

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Debbie Rooks, Successor Trustee of)	
The Ruby M. Robb Living Trust,)	
)	
Plaintiff/Appellee,)	Supreme Court No: 20150047
)	Williams County
)	Civil No: 53-2013-CV-01076
-vs-)	
)	
David C. Robb,)	
)	
)	
Defendant/Appellant.)	

**BRIEF OF APPELLEE DEBBIE ROOKS, SUCCESSOR TRUSTEE OF THE
RUBY M. ROBB LIVING TRUST**

Appeal from Summary Judgment entered January 2, 2015
Williams County District Court,
Northwest Judicial District
The Honorable David W. Nelson, presiding

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TABLE OF CONTENTS

Page No./Paragraph No.

Table of Contents.....i

Table of Authorities.....ii

Statement of the Issues.....¶1

Statement of the Case.....¶3

Statement of the Facts.....¶5

Argument.....¶6

I. Whether the district court properly concluded that the Promissory Note was an asset
of the Ruby M. Robb Living Trust.....¶6

II. Whether the district court properly concluded that the promissory note was
payable on demand.....¶11

Conclusion.....¶15

TABLE OF AUTHORITIES

North Dakota Cases

Halvorson v. Sentry Ins., 2008 ND 205, 757 N.W. 2d 398..... ¶ 7

Perius v. Nodak Mutual Ins. Co., 2010 ND 80, 782 N.W.2d 355..... ¶ 7

Zuger v. State, 2004 ND 16, 673 N.W.2d 615..... ¶ 7

North Dakota Statutes

N.D.C.C. § 41-03-04(1)..... ¶12

N.D.C.C. § 41-03-08(1)..... ¶¶12, 13

North Dakota Rules

N.D.R.Civ.P. 56(e)..... ¶ 8

STATEMENT OF THE ISSUES

[¶1] I. Whether the district court properly concluded that the Promissory Note was an asset of the Ruby M. Robb Living Trust.

[¶2] II. Whether the district court properly concluded that the promissory note was payable on demand.

STATEMENT OF THE CASE

[¶3] On January 3, 2013, Appellee Debbie Rooks, Successor Trustee of the Ruby M. Robb Living Trust (hereinafter “Rooks”), served upon Appellant David C. Robb (hereinafter “Robb”) the Summons and Complaint in this action. Docket ID# 3. Rooks filed the Summons and Complaint with the district court on September 18, 2013. Appellant’s App. at 5. On October 14, 2014, Robb filed his Notice of Motion and Motion for Summary Judgment, and Affidavit in Support of his Motion for Summary Judgment. Appellant’s App. at 13-19. On October 15, 2014, Rooks filed her Notice of Motion for Summary Judgment, Motion for Summary Judgment, and supporting documents. Appellant’s App. at 20-28. On November 12, 2014, Rooks filed her Response to Robb’s Motion for Summary Judgment. Appellant’s App. at 29-31. Robb filed his Reply Memorandum in Support of Defendant’s Motion for Summary Judgment and Response Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and supporting Affidavit on December 15, 2014. Appellant’s App. at 32-39.

[¶4] The district court heard arguments on the parties’ motions for summary judgment on December 31, 2014. Motion Hr’g Tr. at 1, 3. The district court entered an Order for Partial Summary Judgment in favor of Rooks and Dismissal of Remainder of Claims on December 31, 2014. Appellant’s App. at 42-44. On January 2, 2015, judgment was entered in favor of Rooks and against Robb in the amount of \$189,115.00, with interest of 6.50% or \$33.68 per day and dismissing the remainder of Rooks’s claims without prejudice. Appellant’s App. at 45. On January 5, 2015, Rooks caused to be served on Robb Notice of Entry of Judgment. Docket ID# 51; Appellant’s App. at 46.

Robb filed his Notice of Appeal with the North Dakota Supreme Court on February 23, 2015. Appellant's App. at 60-62.

STATEMENT OF THE FACTS

[¶5] From May 2002 to September 2004, Robb received multiple loans from his mother, Ruby M. Robb, totaling \$121,500.00. Appellant's Brief at ¶ 7; Appellant's App. at 27. On October 24, 2004, Robb executed a Promissory Note whereby he promised to pay to the benefit of Ruby M. Robb the principal sum of \$121,500.00, with interest at the rate of 6.00% per annum. Appellant's App. at 9. The Promissory Note was subsequently assigned by Ruby M. Robb to the Ruby M. Robb Living Trust. Appellant's App. at 40. From 2007 to 2012, Robb made payments towards the Promissory Note totaling \$6,500. Appellant's App. at 26. The last payment was received in January 2012. Id. Thereafter, Rooks commenced this action to recover payment on the Promissory Note.

ARGUMENT

[¶6] I. Whether the district court properly concluded that the Promissory Note was an asset of the Ruby M. Robb Living Trust.

[¶7] Whether summary judgment is appropriate is a question of law that this Court reviews de novo based on the entire record. Zuger v. State, 2004 ND 16, ¶7, 673 N.W.2d 615. Summary judgment is used as "a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law." Id. Summary judgment is appropriate if a party "fails to establish the existence of a factual dispute as to an essential element of his claim and on which he will bear the burden of proof at trial." Perius v. Nodak Mutual Ins. Co., 2010 ND 80, ¶9, 782 N.W.2d 355 (quoting Halvorson v. Sentry Ins., 2008 ND 205, ¶5, 757 N.W. 2d 398).

A party seeking summary judgment has the initial burden of showing that no dispute exists as to either material facts or inferences to be drawn from undisputed facts and that the movant is entitled to judgment as a matter of law. If the movant meets that initial burden, the opposing party may not simply rely upon the pleadings or upon unsupported conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.

