

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D35572
W/ct

_____AD3d_____

Argued - April 30, 2012

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
SANDRA L. SGROI, JJ.

2011-02905

DECISION & ORDER

In the Matter of Abraham Neustein, deceased.
(Matter No. 1)

Amy Neustein, respondent-appellant, v Estate of
Abraham Neustein, et al., appellants-respondents.
(Matter No. 2)

(File No. 4714/02, Index No. 42947/02)

Goldberg & Rimberg, PLLC (Mischel & Horn, P.C., New York, N.Y. [Scott T. Horn and Naomi M. Taub], of counsel), for appellants-respondents.

Julia P. Heit, New York, N.Y. (Michael P. Heit of counsel), for respondent-appellant.

In a probate proceeding and a related action, inter alia, pursuant to RPAPL article 15 to compel the determination of claims to real property, to recover damages, and for ejection, wrongful eviction, and injunctive relief, which was transferred from the Supreme Court, Kings County, to the Surrogate's Court, Kings County, and joined with the probate proceeding for disposition, the appeal is from so much of a judgment of the Surrogate's Court, Kings County (Johnson, S.), dated March 1, 2011, as, upon a decision of the same court dated September 13, 2010, made after a nonjury trial, is in favor of Amy Neustein and against Joshua Neustein in the sum of \$774,300, and Amy Neustein cross-appeals, as limited by her brief, from so much of the same judgment as awarded her damages in the sum of only \$774,300.

ORDERED that the appeals by the Estate of Abraham Neustein and Frima Burger are dismissed, as those parties are not aggrieved by the judgment appealed from (*see* CPLR 5511); and it is further,

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MATTER OF NEUSTEIN, DECEASED
NEUSTEIN v ESTATE OF ABRAHAM NEUSTEIN

ORDERED that the judgment is affirmed insofar as appealed from by Joshua Neustein and insofar as cross-appealed from, without costs or disbursements.

“In reviewing a determination made after a nonjury trial, the power of this Court is as broad as that of the trial court, and we may render a judgment we find warranted by the facts, bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses” (*Marini v Lombardo*, 79 AD3d 932, 933; *see Campbell v Campbell*, 50 AD3d 614).

Contrary to the contentions of Joshua Neustein, a defendant in Matter No. 2 (hereinafter Joshua), the Surrogate properly awarded damages to the plaintiff in that matter (hereinafter the plaintiff) for the value of the rent of the subject real property while the property was wrongfully withheld from her (*see RPAPL 601; Cassata v New York New England Exch.*, 250 AD2d 491, 492; *see also Baker v Drake*, 53 NY 211; *Maracina v Shirrmeister*, 105 AD2d 672, 673; *Miceli v Riley*, 79 AD2d 165; *Matter of Rothko*, 56 AD2d 499, 502-503, *affd* 43 NY2d 305; *Crawford v Town of Hamburg*, 19 AD2d 100, 101; *Industrial Dev. Found. of Auburn N.Y. v United States Hoffman Mach. Corp.*, 16 AD2d 600, 601-602; *Rae v Sutbros Realty Corp.*, 6 AD2d 716, *affd* 6 NY2d 963; *Deering v Riley*, 38 App Div 164, 173-174, *affd* 167 NY 184; *cf. Reads Co., LLC v Katz*, 72 AD3d 1054, 1056). The Surrogate also properly trebled a portion of the damages (*see RPAPL 853; Moran v Orth*, 36 AD3d 771; *Rocke v 1041 Bushwick Ave. Assoc.*, 169 AD2d 525; *Lyke v Anderson*, 147 AD2d 18, 24; *Bianchi v Hood*, 128 AD2d 1007; *cf. Golonka v Plaza at Latham*, 270 AD2d 667, 670; *ZCWK Assoc. v Spadaro*, 233 AD2d 126). In addition, the award of damages was based on competent evidence (*see Goldstein v Held*, 63 AD3d 881).

We decline to disturb the Surrogate’s determination that the plaintiff was not entitled to damages based on the purported loss in sale value of the property (*see Marvin v Prentice*, 94 NY 295, 301; *North Main St. Bagel Corp. v Duncan*, 37 AD3d 785, 786; *Long Is. Airports Limousine Serv. Corp. v Northwest Airlines*, 124 AD2d 711).

Joshua’s remaining contentions are without merit.

DILLON, J.P., DICKERSON, HALL and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court