Estate of Scholl v Pursell
2014 NY Slip Op 31483(U)
June 6, 2014
Sup Ct, Tioga County
Docket Number: 42885
Judge: Eugene D. Faughnan

At a Trial Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 2nd day of June, 2014.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

ESTATE OF EDGAR SCHOLL,

Plaintiff,

-vs-

RAYMOND PURSELL, JR.,

Defendant.

DECISION AND JUDGMENT

Index No. 42885
RJI No. 2012-0319

APPEARANCES:

COUNSEL FOR PLAINTIFF,

COUGHLIN & GERHART, LLP
BY: MARK L. RAPPAPORT, ESQ.
PO BOX 2039
BINGHAMTON, NY 13902-9511

COUNSEL FOR DEFENDANT,

GEORGE C. AWAD, JR. ESQ.
171 MAIN STREET
PO BOX 507
OWEGO, NY 13827

EUGENE D. FAUGHNAN, J.S.C.

This action arises from the claim by the Plaintiff that the Defendant failed to make payment on a Note given to Edgar R. Scholl ("Scholl") by the Defendant for $55,000. This action was commenced on May 30, 2012 with the filing of a Summons and Verified Complaint.

The Plaintiff is the Estate of the Decedent, Scholl. The facts surrounding the transaction leading to the issuance of the Note and Mortgage do not appear to be in dispute. On or about July 27, 2007, Defendant borrowed $55,000 from Scholl and gave him a "Mortgage Note" and a Mortgage securing the debt with a property located at 167 Main Street, Owego, New York. The Mortgage was recorded in the Tioga County Clerks Office on July 27, 2007.

It is undisputed that in the summer of 2011, Defendant was endeavoring to sell the Main Street property. Scholl was living in Pottstown, Pennsylvania and was in failing health. On June 26, 2011, in anticipation of a proposed July closing on the subject property, Defendant traveled to Pottstown to secure a discharge of mortgage from Scholl. Scholl's health prevented him from attending any closing and providing the documentation at that time. Defendant obtained the Discharge of Mortgage dated June 26, 2011 (Plaintiff's Exhibit "6") and gave Scholl six post-dated checks totaling $55,000 (Plaintiff's Exhibit "3"). Five checks for $9,000 dated July 22, 2011, July 29, 2011, August 6, 2011, August 13, 2011, and August 20, 2011. One check was dated August 27, 2011 for $10,000. The Discharge of Mortgage was filed with the Tioga County Clerk's Office on July 7, 2011 despite the fact that none of the principal had been paid and the subject property had not been sold. The post-dated checks remained uncashed as of the date of Scholl's death on September 6, 2011.

A non-jury trial was held on June 2, 2014 in Broome County, New York. Richard E. Wells ("Wells"), the Executor of Scholl's estate appeared and testified. Wells is an attorney-at-law admitted to practice in the State of Pennsylvania. Wells testified that sometime after Scholl's death, Scholl's sister-in-law, Susan Scholl, brought the six uncashed checks to his office. Wells attempted to deposit the checks in the estate account but all six were dishonored as a "stop

payment" had been placed on them. Wells was also given a copy of the July 27, 2007 "Mortgage Note" by either Susan Scholl or the son of the Decedent, Edgar Scholl, Jr. Wells has been unable to locate the original note. As Executor of the Estate, Wells undertook to identify assets and accounts. Wells denied finding cash or cash deposits of $55,000 among Decedent's assets. Wells noted one large deposit in Decedent's bank account of $14,000 which he attributed to the proceeds of Decedent's sale of his truck.

Defendant acknowledged the note (Plaintiff's Exhibit "10") and the post-dated checks (Plaintiff's Exhibit "3"). Of significance is the fact that Defendant does not dispute that the copy of the note is a fair and accurate copy of the original note provided to Decedent. Defendant acknowledged placing a "stop payment" on the six checks sometime shortly after Decedent's death. He characterized his relationship with the Decedent as a "father-son" relationship. He testified to having "cash" dealings with the Decedent in the past although admitted that when he received the loan in question, he was given a check for $55,000.

The Defendant testified to "raising" $55,000 in cash in June of 2011 through the sale of race cars, motors and restaurant equipment as well as a $25,000 loan from Betty Lewis. Defendant provided no receipts nor offered any witnesses regarding any of the claimed cash transactions.

Defendant sought to introduce evidence of having paid the full amount of the note to the decedent prior to his death. However, this witness was found incompetent to testify regarding such transaction as an interested party pursuant to CPLR 4519. *See Poslock v. Teachers' Retirement Board,* 88 NY2d 146, 151 *quoting Matter of Wood,* 52 NY2d 139, 144 (1981) (CPLR 4519 is intended "to protect the estate of the deceased from claims of the living, who through their own perjury, cold make factual assertions which the defendant could not refute in court.") No testimony was offered from witnesses who were not "interested parties". Likewise, Defendant failed to submit any documents evidencing repayment of the loan.

