

Samet v Binson

2014 NY Slip Op 33410(U)

January 16, 2014

Supreme Court, Kings County

Docket Number: 15032/98

Judge: Bert A. Bunyan

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At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of January, 2014.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice,

-----X

MICHAEL SAMET, as Executor of the Estate of Andrew Samet, Deceased,

Plaintiff,

- against -

Index No. 15032/98

ISAAC I. BINSON,

Defendants.

-----X

The following papers number 1 to 3 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-2</u> _____
Opposing Affidavits (Affirmations) _____	<u>3</u> _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavits (Affirmations) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant Isaac I. Binson moves for an order: (1) pursuant to CPLR 2221 (a) and (d), granting him leave to reargue his prior motion for summary judgment dismissing the amended verified complaint, which resulted in the decision and order of this court, dated June 25, 2013, which denied his motion, and upon reargument, granting his motion for summary judgment in whole or in part or, in the

alternative; (2) pursuant to CPLR 2201, granting a stay of trial of this action pending appeal of this court's prior decision and order.

Procedural History

Plaintiff's decedent (and father) commenced the instant action on May 4, 1998. The original verified complaint asserted a cause of action against defendant sounding in money had and received; in essence, the action alleges an outstanding debt balance. Defendant did not timely interpose an answer and, consequently, on November 13, 1998, this court entered a default judgment in plaintiff's favor. There was no activity in this action until 2006, when defendant moved, by order to show cause, for an order vacating the default judgment. Extensive motion and appellate practice ensued.

Upon testimony and evidence adduced at a traverse hearing held on March 15, 2007, a Judicial Hearing Officer (JHO) of this court determined that service of process was defective. Shortly thereafter, plaintiff moved to reject the JHO's recommendation; defendant cross-moved for an order: (1) confirming the recommendation; (2) dismissing the complaint for lack of personal jurisdiction; and (3) vacating the default judgment. By order dated September 17, 2007, this court: (1) denied plaintiff's motion and (2) granted defendant's motion only to the extent that the complaint was dismissed, but with leave for plaintiff to properly serve an amended pleading on defendant within 120 days.¹

¹ Both parties appealed from this order, which was affirmed by the Appellate Division (*Samet v Binson*, 67 AD3d 988 [2009] and 67 AD3d 989 [2009]).

Subsequently, plaintiff's decedent timely served and filed an amended verified complaint.² In response, on or about November 30, 2007, defendant interposed a verified answer with counterclaims.³

Plaintiff's father subsequently died and the action was stayed. On July 18, 2008, plaintiff was appointed the executor of his father's estate and, by stipulation so-ordered by this court on August 6, 2008, the caption was amended to reflect the substitution of plaintiff.

In early 2009, plaintiff moved for summary judgment; defendant cross-moved for dismissal. By order dated January 20, 2010, this court denied both motions and ordered that the parties proceed with discovery.⁴ Discovery ensued, and on August 29, 2012, plaintiff filed a note of issue and certificate of readiness, indicating that the instant action was ready for trial. Thereafter, each party moved for summary judgment.

By order dated June 25, 2013, this court denied both motions. As relevant to the instant motion for leave to reargue, this court rejected several of defendant's arguments in favor of summary judgment. First, this court noted that defendant had not been deposed, and

² The amended verified complaint asserts, in essence, the same claim in the original complaint, but adds the allegation that on or about January 1, 2000, defendant voluntarily signed an alleged "Promissory Note" (sometimes referred to as an "IOU") in favor of decedent for the principal amount of defendant's indebtedness to decedent. New causes of action assert, among others, a breach of contract and an account stated.

³ The counterclaims allege, in sum, that decedent was defendant's business partner in the RDC Jewelry Company (RDC), and that from 1993 to 1996, decedent wrongfully took possession of RDC cash, as well as various items of jewelry and precious metals. Plaintiff, in his reply to the counterclaims, asserts that the subject items were "grossly inadequate security, for the monies lent to defendant."

⁴ Plaintiff appealed from the order denying summary judgment and lost (*see* n 1, *supra*).

that summary judgment was thus premature. This court also pointed out that the instant action involves several factual disputes between the parties, and it would be inappropriate for this court to grant summary judgment since certain facts are presumably within the exclusive knowledge of defendant. Also, this court rejected defendant's argument that the alleged note was unenforceable as a matter of law; this court noted that defendant's proffered arguments concerning whether the instrument was enforceable as a promissory note might have merit but were reserved for resolution by the trier of fact. Lastly, this court rejected defendant's claim that plaintiff, by disposing of the alleged collateral for the purported debt, was guilty of spoliation of evidence. This court; required to view the heavily-disputed facts in the light most favorable to plaintiff, accorded plaintiff the inference that plaintiff's decedent disposed of the alleged collateral in a commercially reasonable manner. Moreover, since defendant apparently could still identify⁵ the subject items, this court noted that defendant had other means of proving the value of the same at trial, and therefore was not prejudiced.

