STATE OF VERMONT
WINDSOR COUNTY, SS

Vernon Pierce, Plaintiff v. Sean Morgan, Ron Morgan, and Vivian Morgan, Defendants	SUPERIOR COURT Docket No. 840-11-08 Wrcv

OPINION AND ORDER RE: SUMMARY JUDGMENT

This contract action is before the court on Defendant Sean Morgan's motion for summary judgment. He is represented by Paul Perkins, Esq. Plaintiff Vernon Pierce opposes summary judgment, and he is represented by Kevin Griffin, Esq. For the reasons below, the motion is GRANTED.

FACTS

The following facts are undisputed. On June 9, 2001, Defendant Sean Morgan* was driving along Route 106 in Woodstock, Vermont when he crossed the center lane and collided with an automobile driven by Donna Pierce. Mrs. Pierce died as a result of the injuries she sustained in the accident, and Defendant was subsequently convicted of negligent operation of a motor vehicle.

On August 5, 2002, Plaintiff Vernon Pierce, Donna Pierce's husband, entered into a "Memorandum of Agreement" (Agreement) with Defendant and Defendant's parents. In it, Defendant and his parents agreed to grant Plaintiff a $35,000 mortgage on property Defendant's parents owned in New Hampshire. There was an understanding among the parties that the Morgans would attempt to sell the property in order to satisfy the amount promised to Plaintiff. Defendant, although a signatory to the Agreement, did not have an ownership interest in the New Hampshire property. The Agreement was not an admission of liability by the Morgans, and the Agreement was not to "have any bearing on claims and suits the Pierce[s'] have against the Morgan[s'] insurance companies. It is solely a settlement for those amounts which may exceed insurance coverage, which the Morgans may be personally responsible for, and is full settlement for any uninsured claims against the Morgans." (Def.'s Ex. A.)

On September 12, 2002, Defendant's parents gave Plaintiff a promissory note (Note). In it, Defendant's parents promised to pay Plaintiff $35,000 by August 15, 2003. The Note stated

* Sean Morgan is the only defendant remaining in this case after the claims against his parents Ron and Vivian Morgan were dismissed by the court on October 20, 2009. Therefore, all references to "Defendant" throughout this opinion are to Sean.

that if the full amount was not paid by that date, then Defendant's parents would pay the money over the next ten years in monthly installments. The Note referenced the mortgage that was supposed to be given under the Agreement. The Note stated that in case of default, Plaintiff was entitled to his "statutory remedies available under a mortgage on residential real estate on Woonsocket Avenue, Claremont, New Hampshire, securing this Note, which mortgage shall be executed on near or even date." (Def.'s Ex. B.)

> This Note is granted in full settlement of all claims of the Estate of Donna Vernon [sic], her widower, Vernon Pierce, her children and heirs and assigns against Ronnie and Vivian Morgan or Sean Morgan arising from an automobile accident which caused the death of Donna Pierce in 2001, in Woodstock, Vermont. However, any claims of the Estate of Donna Vernon [sic], her widower, Vernon Pierce, her children and heirs and assigns related to any insurance coverages applicable are not included in the agreement from which this Note arises. All Parties acknowledge that the final settlement of such matters shall be conducted, of necessity, with the participation of any insurance carrier affected.

Id. The Note was signed by Ron and Vivian Morgan but not Sean Morgan. The Morgans never conveyed a mortgage to Plaintiff, and the New Hampshire property was sold before the $35,000 was paid off.

On May 22, 2003, Plaintiff entered into a "Full and Final Release of All Claims" (Release). In exchange for $100,000, given by the Morgans' insurer, Plaintiff "release[d] and forever discharge[d]" Ron Morgan, Vivian Morgan, Sean Morgan, and Metropolitan Property and Casualty Insurance Company

> from any and all actions, causes of action, debts, dues, claims and demands of every name and nature, . . . [Plaintiff] ever had, now ha[s] or may have, for or by reason of any matter or thing to date of the presents; and especially from all claims and demands arising out of any and all personal injuries, death, damages, expenses, loss or damage . . . alleged to have been sustained as a result of an accident which happened on or about June 9, 2001 in South Woodstock, VT.

