

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Debbie Rooks, Successor Trustee of the Ruby M. Robb Living Trust,
Plaintiff and Appellee,

vs.

David C. Robb,
Defendant and Appellant.

Supreme Ct. No. 20150047

District Ct. Civil No. 53-2013-CV-01076

PETITION FOR REHEARING:

IN THE APPEAL FROM THE DISTRICT COURT FOR WILLIAMS
COUNTY, NORTH DAKOTA, NORTHWESTERN JUDICIAL DISTRICT,

HONORABLE DAVID NELSON,

PETITION OF APPELLANT AND DEFENDANT DAVID C. ROBB, SEEKING
MODIFICATION OF ORDER OF THE SUPREME COURT OF THE STATE OF
NORTH DAKOTA

David C. Robb,
Defendant and Appellant, in propria persona
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[¶ 1] TABLE OF AUTHORITIES

Statutes

Paragraph

N.D.C.C. 41-03-04-1a. (3-104) Negotiable Instrument

12, 13

¶ 2] STATEMENT OF ISSUES

Defendant/Appellant concurs with the Supreme Court's reversal of the District Court's granting of the Plaintiff's Motion for Summary Judgment. The issues presented in this Petition for Rehearing are issues raised on appeal but not ruled on in the Opinion issued by the Supreme Court.

I. Does the finding by the Supreme Court that:

"Consequently, we conclude the district court erred when it found the trust manager's affidavit established the note was transferred to the Trust." 2015 ND 274, ¶8

compel a further conclusion that the Trust was not the owner of the Note, and thus make appropriate an order for entry of judgment for Defendant on Defendants motion for Summary Judgment?

II. Should the Supreme Court have addressed Defendant's argument that the Note is not currently due, and reversed the District Court's implied denial of Defendant's Motion for Summary Judgment.

¶ 3] STATEMENT OF THE CASE

¶ 4] This Petition for Rehearing is for the matter addressed by the Supreme Court by opinion 2015 ND 274 filed 12/1/2015. The Supreme Court reversed the District Court's granting of Plaintiff's Motion for Summary Judgment, but referring to Defendant, stated: "we decline to address his other arguments." This Petition seeks a ruling on matters that the Supreme Court declined to address, specifically on the District Court's implicit denial of Defendant's Motion for Summary Judgment.

¶ 5] Plaintiff and Defendant filed cross motions for summary judgment; the District Court granted Plaintiff's motion [Ap. p 49] as to a promissory note executed by Defendant on or about October 24, 2004. [Ap. p 9] (the "Note") Defendant's Motion for Summary Judgment raised two issues, each sufficient to compel entry of judgment for Defendant. Defendant petitions for reversal of the denial of his Motion for Summary Judgment. A question of whether the Note had been assigned to the Ruby M. Robb Living Trust (the "Trust") was central to both of cross motions for summary judgment. Defendant contends the Supreme Court's conclusion: "the district court erred when it found the trust manager's affidavit established the Note was transferred to the Trust" [2015 ND 274, ¶ 8] is dispositive of Defendants Motion. Defendant also raised a defense of contemporaneous agreement that the District Court implicitly disregarded. This

issue, wrongly decided by the District Court, has not been resolved by the Supreme Courts current decision.

[¶ 6] STANDARD OF REVIEW

[¶ 7] As the Supreme Court noted in its Opinion in the current case:

Whether summary judgment was proper is a question of law that we review de novo on the record. . . . On appeal, we view the evidence in the light most favorable to the party opposing the motion. (2015 ND 274 ¶ 6) (Citations omitted).