In response, defendant filed and served the instant motion for leave to reargue and a stay of trial.

Arguments Made by Defendant in Support of his Motion

In support of his motion for leave to reargue, defendant identifies three errors of law allegedly committed by this court when it rendered the underlying decision and order. First, defendant claims that plaintiff waived any deposition of defendant. Defendant argues

⁵ Defendant submitted an inventory of the subject items as an exhibit to his motion papers.

that he moved for summary judgment “after six years of litigation and after all discovery was completed! [sic].” Moreover, defendant points out that when plaintiff filed and served his note of issue and certificate of readiness, plaintiff certified that all discovery was complete. Therefore, reasons defendant, “CPLR §3212 (f) and the related case law simply does not apply . . . [p]laintiff had six years to take defendant’s deposition! [sic].” Defendant asserts that plaintiff’s failure to take a deposition should not weigh against defendant’s motion for summary judgment, and states that “[t]he defendant cannot be blamed because the plaintiff chose not to take defendant’s deposition.”

Defendant also argues that this court incorrectly concluded that his stated defense of lack of consideration for the note or IOU raises issues of fact. Defendant alleges that plaintiff’s “unequivocal admissions” during deposition have made the question of whether the note or IOU is enforceable “purely an issue of law.” Defendant cites the May 9, 2012 examination before trial of plaintiff, who testified, in essence, that defendant received nothing of value when he signed the note or IOU in January of 2000. Accordingly, reasons defendant, plaintiff has acknowledged that the document was executed for past consideration (i.e. was executed solely because of defendant’s alleged indebtedness to plaintiff’s father). Defendant - arguing that “alleged indebtedness dating back to 1995” does not constitute adequate consideration for a note or IOU signed in January of 2000 - concludes that the note or IOU is unenforceable as a matter of law. Defendant then distinguishes the authority cited by this court as inapplicable. Therefore, defendant

contends that there are no issues of fact with respect to whether the subject note is enforceable.

Next, defendant asserts that this court should have imposed a sanction against plaintiff for spoliation of evidence. Defendant does not agree that the RDC cash, jewelry and precious metals were collateral for the alleged indebtedness; instead, defendant asserts that plaintiff's decedent "merely absconded with the jewelry" and, absent a spoliation sanction, defendant "would have no recourse" at trial. Defendant claims that since he disputes that the subject items are collateral, it was therefore "incumbent on plaintiff to hold it until it could be properly identified and appraised." Defendant argues that, irrespective of whether the items were either collateral for debt or wrongfully withheld by plaintiff's decedent, the value of the jewelry "is clearly a central issue in this case." Defendant notes that his affirmative defenses depend on the value of these items. Moreover, defendant accuses plaintiff of being duplicitous - defendant claims that, in reply to defendant's counterclaims, plaintiff asserted that he would keep⁶ the collateral throughout this dispute, but did not. In fact, alleges defendant, "after holding the goods for 17 years, and as this case was drawing to a close, plaintiff simply took it upon himself to dispose of the jewelry through a 'friend' without any advance notice to the defendant or the Court." Defendant argues that this court committed error when it concluded that he suffered no prejudice; acknowledging that he presented an inventory list of the items, defendant nevertheless

⁶ This court notes that one of the paragraphs in the reply asserts that "[a]lthough plaintiff has every legal right to do so, he has not sold, transferred, or otherwise disposed of any portion of the collateral pledged to him by defendant."

claims that “[t]he problem is that plaintiff denies receiving the goods on the inventory list, or claims that the goods are not as valuable as defendant says they are.” Defendant concludes the absence of the goods has precluded the possibility of an effective appraisal at trial, and has therefore, “compromis[ed] the defendant’s ability to defend the case and prosecute his counterclaims.”

Lastly, and in the alternative, defendant seeks a stay of trial of this action pending his appeal of the underlying order. Defendant asserts that he will expeditiously perfect the appeal if this court grants the stay. Defendant asks this court to invoke its discretion and allow the stay “in order to avoid an entire trial and the possibility of re-trial where potentially dispositive issues are on appeal.” For these reasons, defendant concludes that this court should grant his motion.