(Def.'s Ex. C.)

On June 6, 2003, Plaintiff signed a "Settlement Agreement and Release" (Settlement). This document supplied many details regarding the form of payment due under the Release. The Settlement also expounded on the Release and stated, in a section entitled "Release and Discharge," that Plaintiff

> completely release[s] and forever discharge[s] Ronnie Morgan, Sean Morgan and Metropolitan Property and Casualty Insurance Company, Incorporated from any and all past, present or future claims . . . of any nature whatsoever, whether based on a tort, contract or other theory of recovery, which the [Plaintiff] now ha[s], or which may hereafter accrue or otherwise be acquired, on account of, or may in any way grow out of the [June 9, 2001 auto accident].

(Def.'s Ex. D.)

The Settlement went on to state that the discharge was a "general release," and Plaintiff

> expressly waive[s] and assume[s] the risk of any and all claims for damages which exist as of this date, but of which the [Plaintiff] do[es] not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect [Plaintiff's] decision to enter into this Settlement Agreement.

Id. The Settlement was signed by Plaintiff, his attorney, and the insurance adjuster.

Defendant's parents could not obtain the $35,000 due under the Note by August 15, 2003, and so they made monthly payments on the Note from September 15, 2003 until May 15, 2008. After May 15, 2008, Plaintiff did not receive further payments pursuant to the Note, and the outstanding balance on the Note on that date was $20,203.19. Later that year, Defendant's parents filed for bankruptcy, and their debt under the Note was eventually discharged. Defendant did not file for bankruptcy; however, he never made any payments pursuant to the Agreement or the Note.

Plaintiff seeks to collect the remainder of this balance from Defendant pursuant to the Agreement. Defendant argues, among other things, that he is not liable under the Agreement, and he has filed for summary judgment on this issue. Plaintiff opposes summary judgment and argues that the parties intended for Defendant to be liable under the Agreement.

STANDARD OF REVIEW

Defendant moves for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment "has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists." *Price v. Leland*, 149 Vt. 518, 521 (1988). However, "[s]ummary judgment is mandated . . . where, after an adequate time for discovery, a party 'fails to make a showing sufficient to establish the existence of an element' essential to his case and on which he has the burden of proof at trial." *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The court derives the undisputed facts from the parties' statements of fact under V.R.C.P. 56(c)(2). Facts in the moving party's statement are deemed undisputed when supported by the record and not controverted by facts in the nonmoving party's statement which are also supported by evidence in the record. See *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413 (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)).

DISCUSSION

Plaintiff alleges that Defendant is liable to him under the Agreement, which Plaintiff claims was breached when Plaintiff stopped receiving monthly payments towards the $35,000 obligation. Defendant asserts three main reasons why he is not liable to Plaintiff. First, Defendant is not liable under the Agreement. Second, Defendant's liability under the Agreement was abrogated by the Note. And finally, Plaintiff released Defendant's liability under the Agreement when Plaintiff signed the Release and the Settlement. Because we find that Defendant is not liable under the Agreement, we need not address Defendant's other arguments.

The Agreement was signed by Defendant and his parents on August 5, 2002. Plaintiff was not a signatory. The "Memorandum of Agreement" states in its entirety:

> Now come the parties to this matter, Sean Morgan and his parents, as well as Vernon Pierce, his heirs and assigns and agree to the following:
>
> 1. The Morgans shall grant a mortgage of $35,000 to Mr. Pierce on their property in Claremont, NH. They will endeavor to sell the property in order to satisfy the $35,000. If they are unsuccessful after 6 months, they shall have 6 months to obtain independent financing to satisfy the $35,000 claim.
>
> 2. This payment is not an admission of liability, and this agreement may not be used as evidence in any litigation against the Morgans by the Pierce family.
>
> 3. This agreement shall not have any bearing on claims and suits the Pierce[s'] have against the Morgan[s'] insurance companies. It is solely a settlement for those amounts which may exceed insurance coverage, which the Morgans may be personally responsible for, and is full settlement for any uninsured claims against the Morgans.

