

2009 WL 8114444 (Me.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of Maine.  
Kennebec County

Cora KOWALCHUCK, Plaintiff,  
v.  
Faye Lynn GENNESS, Defendant.

No. CV2009161.  
July 21, 2009.

### **Reply to Opposition to Motion Seeking Attachment and Attachment On Trustee Process**

Denis Culley, Esq. (Bar # 9609), Attorney for the Plaintiff, Legal Services for the **Elderly**, Inc., 5 Wabon Street, Augusta, ME 04330-7040, Tel: (207) 621-0087.

Plaintiff, Cora Kowalchuck, through her counsel, hereby replies to Defendant's opposition to Plaintiff's Motion Seeking Attachment and Attachment on Trustee Process as follows:

#### **ARGUMENT**

Defendant offers three arguments in opposition to Plaintiffs Motion Seeking Attachment. They are: 1) based on Plaintiff's pleadings and affidavits it does not appear that it is more likely than not that the Plaintiff will prevail on the merits of the case; 2) the pleadings and affidavits draw a picture of failed agreement in a family situation and Defendant denies any misappropriation or breach of fiduciary duty; 3) There is a genuine issue of material fact regarding what happened to most of the money.

#### **I. Plaintiff's Complaint and Affidavits Clearly Support That it is More Likely Than Not That the Plaintiff Will Recover Judgment.**

Defendant's bald assertion that the Plaintiff's pleadings<sup>1</sup> and affidavits, on their face, do not meet the "more likely than not standard" is unsupported by argument or citation in Defendant's memorandum to any of Plaintiff's affidavits, argument or memorandum of law. The Defendant offers nothing to rebut Plaintiffs careful statement of the standard of review embedded in Rules 4A and 4B and application of that standard to the facts established in her affidavits and applied to the elements of each of the five causes of action in Plaintiffs Verified Complaint.

#### **II. The Pleadings and Affidavits Demonstrate a Straightforward Case of **Financial Abuse of an Elder and Gross Financial Exploitation** of a Parent by a Child -Not a "Failed Agreement in a Family Situation."**

Defendant's Pleading, the Answer in this matter, does not "draw a picture" of any kind as it is a merely a simple standard denial, admission, or qualification, of the allegations contained in the other pleading in this matter, the Plaintiffs Verified Complaint.

Defendant's memorandum in opposition, in paragraph two, once again baldly restates opposition - as does the affidavit attached<sup>2</sup> - without substantively disputing that Plaintiff has proven the elements of the causes of action alleged. For example, nothing in Defendant's memorandum - or affidavit - rebuts the two full pages of Plaintiff's motion which demonstrate that Defendant's actions meet every single element of Improvident Transfer of Title pursuant to [Title 33 M.R.S.A. § 1021 et seq.](#) There is no dispute that 1) Plaintiff is an **elderly** person pursuant to [33 M.R.S.A. § 1021\(2\)](#); 2) Plaintiff was suffering from **depression** and poor health and thus defendant pursuant to [33 M.R.S.A. § 1021\(1\)](#); 3) Plaintiff was unrepresented by independent counsel

pursuant to 33 M.R.S.A. §1021(3); 4) or that Plaintiff had assets taken from her for less than value, see, 33 M.R.S.A. § 1021(4). In fact, Defendant's own affidavit asserts that she presently holds at least \$18,722.95 of assets (in the form of a truck that she owns "free and clear"), *see*, Affidavit of Fayelyne Genness at ¶ 4, that properly belongs to the Plaintiff.

Again, this matter is not "a family situation" or a "failed agreement" as Defendant asserts. It is instead a straightforward case of gross **financial** abuse of a vulnerable **elder** by her daughter. Attachment and trustee process is indicated, and Plaintiff has met her burden.

### **III. Defendant's Bald Assertion of a "Genuine Dispute of the Facts" is unsupported and Imports an Inapt Standard Into Evaluation of Motions Pursuant to Rules 4A and 4B.**

Paragraph three of Defendant's memorandum seeks refuge in the standard of review commonly reserved for summary judgment, namely genuine dispute of fact. What the Defendant is actually arguing is credibility. That argument can readily be settled by this Court via a testimonial hearing on this motion.

### **Conclusion**

Plaintiff's Motion for attachment and trustee process pursuant to M.R. Civ. P. 4A and 4B should be granted by this Court based upon the memorandums, arguments and affidavits submitted by Plaintiff and not rebutted by Defendant. If this Court perceives any issue of credibility related to this matter, the Plaintiff respectfully requests a testimonial hearing in order that the Court may assess the credibility of the averments and affidavits of the parties.

Dated this 21st day of July 2009.

#### Footnotes

- 1 The only pleading filed by Plaintiff in this matter is the Verified Complaint.
- 2 No citations are made to the attached, narrative, affidavit.