

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

JOHN D. RELIGA

Case No. 91-14029 K

Debtor

KATHERINE PORTOLESE KELLY,
Individually and as Parent and
Natural Guardian of JOSEPH KELLY

Plaintiff

-vs-

AP 92-1030 K

JOHN D. RELIGA and
DANIEL E. BRICK, as Trustee

Defendants

In this action the former mother-in-law of the debtor seeks several remedies in connection with monies she claims she loaned to the debtor and which she claims were used to improve the debtor's residence. She seeks:

- (1) To declare the alleged loans to be non-dischargeable under 11 U.S.C. § 523(a)(2).
- (2) To impose a constructive trust on the residence that would be valid against the debtor and his Chapter 7 trustee and estate;
- (3) To impose an equitable lien on the residence that would be so valid.

The residence has been sold by the Trustee with the consent of the Plaintiff. At issue are cash proceeds held by the Trustee.

The debtor, joined by the Trustee, has moved for Summary Judgment dismissing the Complaint. The debtor does not dispute that there are a number of unresolved issues of fact. Rather, he argues that the plaintiff's response to his Summary Judgment motion demonstrates that the Plaintiff could not sustain her burden of proof at a trial.

The debtor argues that a number of essential fact allegations of the Plaintiff's complaint come down to his word against hers, and since he has denied the allegations, she cannot prove them by a preponderance of the evidence. Thus, he argues, Summary Judgment is appropriate.

The debtor is mistaken. It has been aptly stated that "the test of a genuine dispute is whether the proponent's evidence is sufficient to get to the jury."¹ Here the plaintiff, as the opponent of the Motion, is the proponent of the assertion that there exists a genuine dispute requiring trial. Thus the question is whether her evidence could survive a motion for directed verdict.²

¹Schwarzer, *W. Summary Judgment, Under the Federal Rules: Define Genuine Issues of Material Fact*, 99 F.R.D. 465, 484.

²*Id.* p. 489.

I totally discount her attestations regarding what her daughter, the debtor's former spouse, will or will not testify to if called. Indeed, under appropriate circumstances I could draw an adverse inference from the fact that the plaintiff has not yet produced her daughter's affidavit or deposition testimony. "The requirement that the opponent [of the Motion for Summary Judgment] come forward with facts furthers the policy of the Federal Rules of Civil Procedure favoring full pre-trial disclosure of evidence and penalizing its withholding ... [and] to eliminate trial by ambush."³

Nonetheless, the Plaintiff has produced her own affidavit reciting from her own knowledge a version of the facts that is directly at odds with the debtor's version in key regards. The plaintiff's reply is not one which merely challenges credibility of the debtor's evidence,⁴ it offers specific "facts" in opposition.

In those regards the testimonial demeanor of the witnesses is significant to the outcome of one or more of the causes of action.

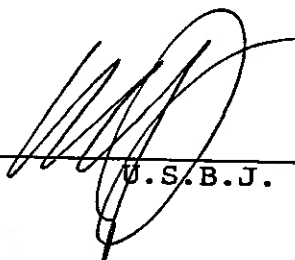
The remaining issues of law raised by the debtor's motion will be addressed upon suitable *in limine* motion or after trial, if necessary.

³Id., p. 482.

⁴Id., p. 485.

The motion is denied. This matter shall be set for immediate trial.

Dated: Buffalo, New York
August 27, 1992



U.S.B.J.