

Hersko v Hersko

2023 NY Slip Op 33934(U)

October 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 519449/2021

Judge: Leon Ruchelsman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: CCP

-----x

BARRY HERSKO,

Plaintiffs,

Decision and order

- against -

Index No. 519449/2021

MORRIS HERSKO & SARA G. HERSKO,

Defendants,

October 31, 2023

-----x

PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #6

The plaintiff has moved seeking to extend the discovery deadline in this action. The defendants have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff alleges he loaned the defendant and his wife significant sums of money. Specifically, the complaint alleges the defendant Morris who is the plaintiff's nephew borrowed \$190,000, \$169,834.35, \$90,163.55 and \$250,000 between 2011 and 2014. The loans were all oral and were allegedly due during 2017. The loans were not repaid and this lawsuit was commenced.

On June 1, 2023 the plaintiff served defendants with a discovery demand. The defendants responded to the demand on June 20, 2023 which response included objections. On June 28, 2023 the plaintiff responded with a deficiency letter and sought another production and a meet and confer. The defendants never furnished another production and a meet and confer never took

place. Further, on June 14, 2023 the defendants served a demand upon the plaintiff and on July 5, 2023 the plaintiff responded that he would respond to the demands at a future date and ultimately responded on August 18, 2023. On July 18, 2023 the court issued an order requiring all depositions by September 1, 2023 and that by August 7 the parties were required to schedule depositions. The plaintiff sought to schedule plaintiff's deposition on August 23 subject to the completion of all discovery. The plaintiff asserts that on August 23, 2023 the defendants informed the plaintiff that no further discovery would be furnished prompting the plaintiff to serve a subpoena upon TD Bank and to seek an extension of time in which to conduct depositions. This motion seeking the extension of time has now been filed. The plaintiff asserts that the bank statements are vital and depositions cannot be conducted without them. The defendants counter the bank statements are irrelevant and the motion seeking an extension should be denied.

Conclusions of Law

It is well settled that where a party alleges a loan has been extended and has not been repaid that party bears the burden of demonstrating such loan exists even if the other party asserts the money given was intended as a gift (Peters v. Papoulacos, 218

Cal.App2d 791, 32 Cal.Rptr. 689 [District Court of Appeal, Second District, Division 3, California 1963]). Thus, in further support of the plaintiff's burden, the plaintiff seeks the defendant's bank records from TD Bank. There is no dispute that on November 28, 2011 the plaintiff provided the defendants with \$190,000 and that on March 5, 2012 provided another \$169,834.45 and that on March 12, 2012 provided another \$90,163.55 and that in March 2014 provided another \$250,000. There is further no dispute all the transfers made by the plaintiff to the defendants were oral and there is no written agreement. The plaintiff seeks the defendants bank records to substantiate the allegation the funds provided were used to allow the defendants to pay off mortgage debt. Specifically, the plaintiff seeks to utilize the bank statements to match funds submitted with mortgage payments made which will corroborate the fact the money was intended to be given as loans. However, even if that is true and the funds were used to pay off mortgages, a contention that might not even be disputed, that does not in any way support the plaintiff's theory that loans were intended. The case of Smith-Knabb v. Vesper, 206 NE3d 1265, 2023-Ohio-259 [Court of Appeals of Ohio, Twelfth District, Warren County 2023] is instructive. In that case the court affirmed the trial court's conclusion that a bridge loan was really a gift. In that case the donor signed a gift letter

essentially conceding the money forwarded was a gift. The money forwarded in that case was used as a bridge loan and no bank statements were ever produced to corroborate the nature of the gift or loan. The reason is clear. The existence of any bank statements would fail to advance any of the plaintiff's assertions at all. Indeed, any discovery that seeks irrelevant information is not proper (see, New York Central Mutual Fire Insurance Company v. Librizzi, 106 AD3d 921, 965 NYS2d 183 [2d Dept., 2013]).

The resolution of this case will rest upon the strength of any presumptions regarding money forwarded to relatives (see, generally, Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift [91 ALR3d (1979)], the intent of the transferor (see, generally, § 6 Distinction between gifts inter vivos and other transactions and the credibility of the witnesses who will testify at trial [Corpus Juris Secundum (2023)] and the credibility of the witnesses at trial (see, Capozzi v Luciano, 384 A2d 359, 174 Conn 170 [Supreme Court of Connecticut 1978])). Any bank statements that demonstrate funds admittedly received do not in any way support the contention the funds were intended as loans and not gifts. Therefore, based on the foregoing, the plaintiff's motion seeking an extension is denied. The depositions may not be


postponed based upon a request for any bank records.

Lastly, all motions seeking sanctions are denied.

So ordered.

ENTER:

DATED: October 31, 2023
Brooklyn N.Y.



Hon. Leon Ruchelshman
JSC