

**Matter of Omanoff**

2007 NY Slip Op 32801(U)

September 5, 2007

Supreme Court, Nassau County

Docket Number: 5584-07/

Judge: William R. Lamarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 19**

**PRESENT: HON. WILLIAM R. LaMARCA  
Justice.**

**In the Matter of the Application of**

**Motion Sequence # 001, # 002  
Submitted June 26, 2007**

**JULIA OMANOFF  
life tenant, to sell real property in the  
County of Nassau, State of New York  
Pursuant to RPAPL § 1602**

**INDEX NO: 5584/07**

**The following papers were read on these petitions:**

**Notice of Petition/Order to Show Cause.....1**  
**Petitioner’s Memorandum of Law in Support.....2**  
**Verified Answer with Counter-Claims.....3**  
**Notice of Cross-Motion.....4**  
**Petitioner’s Reply to Answer and Counter-Claims.....5**  
**Affirmation in Support of Reply to Answer and Counter-Claims.....6**  
**Affirmation in Response to Counter-Claims and in Opposition  
to Cross-Motion.....7**  
**Affirmation in Opposition to Cross-Motion.....8**  
**Affirmation in Opposition to Cross-Motion.....9**  
**Reply Affirmation in Support of Cross-Motion and Verified Answer.....10**

Petitioner, JULIA OMANOFF (hereinafter referred to as “JULIA”), surviving life tenant of real property located at 20 Maple Street, Massapequa, New York, moves for an order, pursuant to Article 16 of the Real Property Actions and Proceedings Law (RPAPL), directing the sale of the subject premises with the net proceeds divided and paid to the petitioner and remaindermen in accordance with their interests in the premises. 50%

remainderman, WILLIAM OMANOFF, son of petitioner (hereinafter referred to as "WILLIAM"), cross-moves for an order, pursuant to CPLR §325(e), to transfer this matter to Surrogate's Court and consolidate same with a pending accounting proceeding commenced therein. 50% remainderman, DENNIS OMANOFF, son of petitioner and brother of WILLIAM (hereinafter referred to as "DENNIS"), joins in his mother's petition and opposes WILLIAM's cross-motion. The motion and cross-motion are determined as follows:

This is an action by JULIA, the surviving spouse of Michael Omanoff (hereinafter referred to as "MICHAEL"), and surviving life tenant of the premises, to compel the sale of the premises and divide the net proceeds of the sale between herself and the two remaindermen, WILLIAM and DENNIS, the surviving sons of JULIA and MICHAEL. MICHAEL, died a resident of Nassau County, on April 24, 1997. On January 24, 1997, approximately three (3) months before he died, MICHAEL and JULIA transferred the subject property to their sons, WILLIAM and DENNIS, apparently for Medicaid planning purposes, reserving a life estate for themselves. Based on the record herein, it appears that MICHAEL was a life tenant for only three (3) months, from January 24, 1997 to April 24, 1997.

Tragically, there is acute acrimony between WILLIAM, on the one hand and JULIA and DENNIS, on the other. WILLIAM and JULIA are involved in a contested accounting proceeding entitled "*In the Matter of the Petition of William Omanoff to Compel an Accounting of the Estate of Michael Omanoff, Deceased*", Surrogate's Court Nassau County, File No. 300263", brought some nine (9) years after his father's death against his mother as Executrix.

