

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ARLEEN WOLF

Appellant

v.

GEORGE KOTSOPOULOS

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 186 EDA 2013

Appeal from the Judgment Entered December 17, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): August Term, 2011, No. 004793

BEFORE: BOWES, J., DONOHUE, J., and OTT, J.

MEMORANDUM BY OTT, J.

FILED DECEMBER 31, 2013

Arleen Wolf appeals from the judgment entered in favor of defendant, George Kotsopoulos, resulting from a non-jury trial before the Honorable Victor DiNubile of the Court of Common Pleas of Philadelphia County. Wolf sought enforcement of a promissory note signed by Kotsopoulos regarding purchase of real estate, 331 41st Street, Second Floor, Brigantine, New Jersey. The trial court determined Wolf was not entitled to the benefit of the note because she was not the obligee and Kotsopolous's obligation had terminated after his partners, Edward and Michael Wolf,¹ bought his interest in the property. In this timely appeal, Wolf claims the trial court erred in

¹ Edward Wolf, deceased, was Arleen Wolf's husband. Michael Wolf is Arleen Wolf's stepson. Edward and Michael were business partners, owning more than 24 properties.

determining (1) that although the note was a valid contract between Wolf and Kotsopolous, it was not enforceable; (2) that Edward or Michael, acting on their own behalf, were authorized to extinguish Kotsopolous's obligation; (3) that Edward or Michael were authorized to act on Wolf's behalf to extinguish Kotsopolous's obligation; and (4) that Kotsopolous's obligation under the note was extinguished upon his sale of the property to Edward and Michael.² Following a thorough review of the submissions by the parties, the certified record, and relevant law, we affirm, albeit on different grounds.

Our scope and standard of review are as follows:

Because contract interpretation is a question of law, this Court is not bound by the trial court's interpretation. Our standard of review over questions of law is *de novo* and to the extent necessary, the scope of our review is plenary as the appellate court may review the entire record in making its decision. However, we are bound by the trial court's credibility determinations.

Ruby v. Abington Memorial Hospital, 50 A.3d 128, 132 (Pa. Super. 2012) (citation omitted).

Additionally, we are cognizant that

[o]ur appellate role in cases arising from non-jury trial verdicts is to determine whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in any application of the law. The findings of fact of the trial judge must be given the same weight and effect on appeal as the verdict of a jury. We consider the evidence in a

² We have rephrased the questions for clarity.

light most favorable to the verdict winner. We will reverse the trial court only if its findings of fact are not supported by competent evidence in the record or if its findings are premised on an error of law.

McEwing v. Lititz Mutual Ins. Co., 77 A3d 639, 646 (Pa. Super. 2013) (citation omitted).

We briefly relate relevant facts from the trial court's opinion.³

Kotsopolous entered into a real estate deal with his friend Michael Wolf thereby purchasing the second floor unit of a duplex located at 331B South 41st Street, Brigantine, New Jersey. Kotsopolous already owned the street level unit. Although Kotsopolous obtained the original financing for the purchase, Wolf refinanced the mortgage through the Roxborough-Manayunk Bank (RMB), a financial institution that Michael Wolf and his father, Edward Wolf, had used on prior occasions to finance other real estate deals. Edward and Michael Wolf were partners in a real estate business that bought, renovated, rented and/or sold a variety of properties. The loan amount from RMB was \$131,000.00.

Shortly after the purchase was refinanced, Edward Wolf was brought into the deal. The RMB loan was repaid in full using personal funds from a joint account shared by Edward and Arleen Wolf. Arleen Wolf signed the

³ We rely on the findings of fact as stated by the trial court in its October 24, 2012 Findings of Fact and Conclusions of Law, as well as those facts as stated in the Pa.R.A.P. 1925(a) Opinion of February 26, 2013. Both the Findings of Fact and Opinion are incorporated into this decision. The parties are directed to attach a copy of these documents in the event of further proceedings.

\$131,000.00 check that satisfied the RMB loan. In exchange for satisfaction of the RMB loan, Kotsopolous drafted a promissory note indicating Arleen Wolf had been the lender of the \$131,000.00 and obliging both Kotsopolous and Michael Wolf to repay the loan over a 30-year period at 6% interest per annum. Kotsopolous signed the note and returned it to Edward Wolf. Michael Wolf never signed the note. Although Arleen Wolf was named as the lender, she testified at trial that she was not aware of the note until several years after the note had been destroyed. Wolf was never in possession of the note. Monthly payments of \$748.41 were made by the Wolf real estate partnership from the inception of the loan in January 2003, to March 2011.⁴

Not long after he signed the promissory note, Kotsopolous decided to sell his interest in the second floor unit. Edward and Michael Wolf and Kotsopolous determined that Kotsopolous's equity in the property was approximately \$31,000.00. Subsequently, Arleen Wolf once again signed a check from the joint account, this time for the amount needed to purchase Kotsopolous's interest in the property. Evidence provided at trial demonstrated Wolf provided a written notation that the money was to be used to "Buy out George (1/3 partner Brigantine)". N.T. Trial, 10/18/12, at 56-57; Wolf Exhibit 4.

