

NZM Retirement Plan v Adoni
2017 NY Slip Op 31558(U)
May 11, 2017
Supreme Court, New York County
Docket Number: 157013/15
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

_____ X

NZM RETIREMENT PLAN,

Plaintiff,

INDEX NO. 157013/15

-against-

DECISION & ORDER

JACOB ADONI,

Defendant.

_____ X

OSTRAGER, J:

The trial of this action on an alleged note is at bottom a nasty inter-family squabble arising out of a \$300,000 loan defendant's cousins extended to the defendant that was brokered by Moshe Mousserie ("Mousserie"), the uncle of the defendant. Plaintiff offered no proof that defendant executed the note upon which plaintiff seeks to collect. And, the testimony adduced from defendant's forensic handwriting expert suggests that the note admitted into evidence documenting the loan does not appear to contain the authentic signature of the defendant. Significantly, the note is purportedly between Mousserie and the defendant, although it is undisputed that the suspect note was assigned by Mousserie to plaintiff NZM Retirement Plan ("NZM") at some unspecified date. The suspect note which is dated June 16, 2004 recites that the defendant borrowed \$300,000 that would be repaid on or before June 16, 2005 and that defendant would receive net proceeds of \$270,000 reflecting pre-paid interest of \$30,000. There is no provision in the suspect note for a rate of interest that was to be paid in the event the note was dishonored. The defendant acknowledges receipt of the \$270,000 and does not dispute that although he agreed to repay the loan, he did not repay the loan by June 16, 2005. The defendant claims to have repaid the loan in full with interest over time with payments by check and with

cash. The plaintiff, on the other hand, claims it is entitled to close to approximately \$475,000 in unpaid principal and interest.

Mousserie initiated an action against the defendant in this Court in 2011 to recover on a different note with substantially identical terms which defendant claimed in that action was not signed by the defendant. The Mousserie action was dismissed for lack of standing because of the assignment of the alleged note to the plaintiff in this action. Prior to the dismissal of the Mousserie action, counsel for Mousserie, who is also counsel for the plaintiff in this action, executed a stipulation reciting among other things that Mousserie acknowledged: (1) receiving payment in the form of checks from defendant totaling \$193,000; (2) prepayment of \$30,000 in interest on the loan from defendant; and (3) there was no agreement as to whether the payments represented principal or interest.

At the trial of this family dispute, not a single witness other than defendant's forensic handwriting expert gave testimony that was entirely truthful. The plaintiff sponsored testimony of alleged non-payment of principal and interest that cannot be reconciled with the stipulation in the Mousserie case. The defendant, for his part, denied receiving any "dunning" notices that he should have received even though many of them were sent to an address from which the correspondence would have been forwarded to a new address at which defendant then resided and/or a post office box defendant opened to receive mail addressed to his then former address. And the defendant did make partial payment on his indebtedness from 2006 to 2010. One of the more critical items of evidence is an unsigned document purporting to extend the loan and increase the interest from 10% to 12% on this loan to a family member. This suspect document was addressed to defendant at an address at which there is no evidence he ever resided.

Accepting as I must the stipulation dated January 7, 2015 which recites that plaintiff repaid at least \$193,000 of the loan, the key issue in the case is whether defendant's testimony that he paid \$208,500 in cash to the plaintiff and/or Mousserie can be credited. The evidence established that defendant made sufficient cash withdrawals from a Citibank checking account every month between June 2005 and December 2010 to have made these cash payments. Plaintiff and Mousserie vehemently denied receiving any cash payments. The plaintiff concedes that no interest was due as at May 6, 2008, but does not give defendant full credit for the sums Mousserie stipulated were paid to Mousserie by defendant. As previously indicated, while defendant's testimony about the cash payments is subject to question, the parties questioning this testimony were all either impeached at trial by prior inconsistent statements (Mousserie) or offered testimony that is equally subject to question (Zvi Mosery on behalf of plaintiff NZM Retirement Plan). And, there is the perplexing role of Mousserie whose attorney signed the stipulation and originally initiated a lawsuit against the defendant in his own name. Many of the documents either offered or received in evidence appear to have been created after the fact and there is a great deal of animus among the parties. Significantly, defendant does not dispute that he signed a note, although he denies signing the note upon which this action is predicated.

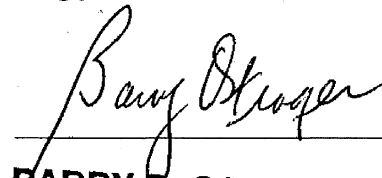
Confronted with a case in which none of the witnesses (other than the forensic handwriting expert) was fully truthful, the Court finds that plaintiff has failed to carry its burden of proof as to the amount claimed to be due in principal and interest. Nevertheless, because defendant acknowledges receipt of the loan proceeds and the Court has doubts as to whether the exhibit reflecting the alleged cash payments is a true and accurate running account of cash payments made to plaintiff, the Court will use the baseline admission by Mousserie that

defendant had paid at least \$193,000 of the loan through January 7, 2015 and award plaintiff the sum of \$107,000 plus prejudgment interest at the statutory rate from January 7, 2015 to date.

Defendant initiated a third-party action against Mousserie, but inasmuch as no proof was adduced in support of that claim, the third-party action is dismissed.

The Clerk is directed to enter judgment accordingly.

Dated: May 11, 2017



J.S.C.

BARRY R. OSTRAGER
JSC