[¶8] In a Motion for Summary Judgment, parties submit all evidence in documents; the Court determines whether the admissible evidence establishes uncontroverted facts on which the Court may grant judgment. The court does not weigh evidence; it takes uncontroverted credible, admissible evidence as true. If an opposing party presents admissible evidence controverting material facts, the court must deny the motion. On an appeal from a Summary Judgment, unlike from a trial, all evidence presented to the District Court is equally available to the Supreme Court. On appeal from cross motions for summary judgment, if the Supreme Court finds the uncontroverted facts dictate judgment for the Appellant on Appellant's Motion for Summary Judgment, it may order that the District Court enter judgment for Appellant. This appeal is from cross motions that resulted in a judgment for Plaintiff. The Supreme Court's conclusion that: "the district court erred when it found the trust manager's affidavit established the note was transferred to the Trust" is dispositive of Defendants Motion for Summary Judgment. Defendant respectfully requests that the Supreme Court order that the

District Court enter Judgment for Defendant on Defendant's Motion for Summary Judgment.

[¶9] STATEMENT OF THE FACTS

[¶ 10] From May 2002 through September 2004 Ruby M. Robb lent her son, Defendant David C. Robb \$121,000.00 through payments spread over that period. On September 13, 2004, Ruby M. Robb created the Ruby M. Robb Living Trust. [Ap. p 40, ¶ 2] On October 24, 2004 approximately 5 and 1/2 weeks following creation of the Trust, the amounts loaned were documented in the Note, which was expressly made payable to Ruby M. Robb. [Ap. p 9] By oral agreement contemporaneous to the Note, Mrs. Robb and her son agreed that he would pay the Note when and if he were able. [Ap. p 16, ¶ 3 & 4]

[¶ 11] Debbie Rooks, Successor trustee of the Ruby M. Robb Living Trust, and Plaintiff Trustee in the current action, knew of the contemporaneous agreement that Defendant would only pay as he was able to pay. In answer to an interrogatory Plaintiff admitted:

Plaintiff understood that payment would be made as Defendant was able. [Ap. p 38, ¶ 2]

[¶12] Defendant has made payments against the Note, but he has had continuing difficulties with ability to pay. [Ap. p 17, ¶ 7 & 8] The Plaintiff has not claimed Defendant has any ability to pay, instead asserting that the Note is due on demand, contrary to the agreement that Plaintiff Trustee was aware of at the time of formation.

[¶13] Plaintiff admitted through counsel at the hearing on the Motion for Summary Judgment that "there is no assignment of the [N]ote to the [T]rust." [Ap. p 52, Lines 2-6], and instead asserted that the Note, expressly payable on its face to Ruby M. Robb, is payable to bearer. Contrary to North Dakota law, Plaintiff's Counsel argued:

And under North Dakota law, if a negotiable instrument -- which this promissory note qualifies as, because it's a promise to pay a fixed amount of money, it's payable to the bearer, and it's payable on demand and does not contain any other promise other than a promise to pay. (Emphasis added) [Ap. p 52, Lines 2-6]

[¶ 14] STATEMENT OF LAW AND ARGUMENT

[¶ 15] A. The determination by the Supreme Court that the challenged affidavit failed to establish transfer of the Note to the Trust is controlling in Defendants Motion for Summary Judgment.

[¶ 16] It is uncontested that the Note was made payable to Ruby M. Robb. Ruby M. Robb has passed away, so the Note has automatically passed by law to her estate. The Trust was created September 13, 2004 [Ap. p 40, ¶ 2]; the Note was then created October 24, 2004 [Ap. p 9]. That the Note was created in the month following the month of the creation of the Trust, but expressly made payable to Ruby M. Robb, shows the Note was intentionally held outside the trust. Plaintiff asserted in oral argument at the hearing on the cross motions for summary judgment:

In reviewing the file, we -- the trust agreement had a Schedule A attached to it outlining the assets that were transferred to the trust. Unfortunately, that schedule has been lost over the years, and there is no assignment of the note to the trust. [Ap. p 52, Lines 1-6]

Thus, Plaintiff's admission that "...there is no assignment of the note to the trust." is combined with an admission that even the basis for the claim in the Complaint presumed the existence of a (now purportedly lost) document that was allegedly created as an attachment to the Trust... and thus created before the Note was even created. Thus Plaintiff has relied on an unavailable Trust Attachment A, that could not list the Note that did not exist at the time of the creation of the Trust.