JULIA is 89 years old (d/o/b January 20, 1918). Since her husband's death in 1997, she has been living with her son DENNIS and they now reside in California. JULIA alleges in her petition in support of the sale of the subject premises, as follows:

7. The Premises are not rented, and I have been paying for real estate taxes, insurance and ordinary maintenance and repairs for the Premises since my husband died. [April 24, 1997]. I initially did not attempt to rent the Premises because my son, William, lived nearby at the time, and it was my hope that I would reconcile with him, and stay at the Massapequa home while visiting him and his family.
8. In view of my advanced age and the need I now have for home health care and for medical expenses, paying for upkeep of the Premises has become burdensome. I am unable and unwilling to assume the responsibilities of an absentee landlord at this stage of my life.
9. In addition, an independent contractor has advised that \$31,400 of expenditures will be required to modernize the Premises in order to obtain a suitable rental. It would be difficult for me to pay this. My son, one of the remaindermen, William Omanoff, is neither willing to contribute to these costs, nor is he willing to allow the sale of the Premises.
10. In fact, my son William has accused me of committing waste on the Premise and has threatened to bring suit against me.

The attorneys for WILLIAM have interposed a verified answer, affirmative defenses, and counterclaims. The first affirmative defense alleges that the Estate of MICHAEL OMANOFF is a necessary party in the instant proceeding. Next, the second affirmative defense alleges that the parties herein are the same parties as in the Surrogate's Court proceeding and urges that this action be transferred to the Nassau County Surrogate's Court and consolidated with the pending accounting proceeding commenced therein. The First Counterclaim alleges WILLIAM's mother and father, JULIA and MICHAEL as life tenants, committed waste and WILLIAM suffered damages in excess of \$34,000.00.

The holder of a life estate may, under certain circumstances, force the sale of real property and collect the value of her life estate, assuming she can demonstrate that the proposed sale is expedient. *Matter of Sauer*, 194 Misc.2d 634, 753 NYS2d 318 (Surr. Ct. Nassau County, 2002). In a reply, WILLIAM now consents to an immediate sale of the premises on condition that any funds from the sale be deposited into the Court pending the final disposition of this matter and that the Court takes into account the waste committed by JULIA.

As asserted by counsel for DENNIS, although it may be beyond the realm of reason, and rather disingenuous for remainderman, WILLIAM, to assert that his deceased father had somehow engaged in “waste” of the subject premises more than ten (10) years ago or during the 90-day period between the date on the deed of conveyance of the subject premises (January 24, 1997) and the date of his father’s death (April 24, 1997), the Court finds that the request by DENNIS’ attorney to dismiss the counterclaim in its entirety at this time to be premature. In the absence of a properly filed and served cross-motion, DENNIS is not entitled to any affirmative relief. *Vanek v Mercy Hospital*, 135 AD2d 707, 522 NYS2d 607 (2<sup>nd</sup> Dept. 1987).

With respect to transferring and consolidating the instant action with the Surrogate’s Court proceeding, both counsel for JULIA and DENNIS point out that the parties’ interests in the instant proceeding arose by deed, and not under a Will or as a result of the administration of MICHAEL’s estate. It is their position that the compulsory accounting proceeding in the Surrogate’s Court, in which WILLIAM challenges the actions taken by his mother, JULIA, has no connection to the instant proceeding which seeks to sell real property, notwithstanding WILLIAM’s purported counter-claim for waste against MICHAEL

and JULIA. They contend that WILLIAM is trying to “bootstrap” the within action into the case in Surrogate’s Court by making it appear that the parties to the two (2) proceedings are the same. Counsel urge that the Surrogate’s Court lacks subject matter jurisdiction in this proceeding as it involves a lifetime transaction having no connection to either an estate or to a trust and that under CPLR §325, removal of an action to the Surrogate’s Court is proper only where the administration of an estate is affected, citing *Augusta v Augusta*, NYLJ 4/18/07, p.22, col. 3.

“The transfer of an action from Supreme Court to the Surrogate’s Court is exclusively within the discretion of the Supreme Court and a Surrogate’s Court order consenting to the transfer is not necessary. (NY Const. Art. VI §19[a])”. *Estate of Tartaglia*, 2006 NY Misc. LEXIS 5648 (Surr. Ct. Nassau Co.). See also, *Garland v Raunheim*, 29 AD2d 383, 288 NYS2d 417(1st Dept. 1968). However, the Supreme Court is often aided by the Surrogate Court’s view of its jurisdiction and whether the transfer would be appropriate. *Estate of Tartaglia, supra*.