(Def.'s Ex. A.)

The language quoted above, when compared to the language in the Note, indicates that the Agreement was merely a preliminary agreement between the parties and not a final contract that placed affirmative duties upon Defendant. "If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called 'contract to make a contract' is not a contract at all." *Herbert v. Boardman*, 134 Vt. 78, 84 (1975) (quoting 1 Arthur Linton Corbin, Contracts § 29, at 85 (1963)).

A "contract to make a contract" is not *per se* unenforceable. "The enforceability of such an agreement depends rather on whether the parties have manifested an intention to be bound by its terms and whether these intentions are sufficiently definite to be specifically enforced." *Normandy Place Assoc. v. Beyer*, 443 N.E.2d 161, 164 (Ohio 1982). "Without an express statement of intent, the focus is on whether the contract is too indefinite to enforce. Thus, the existence or nonexistence of a contract turns on whether material terms are missing." *Mays v. Trump Indiana, Inc.*, 255 F.3d 351, 358 (7th Cir. 2001).

In this case, the Agreement is not a contract, and therefore, Defendant is not obligated to Plaintiff under the Agreement. The Agreement does not contain an express statement of intent to be bound. Conspicuously absent is any express statement that Defendant intended to pay Plaintiff $35,000. Without an express statement of intent, the court must focus on the existence of material terms. If the Note contains any material term that was not already agreed on in the Agreement, then the Agreement is an unenforceable contract to contract.

The Agreement did not explicitly state that Defendant or the Morgans would pay Plaintiff $35,000. The Note, by contrast, explicitly states that "Ronnie E. and Vivian K. Morgan, Debtors, promise to pay to the Estate of Donna Vernon [sic], her widower, Vernon Pierce, her children and heirs and assigns, Creditor, . . . the sum of Thirty-five Thousand Dollars ($35,000) in accord with the following terms." (Def.'s Ex. B.) It is the absence of this definite and material term from the Agreement that militates against a finding that the Agreement was a contract obligating Defendant.

Furthermore, other essential terms that were included in the Note were absent from the Agreement. These include the date on which the money was due, a periodic payment schedule, an interest rate, and remedies for default. See *Union State Bank v. Woell*, 434 N.W.2d 712, 717 (N.D. 1989) (essential terms of contract to lend money include the amount and duration of the loans, interest rates, and the methods of repayment and collateral for the loans). The Note also explicitly stated that it was made to settle claims arising from the automobile accident. The Agreement made no reference to the accident, did not mention a release to be executed by Plaintiff, and was not signed by the Plaintiff.

Thus, the court finds that the Note contained material terms that were not already agreed to in the Agreement. The Agreement was merely a contract to make a contract and is therefore unenforceable against Defendant. Furthermore, it is undisputed that Defendant is not liable under the Note because he did not sign it. See 9A V.S.A. § 3-401(a) ("A person is not liable on an instrument unless . . . the person signed the instrument."). Without an enforceable contract, Defendant is not liable to Plaintiff, and summary judgment is GRANTED.

ORDER

For the reasons given above, Defendant's motion for summary judgment is **GRANTED**.

Dated at Woodstock, Vermont this 25 day of May, 2010.

Harold E. Eaton, Jr.
Superior Court Judge

STATE OF VERMONT
WINDSOR COUNTY, SS

Vernon Pierce, Plaintiff v. Sean Morgan, Ron Morgan, and Vivian Morgan, Defendants	SUPERIOR COURT Docket No. 840-11-08 Wrcv

JUDGMENT

All claims of the Plaintiff against the Defendants having been decided, judgment is hereby entered in favor of Defendants. Plaintiff is to take nothing by his complaint.

Dated at Woodstock, Vermont this 25 day of May, 2010.

Harold E. Eaton, Jr.
Superior Court Judge