Arguments Made by Plaintiff in Opposition to Motion

In opposition to the instant motion, plaintiff first asserts that there is no need for this court to grant defendant leave to reargue; plaintiff opines that the underlying decision and order was “well-reasoned” and “supported by relevant case authority.” Additionally, plaintiff accuses defendant of simply reiterating his prior arguments that this court rejected, and states that defendant is therefore not entitled leave to reargue.

Alternatively, plaintiff attacks the merits of defendant’s contentions. First, plaintiff accuses defendant of selectively quoting deposition testimony in order to conclude that plaintiff has admitted that the alleged note was made for past consideration. Plaintiff alleges that, to the contrary, when taken as a whole, his sworn testimony establishes that

there was valid consideration for the note. Plaintiff further argues that the note is, in reality, an IOU - an instrument that evidences defendant's indebtedness. Plaintiff also points out that several of his causes of action (such as one sounding in money had and received) are viable even if the alleged note were found to be unenforceable.

Next, plaintiff rejects defendant's arguments concerning spoliation. Plaintiff reiterates that the subject goods were collateral for defendant's indebtedness; therefore, plaintiff reasons that he had the right to make any commercially reasonable disposition of the subject goods in the event of defendant's default. Plaintiff argues that since defendant did in fact default on the subject loan, he thus had the right to sell the subject goods. Moreover, plaintiff asserts that spoliation sanctions should only apply if the adverse party lacked the opportunity to inspect the subject items. In this action, explains plaintiff, defendant had the chance to inspect the items as early as 2006, but chose not to. Plaintiff concludes by stating that defendant, who never endeavored to inspect the subject items, should not now be allowed to accuse plaintiff of spoliation.

Lastly, plaintiff asserts that defendant is not entitled to a stay of trial pending appeal. Plaintiff accuses defendant of engaging in "a dilatory tactic," and argues that a stay pending appeal should be granted sparingly, and only when an appellate decision is imminent. Here, claims plaintiff, defendant has done nothing to pursue an appeal beyond filing a notice of appeal, which is insufficient to entitle defendant to a stay.

Discussion

CPLR 2221 states, in applicable part:

“(d) A motion for leave to reargue:

- 1. shall be identified specifically as such;
- 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion”

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court (*see e.g. Mansueto v Worster*, 1 AD3d 412, 413 [2003]; *Matter of Hoey-Kennedy v Kennedy*, 294 AD2d 573, 573 [2002]; *South Liberty Realty Corp. v Mercury*, 292 AD2d 516, 517 [2002]), and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 26 [1992], *lv denied in part and dismissed in part* 80 NY2d 1005 [1992]). Reargument is not designed to allow an unsuccessful party “successive opportunities to reargue issues previously decided” (*id.* at 27 [internal citations omitted]).

The motion to reargue is denied. First, it may very well be the case that plaintiff waived the examination before trial of defendant. However, defendant moved for summary judgment, yet submitted no sworn testimony of his own other than an affidavit. Since this matter involves several disputed issues of fact,⁷ and since this court cannot determine defendant’s (or plaintiff’s) credibility based only on an affidavit (*see e.g. Krupp v Aetna Life & Cas. Co.*, 103 AD2d 252, 262 [1984] [“the credibility of persons possessed of exclusive

⁷ Indeed, this court acknowledges that defendant’s theory of the case involves the assertion that plaintiff’s father essentially stole money and goods from defendant and his business (RDC).

knowledge of the facts should not be determined by affidavits”]), it may not grant defendant summary judgment (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314-315 [2004] [“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment”]). Moreover, defendant’s bald assertion that “CPLR §3212 (f) and the related case law simply does not apply” to this matter is rejected as unsupported by authority.

Next, this court rejects defendant’s contention that the alleged note is unenforceable. First, this assertion is irrelevant for summary judgment purposes; even if the alleged note is unenforceable, the subject document may still properly be considered an “I.O.U. instrument” and plaintiff could, therefore, use the document to succeed at trial on his action to recover the debt (*see e.g. Shmiel v Williams*, 136 Misc 464, 466 [1930] [court found I.O.U. instrument “constitutes an admission of every element which is necessary to create a valid debt, including a consideration”]), in which case defendant would not be entitled to summary judgment. Alternatively, defendant is not entitled to summary judgment because he has not established that the alleged note lacked consideration through admissible evidence. The instrument is not unambiguous on its face and, therefore, the resolution of any ambiguity is for the trier of fact (*Pellot v Pellot*, 305 AD2d 478, 497 [2003], citing *State of New York v Home Indem. Co.*, 66 NY2d 669 [1985]). To be clear, defendant may eventually convince the trier of fact that there was no valid consideration for the alleged note (*see e.g. Fopeco, Inc. v General Coatings Technologies*, 107 AD2d 609, 610 [1985] [“If proven at trial, lack

of consideration is a perfectly viable defense”]). However, the mere assertion of this defense is not sufficient for summary judgment purposes.⁸