[¶ 17] The Note was never assigned to the Trust. Plaintiff's complaint does not assert a transfer of the Note to the Trust: only that the Trust is the Note holder.

[Ap. p 5, lines 1 12-15] At the District Court hearing Plaintiff misrepresented North Dakota law, asserting that the Note, which was made payable to an identified person [Ap. p 9] is "payable to bearer." [Ap. p 52, Lines 21-25] North Dakota law is contrary to Plaintiff's assertion. Specifically, it provides:

Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder. (emphasis added)
[¶14, N.D.C.C 41-03-20-2. (3-201)]

The copy of the Note attached to the verified complaint clearly shows no endorsement, and Plaintiff has never suggested the Note was endorsed.

[¶18] Throughout this action, Plaintiff has failed to address the statutory requirement for assignment of the Note, i.e. endorsement. Instead Plaintiff has continued to argue, contrary to North Dakota law, that the Note is payable to bearer.

[¶ 19] Plaintiff's sole attempt to show transfer of the Note to the Trust was the conclusory, unsupported statement in an affidavit that the Supreme Court has found lacked any showing of personal knowledge and failed to state facts supporting the conclusion of transfer to the Trust. [2015 ND 274, ¶8] Absent

admissible evidence from that affidavit, Plaintiff has failed to controvert the ample evidence that the Trust is not the Note holder.

[¶ 20] With the Supreme Court's conclusion that the affidavit was inadequate to support Plaintiff's allegation that the Note was transferred, Defendant asserts this conclusion required not only reversal of the District Court's granting of Plaintiff's motion, but also supports reversing the District Courts implied denial of Defendants motion. Since the Supreme Court has already made the controlling determination, Defendant requests they complete the process by ordering that the District Court enter Judgment for Defendant.

[¶ 21]B. The Supreme Court is in a position to resolve the issue regarding a contemporaneous Agreement affecting when the Note is due.

[¶22] By granting summary judgment to Plaintiff, the District Court implicitly denied Defendants claim that a contemporaneous Agreement concerning timing of payment was a defense to Plaintiff's claim. Even assuming the Supreme Court grants Defendant's request for an order for entry of Summary Judgment for defendant, that will only establish that the Plaintiff is the wrong party. The underlying issue then becomes a matter between the estate of Ruby M. Robb and Defendant. Defendant asserts the District Court erred in its implied denial of Defendant's defense of contemporaneous agreement, and requests that the Supreme Court rule on this matter. Both parties in this appeal have adequately

briefed the facts and issues surrounding this defense, and Defendant incorporates his previously briefed arguments by reference.

[¶ 23] CONCLUSION

[¶24] Defendant David C. Robb respectfully petitions the Supreme Court to order Judgment for Defendant on Defendant's Motion for Summary Judgment.

Defendant also requests that the Supreme Court address Defendants defense of contemporaneous agreement in order to correct the error made by the District Court in the judgment appealed from, and to guide the District Court when this is presented as a case between the proper parties. Defendant believes the issues raised in this Petition have been adequately briefed, and that oral argument on this Petition is not needed.

Dated this 8th day of January, 2016

David C. Robb, Defendant and Appellant, in propria persona
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By: ___/David C. Robb/_____
David C. Robb, in propria persona

IN SUPREME COURT OF NORTH DAKOTA

Debbie Rooks, Successor)	
trustee of The Ruby M. Robb)	
Living Trust)	
)	Defendant's/Appellant's Proof of
Plaintiff,)	Service
)	
vs.)	
)	Civil No. 53-2013-CV-01076
David C. Robb,)	Supreme Court No. 20150047
)	
Defendant)	

PROOF OF SERVICE

On this date, I emailed copies of:

- Defendant's/Appellant's Petition for Rehearing Brief

by placing same in electronic mail (email) addressed to:

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____January 8, 2016____
 Date