It has been held that as a matter of comity, prior consent of the Surrogate should be obtained. This way, the Supreme Court justice is advised as to whether the Surrogate deems the action sufficiently related to the estate of a decedent and worthy of a transfer to the latter court. *Estate of Israel*, 88 Misc2d 999, 390 NYS2d 577 (Surr. Ct. Bronx Co. 1977); *In re Meister*, 55 Misc2d 1050, 287 NYS2d 511(Surr. Ct. NY Co. 1968); *Estate of Suchoff*, 55 Misc2d 284, 285 NYS2d 134 (Surr. Ct. Nassau Co. 1967). Therefore, when seeking an order from the Supreme Court for the transfer of an action, the practitioner should make a simultaneous application in the Surrogate’s Court for its consent. (31

Bender's Forms for the Civil Practice, notes to Form SCPA 501:1 at pages 5-21; see also, The Uniform Rules for the Surrogate's Court, 22 NYCRR § 707.7, Transfer of Actions from Other Courts; *Estate of Piccione*, 57 NY2d 278, 456 NYS2d 669, 442 NE2d 1180 [C.A. 1982]).

After a careful reading of the submissions herein, it is hereby

**ORDERED**, that, absent the further order of another court of competent jurisdiction, the cross-motion by WILLIAM to transfer this action to Surrogate's Court is denied; and it is further

**ORDERED**, that the petition by the life tenant, JULIA, for the immediate sale of the subject property is granted, on consent, and the Court finds that such a sale is expedient. All counsel who have appeared and their respective clients are directed to cooperate with the sale of the subject premises, *forthwith*. The net proceeds shall be distributed to JULIA, WILLIAM and DENNIS, in a gross lump sum, in accordance with their interests in the premises; and it is further

**ORDERED**, that, there being no showing of hardship, JULIA's life estate is to be allocated and valued pursuant to RPAPL §403 and RPAPL §406. The life tenant's interest shall be valued based upon her age at the time the premises is sold. *Matter of Strohe*, 7 Misc3d 853, 791 NYS2d 818 (App. Term 1<sup>st</sup> Dept. 2005); *Matter of Fisher*, 169 Misc2d 412, 645 NYS2d 1020 (Surr. Ct. Rockland Co. 1996). Within ten (10) days after the closing of sale of the property, petitioner shall advise the court of the amount of proceeds subject to distribution, as well as the life tenant's age at the time of sale. Upon receipt of such information, the Clerk of the Court shall transmit, pursuant to RPAPL §406, the statement

of facts as is necessary to permit the computation by the Superintendent of Insurance of the value of the life estate interest of JULIA in the subject property. The Superintendent of Insurance is directed to make such computation and certify same to the Court. *Matter of Strohe, supra*; and it is further

**ORDERED**, that WILLIAM's application to hold the proceeds from the sale in escrow pending the resolution of the issue of "waste" is granted to the extent that \$34,000.00 shall be taken from the full proceeds of sale by petitioner's attorney and placed in escrow in an interest bearing account, prior to distribution of the remaining proceeds of sale, pending resolution of the counter-claim herein; and it is further


**ORDERED**, that counsel shall appear for a Preliminary Conference on October 3, 2007, at 2:30 P.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served by petitioner on all parties and on DCM Case Coordinator Richard Kotowski. All discovery should be completed by November 2, 2007. The Preliminary Conference Order shall provide for a certification conference to be held no later than December 7, 2007. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

Learned counsel and their clients are admonished to use their best efforts to reach a settlement of this matter. In the event a trial is necessary on the issue of "waste", petitioner is granted a preference pursuant to CPLR §3403(a)(4).

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 5, 2007



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WILLIAM R. LaMARCA, J.S.C.

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**ENTERED**

SEP 10 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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