Also, the court rejects defendant’s arguments concerning alleged spoliation of evidence. Again, the court points out that defendant’s theory of this case is that the action is based on a dispute between defendant and plaintiff’s decedent, who were partners in a jewelry business. Since the items that plaintiff allegedly disposed of were items of jewelry (and, according the opponent of a motion all reasonable inferences), plaintiff, as Andrew Samet’s successor-in-interest, had the right to dispose of the items in any commercially reasonable manner (*see e.g. LI Equity Network, LLC v Village in the Woods Owners Corp.*, 79 AD3d 26, 30 [2010]). Defendant’s contention that plaintiff may have “simply absconded with the jewelry” thus seems at odds with the allegations concerning the jewelry business; it appears instead that he disposed of the items in accordance with the terms of defendant’s debt to plaintiff.⁹ In any event, the court stresses that it makes no findings with

⁸ Defendant asserts that plaintiff’s testimony concerning the note establishes the lack of material issues of fact as to whether there was consideration (other than “old indebtedness”) for the note. This court disagrees. Plaintiff, Michael Samet, is the executor of the estate of Andrew Samet, and his successor-in-interest. The transactions that are the subject of this action were between Andrew Samet and defendant - there is no indication that plaintiff either drafted the alleged note or was present when the alleged note was executed by defendant. Since plaintiff apparently has no independent knowledge of the subject note (i.e. plaintiff is ostensibly prosecuting a claim that belonged to his father), plaintiff’s testimony concerning the alleged note - or, more specifically, whether there was proper consideration for the same - appears to lack any probative value.

⁹ Defendant finds fault with this court’s prior assertion that since he had a list of the alleged items of collateral, he thus did not suffer prejudice; he can call appraisers as witnesses at trial to testify as to the value of the items. Defendant protests that plaintiff “denies receiving the goods on the inventory list, or claims that the goods are not as valuable” as defendant believes. This court rejects defendant’s protestation - the value of the subject items and whether they were intended as collateral are some of the many disputed issues of fact that must be resolved by the trier of fact.

respect to the alleged collateral; the court is simply exercising its “broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence” (*Lentz v Nie’s Gym, Inc.*, 90 AD3d 618, 618 [2011]; see also *Iannucci v Rose*, 8 AD3d 437, 438 [2004]) and presently imposing no sanction. Defendant’s contention that he may be entitled to an adverse inference charge at trial is well-taken (see e.g. *Mendez v La Guacatála, Inc.*, 95 AD3d 1084, 1085-1086 [2012]); therefore, defendant’s request for an adverse inference charge is denied with leave to renew at the trial of this action.

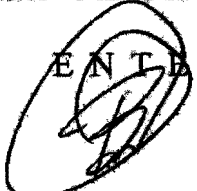
Lastly, this court denies defendant’s request for a stay of trial pending appeal of this court’s prior decision and order. “Stays are addressed to the sound discretion of the trial court” (*Estate of Salerno v Estate of Salerno*, 154 AD2d 430, 430 [1989]; see also *Blue Ridge Farms, Inc. v Kontogiannis*, 83 AD3d 982 [2011] [upholding trial court denial of alternative requests to stay all proceedings]; *Fleet Natl. Bank v Marrasso*, 23 AD3d 337 [2005] [reversing trial court that granted stay]). Also, “[t]he power to stay proceedings should be exercised sparingly and only where other remedies are inadequate and the equities invoked are compelling” (3A Carmody-Wait 2d § 22:4 [“Policy as to granting stay”], citing *Croker v New York Trust Co.*, 206 App Div 11 [1923]). Based on these principles, this court exercises its discretion and declines to stay trial of this action.

What defendant sought in his prior motion - and what he seeks in this motion for leave to reargue - are orders of this court that completely credit his statements and impugn those of plaintiff. In sum, defendant seeks an order determining credibility in advance and in his favor - an order that this court is not permitted to issue.


Conclusion

For the foregoing reasons, this court denies the motion of defendant, Isaac I. Binson.

The foregoing constitutes the decision and order of the court.

ENTER,


J. S. C.
HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT


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