Perius, at ¶7 (internal citations omitted).

[¶8] The district court properly concluded that the Promissory Note was an asset of the Ruby M. Robb Living Trust. Robb asserts that the Affidavit of Trust Asset executed by Laurie Peterson and submitted by Rooks was insufficient to show that Ruby M. Robb transferred the Promissory Note to the Ruby M. Robb Living Trust because it is not based on personal knowledge and shows no evidence of an assignment to the Trust. Appellant's Brief at ¶¶12-13. Rule 56(e) of the North Dakota Rules of Civil Procedure govern affidavits submitted in support of a Motion for Summary Judgment. N.D.R.Civ.P. 56(e). The rules provides, "[a] supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Id. (emphasis added). In the Affidavit at issue here, Laurie Pederson identified herself as the Vice President and Trust Manager of American State Bank & Trust Company. Appellant's App. at 40. As Trust Manager, Laurie Pederson had personal knowledge of the trusts being administered and managed at American State Bank & Trust Company. As stated in her affidavit, American State Bank & Trust Company was the Trustee of the Ruby M. Robb Living Trust from its creation in 2004 until 2012. Id. Therefore, Laurie Pederson had sufficient

personal knowledge to execute the affidavit stating the Promissory Note was assigned to the Ruby M. Robb Living Trust.

[¶9] Robb’s own words and actions establish that he understood that the Promissory Note was an asset of the Ruby M. Robb Living Trust. In his Answer, Robb stated: “Exhibit “A” attached shows the payments that were made to the Ruby Robb Trust while it was administered by American State Bank. Defendant has not known where to send any further payments since that time.” Appellant’s App. at 10, 12. Furthermore, Robb directed all of the correspondence submitted with these payments to Laurie Pederson, which Robb provided to Rooks during the discovery process. Robb clearly understood that the Promissory Note was an asset of the Ruby M. Robb Living Trust, and that Laurie Pederson had sufficient knowledge of this fact to execute the Affidavit of Trust Asset.

[¶10] Unfortunately, over the passage of time, the document assigning the Promissory Note to the Ruby M. Robb Living Trust has been misplaced and cannot be found. However, as discussed above, all parties understood that the Promissory Note was held by the Ruby M. Robb Living Trust. The Affidavit of Trust Asset conclusively established the Promissory Note was assigned to the Ruby M. Robb Living Trust. Therefore, the district court properly concluded that the Promissory Note was an asset of the Ruby M. Robb Living Trust.

[¶11] II. Whether the district court properly concluded that the promissory note was payable on demand.

[¶12] Robb argues that the Promissory Note was not payable on demand, but rather payable when and if he was able, and therefore is not currently due. North Dakota law defines a negotiable instrument as:

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:

- a. Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
- b. Is payable on demand or at a definite time; and
- c. 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, except

that

the promise or order may contain an undertaking or power to give, maintain, or protect collateral to secure payment, an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or a waiver of the benefit

of any law intended for the advantage or protection of any obligor.

N.D.C.C. § 41-03-04(1). A promissory note that does not state any time of payment is considered “payable on demand.” N.D.C.C. § 41-03-08(1). The Promissory Note here constitutes a negotiable instrument that was payable on demand, as it did not state any time of payment. See Appellant’s App. at 9. After Robb’s payments stopped in January 2012, Rooks demanded payment be made by serving the Summons and Complaint upon Robb.

[¶13] Robb asserts that he and his mother entered into an oral, contemporaneous agreement which established that the Promissory Note would only be due and payable as Robb was able to pay. Appellant’s Brief at ¶18. In his Affidavit in Support of his Motion for Summary Judgment, Robb stated:

The oral agreement was that the payments to me would be considered a debt which I would repay when and if I was able to, and that if I had not repaid the debt upon the expiration of her life, that any remaining non-repaid amounts would either be forgiven or deducted from whatever inheritance I would have otherwise received.

Appellant's App. at 16. Other than this assertion, Robb provides no evidence that a contemporaneous agreement existed to alter the terms of the Promissory Note. Robb's argument that the debt was only payable when and if he was able, and any remaining amount would be forgiven upon Ruby M. Robb's death, is an attempt to transform this debt into a gift; such an interpretation completely negates the need for a Promissory Note. The Promissory Note speaks for itself. Because it did not contain a specific time of payment, the Promissory Note was considered payable on demand. N.D.C.C. § 41-03-08(1). For a period of almost a decade, the Trustee of the Ruby M. Robb Living Trust did not demand payment be made, thereby allowing Robb to make payments when he was able. Upon service of the Summons and Complaint in January 2013, Rooks demanded payment be made, and payment was due at that time.

[¶14] Robb argues that Rooks has acknowledged that the Promissory Note was only due when and if he was able by her response to an interrogatory, in which she stated that she understood payment on the Promissory Note would be made as Robb was able. Appellant's Brief at ¶18. The Promissory Note was executed in October 2004. Appellant's App. at 9. This action was not commenced until January 2013. Docket ID#3. Prior to commencement of this action, payments on the Promissory Note were made as Robb was able. However, with the passage of time and changes in circumstances, Rooks determined payment on the Promissory Note was needed, and demanded payment by serving the Summons and Complaint. Therefore, the district court properly concluded that the Promissory Note was payable on demand under North Dakota law.

CONCLUSION

¶15] For the reasons stated above, Rooks respectfully requests that the summary judgment of the district court be affirmed.

Dated this 23rd day of June, 2015.

 /s/ Abby T. Siewert

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