⁴ Neither the note nor a mortgage regarding the loan was ever recorded. There is also no indication what became of the monthly payments; i.e. whether the payments were deposited in the joint account or solely to the benefit of Wolf.

Kotsopolous transferred his rights to the property to the Wolf real estate partnership and in return received the money and the original note, which he then destroyed.

After Edward Wolf died in 2006, two years after the note had been returned to Kotsopolous, Wolf, individually and as executor of the Estate of Edward Wolf, sued Michael Wolf and others, but not Kotsopolous, regarding ownership of 27 properties. In 2010, Judge Albert W. Sheppard determined that 24 of the properties, including the Brigantine property, had been owned by Edward Wolf and Michael Wolf as joint tenants with right of survivorship, meaning, relevant to this matter, Michael Wolf was the sole owner of the Brigantine property.⁵ During discovery in the prior lawsuit, Wolf was provided with a copy of the note signed by Kotsopolous. This was this first time Wolf was aware of the note.

Subsequent to the ruling in the prior lawsuit, Wolf filed this suit against Kotsopolous, claiming only she was entitled to terminate Kotsopolous's obligation under the note, and because she had not, Kotsopolous was obligated to pay the outstanding balance of approximately \$114,000.00.

⁵ Wolf's argument regarding her right to a share of the properties was apparently based on a claim that the properties were held by Edward and Michael Wolf as joint tenants in common, not on a claim that she was a partner in the real estate venture.

The trial court instantly determined that Kotsopolous, by virtue of the sale of his interest in the property, had no further obligation under the note. We reach the same result on different grounds. Essentially, because the promissory note was a negotiable instrument and Wolf was never the holder of the note, she is legally unable to enforce the note.

First, we note that the promissory note involved herein was a negotiable instrument.⁶ A negotiable instrument is defined in relevant part as:

(a) Definition of “negotiable instrument”.--Except as provided in subsections (c) and (d), “negotiable instrument” means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain:

(i) an undertaking or power to give, maintain or protect collateral to secure payment;

(ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral; or

⁶ Because of the unique factual history of this matter, there is no case law directly on point. Therefore, we resolve the matter through statutory interpretation.

(iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) Definition of "instrument".--"Instrument" means a negotiable instrument.

(c) Negotiable instrument and check.--An order that meets all of the requirements of subsection (a), except paragraph (1), and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.

(d) When promise or order not an instrument.--A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this division.

(e) Note and draft.--An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

13 Pa.C.S. § 3104(a)-(e).

The promissory note at issue fulfills the statutory definition of a negotiable instrument. Regarding subsection (d), the promissory note does not contain the disclaimer and, in fact, specifically allows for the transfer of the note.⁷

Title 13 also provides the statutory requirements for the enforcement of a negotiable instrument.

"Person entitled to enforce" an instrument means:

⁷ It is undisputed that the original note was destroyed. However, a copy of the note survives.

- (1) the holder of the instrument;
- (2) a nonholder in possession of the instrument who has the rights of a holder; or
- (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3309 (relating to enforcement of lost, destroyed or stolen instrument) or 3418(d) (relating to payment or acceptance by mistake).

A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

13 Pa.C.S. § 3301.

Therefore, in order to demonstrate a legal entitlement to enforce the promissory note, Wolf must fulfill one of the three requirements found in Section 3301.

Wolf was not the holder of the note. The "holder" is defined as the "person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession." 13 Pa.C.S. § 1201. Although Wolf was identified as the lender and the person to whom payments were to be tendered, she was never in possession of the instrument.

She did not qualify as a nonholder in possession because she was not in possession of the instrument.

The final definition applies to a person not in possession if, relevant to this matter, section 3309 is applicable. Section 3309 addresses the statutory requirements for enforcement of an instrument that has been lost, destroyed or stolen, and states, in relevant part:

(a) Enforcement.--A person not in possession of an instrument is entitled to enforce the instrument if:

(1) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred;

(2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and

(3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

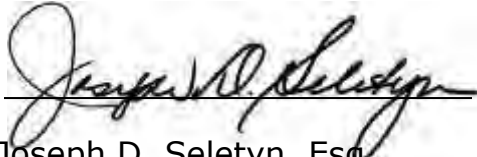
13 Pa.C.S. § 3309(a).

Here, the statute provides three requirements for the enforcement of a note by a person not in possession of the instrument. The first requirement is that the person was in possession of the note at the time it was lost, destroyed or stolen. Because Wolf was never in possession of the note, she cannot fulfill the requirements of Section 3309, and therefore, cannot enforce the note. Accordingly, with no legal right to enforce the note, she cannot prevail.

Judgment affirmed. Parties are directed to attach a copy of the October 24, 2012 Findings of Fact and Conclusions of Law and the February 26, 2013 Trial Court Opinion in the event of further proceedings.

J-A26036-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/31/2013