IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BYRON DEAN MUNRO, Plaintiff	:	NO. 10 – 01,032
	:	CIVIL ACTION - LAW
vs.	:	
JACK ECK,	:	Non-Jury Trial

OPINION AND ORDER

Before the Court is Plaintiff's claim in replevin for the return of a Kubota tractor. A trial before the court sitting without a jury was held November 3, 2011.

According to the testimony of the parties, they became neighbors when Defendant moved in to his current residence in the fall of 2006. In either 2007 or 2008 (the year is in dispute) Defendant began mowing Plaintiff's grass. In July 2009, Plaintiff and Defendant went together to Dunlap's and purchased the tractor. Plaintiff traded in a lawn-mower for $2,345.00 and paid for the balance of $11,209.50. Originally the receipt was made out to Plaintiff, but a second receipt was then made out to Defendant. The tractor was delivered to Defendant's residence at Plaintiff's request. Dunlap's later mailed the warranty cards to Defendant. Defendant continued mowing Plaintiff's grass (using the Kubota) until November 2009 when Plaintiff's family and Defendant's family had a "falling out". Plaintiff then asked for the return of the tractor but Defendant has refused to return the tractor. Defendant contends the tractor was a gift.

It is well settled that one claiming to be the donee of property must establish all facts essential to the validity of such gift by clear and convincing evidence. Henes v. McGovern, 176 A. 503 (Pa. 1935). The essential elements of a gift inter vivos are an intention to give and delivery of the thing given. *Id.* In the instant case, Plaintiff admits that the tractor was delivered to Defendant and remains in his possession. The dispute here focuses on Plaintiff's intent.

Plaintiff testified that he intended Defendant to retain the tractor only so long as Defendant mowed his (Plaintiff's grass) with it. He testified that he asked for it to be returned

when Defendant stopped mowing his grass. Defendant, on the other hand, testified that Plaintiff told him it was a gift, that he used the word "gift", and that Plaintiff explained it was being given because Defendant had mowed his grass for three years. Mr. Dunlap testified, on Defendant's behalf, that during the purchase, and in returning to have the receipt changed from Plaintiff's name to Defendant's name, Plaintiff explained that he was "giving" the tractor to Defendant because he mowed his grass for him.

Considering all of the testimony, the court cannot find by clear and convincing evidence that Plaintiff intended an irrevocable gift to Defendant. Between Plaintiff and Defendant, the Court finds Plaintiff the more credible.[1] And, with respect to Mr. Dunlap's testimony, Plaintiff's use of the word "giving" could just as well have meant "possession" as "title". Therefore, the court will enter the following:

ORDER

AND NOW, this 4th day of November 2011, for the foregoing reasons, the court finds in favor of Plaintiff and against Defendant on Plaintiff's claim in replevin. Defendant shall return the Kubota tractor (Serial number 11622) and keys to Plaintiff within thirty (30) days of this date. The Court also finds in favor of Plaintiff and against Defendant on Defendant's counter-claim for "Malicious Slander of Title".[2]

BY THE COURT,

Dudley N. Anderson, Judge

cc: Ryan Tira, Esq.
Marc Drier, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

[1] Defendant introduced into evidence calendars which purported to show (by notations on each date the grass was allegedly mowed) how many times Defendant had mowed Plaintiff's grass in 2007, 2008, and 2009, after a witness for Plaintiff testified that only he had mowed Plaintiff's grass in 2007. It is obvious from an inspection of at least the 2007 calendar (the original 2007 calendar was provided to the Court, whereas only copies of the 2008 and 2009 calendars were provided) that the notations were added after the fact, all at the same time. The Court also finds the written calculations of monies related to the mowing (on the fronts of the calendars), which Defendant testified were added on December 31 of each year, strikingly inconsistent with Defendant's version that the tractor was given in exchange for his kindness in helping his neighbor by mowing his grass. When questioned why he would keep track of the mowing, Defendant answered that he "knew something like this would happen", but the notations were supposedly made before the tractor "gift" was even thought of.

[2] No evidence on this counter-claim was offered at trial.