing of any action, suit or proceeding to enforce any of the terms of the

Agreement to be performed or complied with, or to enforce any rights to recover any amount to be paid under this Agreement, provided such suit, or other proceeding results in a judgment, decree, or order in favor of the noticing party.

2. It is expressly understood and agreed that in the event that either party shall institute a suit or other proceeding against the other to enforce any of the terms, covenants, or conditions of this Agreement, and after the institution of such action or proceeding and before judgment, decree or order is, or can be entered, the defaulting party shall comply with such term or condition of the Agreement, the suit, motion, or proceeding shall be deemed to have resulted in a judgment, award, decree, or order in favor of the non-defaulting party making operative the provisions of paragraph "1" of this Article with respect to expenses, costs and attorneys fees.

3. It is expressly further understood and agreed that in the event that either party shall retain counsel and incur legal fees to enforce any of the terms, covenants, or conditions of this Agreement, and prior to the institution of a suit or other proceeding, the defaulting party shall comply with such term of condition of the Agreement the defaulting party shall reimburse the non-defaulting party for any and all expenses, costs and attorney's fees incurred in connection with such default.

4. Any payment required to be made by one party to the other party to this Agreement not received by the payee on the due date specified in this Agreement shall be paid together with interest thereon at the then legal rate applicable to judgments, counting from the due date thereof to the date of payment. The parties acknowledge that the legal rate applicable to judgments at this date is nine percent (9%) per annum

...

ARTICLE XVII

General Provisions

...

5. A modification or waiver of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement. The failure of either party to insist upon strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature, or of any other nature of kind.

...

11. Except as otherwise specifically provided herein, all the provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, next of kin, executors, administrators and assigns.

It is undisputed that defendant paid the decedent \$15,000.00 per month, as required by the agreement, until March 2006. Beginning in April 2006 and continuing through February 2007, defendant paid the decedent \$7,500.00 per month, or one-half of the amount due pursuant to the agreement. Defendant did not pay any sum for maintenance for March or April 2007. As indicated herein decedent expired on April 27, 2007, thus in accordance with the agreement, no maintenance would be due thereafter. Plaintiff, as executor of the decedent's estate, claims that defendant owes the estate \$7,500.00 for each of the eleven months that she paid him half of the amount stated in the agreement, \$15,000.00 for March and April 2007, and interest at 9 % per annum from the date the payments were due, for a total of \$112,500.00 plus interest. She now seeks summary judgment on her complaint.

Defendant cross moves for summary judgment alleging that the decedent orally waived the payment provisions of the agreement. She maintains that the decedent agreed orally and by his actions to accept half of the stipulated amount for eleven months and to take no maintenance for the last two months of his life due to a change in defendant's financial position.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

“Contractual rights may be waived if they are knowingly, voluntarily, and intentionally abandoned. Such abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage. Generally, the existence of an intent to forgo such a right is a question of fact” (*Hannigan v Hannigan*, 104 AD3d 732, 734, 735, 960 NYS2d 492 [2d Dept 2011] *internal citations omitted*; *see also Messina v Messina*, 143 AD2d 735, 533 NYS2d 298 [2d Dept 1988]). However, “[a] waiver is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence. Rather, there must be proof that there was a voluntary and intentional relinquishment of a known and otherwise enforceable right. The party claiming a waiver must come forward with evidence of a voluntary and intentional relinquishment of a known and otherwise enforceable right” (*Hinck v Hinck*, 113 AD3d 681, 683, 979 NYS2d 116 [2d Dept 2014] *internal citations omitted*). Where one party to an agreement claims a waiver on the part of the other party to support payments, and the other party denies such a waiver, “an issue of fact, not of law, is presented” (*Morris v Morris*, 74 AD2d 490, 493, 428 NYS2d 10 [1st Dept 1980]).

“Generally, a written agreement which prohibits oral modification can only be changed by an executory agreement . . . in writing. . . However, an oral modification is enforceable if the party seeking enforcement can demonstrate partial performance of the oral modification, which performance must be unequivocally referable to the modification” (*Calica v Reisman, Peirez & Reisman*, 296 AD2d 367, 368, 369, 744 NYS2d 495 [2d Dept 2002] *internal citations and quotations omitted*; see also *Hannigan v Hannigan*, *supra*). “[I]n order to be unequivocally referable, conduct must be inconsistent with any other explanation” (*Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.*, 304 AD2d 462, 463, 758 NYS2d 321 [1st Dept 2003]).

Here, where the submissions of the parties show that they directly contradict each other as to the intentions of the decedent (plaintiff claims that it was his intent to seek payment from defendant for the months in which she only paid him half or none of the sums due him pursuant to the agreement, while defendant maintains that decedent expressly orally waived those sums) there is a question of fact as to whether there was a waiver or an oral modification of the agreement. Despite the fact that defendant’s burden at trial may be hindered by the “Dead Man’s Statute” (*i.e.* CPLR 4519), because much of her “proof” or evidence of waiver is based upon her alleged conversations with the decedent, the assertion of the rights under the statute is not permissible in a summary judgment motion, and, “[p]roof which might be inadmissible at trial may, nevertheless, be considered in opposition to a motion for summary judgment” (*Carden v City of New York*, 82 AD3d 818, 819, 918 NYS2d 381 [2d Dept 2011]).

Accordingly, a hearing is necessary to determine if provisions of the agreement were waived or orally modified by the decedent and the motions for summary judgment are denied.

Dated: September 17, 2014


PETER H. MAYER, J.S.C.