In an action for payment on a note, the plaintiff bears the initial burden of proving the validity of

the note, and that defendant was in default under the terms of the note. *See Security Mutual Life v. Member Services, Inc.* 46 AD3d 1077 (3rd Dept. 2007); *Mastro v. Carroll,* 296 AD2d 802 (3rd Dept. 2002) Once the note is found valid, the burden shifts to the defendant to prove the elements of any defense such as repayment or satisfaction. *Security Mutual, supra*

In the present matter, there is no dispute as to the validity of the note in question. Although the original note has not been located, the Defendant acknowledged that the note in evidence (Plaintiff's Exhibit "10") is a fair and accurate copy of the note he gave to the Decedent in connection with the $55,000 loan. Although the Discharge of Mortgage (Plaintiff's Exhibit "6") contains language explicitly noting that the related debt has been paid, Defendant acknowledged that at the time the Discharge of Mortgage was filed with the Tioga County Clerk, no payment of principal had been made. Rather, the Defendant had given Decedent 6 post-dated checks for which there were never funds in his account. Based upon Defendant's concession that payment had not been made when the Discharge was filed, and upon the testimony of the Executor that no cash, or other evidence of payments were found in the Decedent's possession, the Court finds sufficient evidence of default in payment of prinicipal. Therefore, the Court finds that the evidence supports the validity of the July 27, 2007 note, and the Defendant's default in payment of principal.

Having found the note valid, the Court now turns to the defense of repayment or satisfaction. As noted *supra,* the Defendant, as an interested party pursuant to CPLR 4519, is incompetent to testify regarding the repayment transaction with the Decedent. *See Mantella v. Mantella,* 268 AD2d 852 (3rd Dept. 2000). The Defendant has offered no documentary proof of repayment nor offered testimony of disinterested parties to substantiate his claim of repayment. Although Defendant testified to selling assets for cash and receiving a loan to repay the note, no documentary evidence to support such sales or loan was submitted. Similarly, no witnesses to these transactions were offered.

The Court finds the Defendant's testimony to be insufficient to support a defense of repayment or

satisfaction. There simply is no evidence in the record to support the fact that the Defendant paid the decedent $55,000 in cash sometime in the summer of 2011. Even if the Defendant had been permitted to testify to repayment, the Court would have found such self interested testimony incredible and without other support in the record.

For the reasons set forth herein, the Court finds in favor of the Plaintiff and awards $55,000 in damages.

The Plaintiff is also seeking interest pursuant to the note from July 27, 2007 to date. The note required interest payments at 10% per year from September 1, 2007 to August 1, 2010 and until the principal is repaid. Payments of the interest were to be made at $458.33 per month. However, no evidence was introduced at trial as to whether and how much, if any, interest was paid by the Defendant between September 1, 2007 and August 1, 2010. Based upon the lack of proof on this issue, the Court finds in favor of the Defendant regarding any interest claim from September 1, 2007 to August 1, 2010.

With regard to interest from August 1, 2010 to August 1, 2011, there is likewise no evidence regarding what, if any, interest was paid to the Decedent. Hence, the Court finds in favor of the Defendant regarding interest for this period.

With regard to the period from August 1, 2011 to date, the Court finds that the Plaintiff is entitled to the interest stated in the note; 10% per annum or $458.33 per month. The Court has found that the principal has not been repaid. The evidence is clear that no payments of any kind were made after August 1, 2011. Therefore, with regard to the this time frame, the Court finds in favor of the Plaintiff.

Finally, the Plaintiff seeks reasonable attorney's fees and costs pursuant to the Mortgage dated July 27, 2007. Paragraph 21 provides in relevant part that "The Mortgagor shall be responsible for all attorney's fees and costs upon the Mortgagee commencing a foreclosure action or any

action involving the enforcement of the *Mortgage or Note.*" (Plaintiff's Exhibit 5). However, the Mortgage was discharged on July 7, 2011. There was no evidence presented at trial to suggest any fraud or improper conduct on the part of the Defendant in filing this discharge prior to the closing and satisfaction of the note. *See DLJ Mortgage Capital v. Windsor,* 78 AD3d 645 (2nd Dept 2010). In fact there was no evidence whatsoever as to why the discharge of mortgage was filed on July 7, 2011. The fact remains that once discharged, the mortgage became a nullity. *See eg. DLJ Mortgage Capital, supra.* Hence, any claim arising out of the discharged mortgage, such as a claim for attorneys fees and costs, has no basis in fact, or law.

JUDGMENT: In favor of the Plaintiff for $55,000, plus interest from August 1, 2011 as stated in the note, 10% per annum, or $458.33 per month.

This constitutes the decision and judgment of the court.

ENTER.

Dated: June 6, 2014
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

cc: Robert L. Woodburn, Tioga County Clerk
Janean Cook, Chief Court Clerk