

Matter of Mannion

2008 NY Slip Op 30833(U)

March 18, 2008

Surrogate's Court, Nassau County

Docket Number: 0344169/2008

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----x
In the Matter of the Estate of

MARTIN JOSEPH MANNION,

Deceased.

File No. 344169

Dec. No. 93
-----x

In this proceeding to compel performance of an alleged contract for the sale of real property, petitioners move for an order granting summary judgment.

Decedent, Joseph Mannion, died intestate on May 13, 2005. Letters of administration issued to Kathleen Falciano and Patricia Skrynecki on March 13, 2007.

Gail Marturano and Wayne Marturano filed a petition on April 30, 2007 in which they seek specific performance of an alleged contract between decedent as seller and petitioners as purchasers for the sale of real property located at 505 South Oyster Bay Road, Plainview, New York. The documents which petitioners seek to enforce are a “Residential Contract of Sale” and a rider to the contract.

The contract of sale provides at paragraph 28(e):

“This contract shall not be binding or effective until duly executed and delivered by Seller and Purchaser.”

Petitioners allege that decedent signed the contract and rider. Petitioner Gail Marturano testified at an examination before trial on August 16, 2007 that she received the contract in the mail. She further conceded that the contract was not executed by petitioners nor was it delivered to decedent or any third person during his lifetime.

In her answer, Kathleen Falciano denied that decedent executed the contract. As an affirmative defense it is alleged that petitioners unilaterally altered the purchase price in the contract by eradicating

an original figure and substituting "\$100,000" in its place. Kathleen Falciano raises as an additional affirmative defense that petitioners failed to sign and deliver the contract. Kathleen Falciano's answer further asserts a counterclaim for rent against co-administratrix Patricia Skrynecki in her individual capacity.

During the pendency of this proceeding and subsequent to joinder of issue petitioners signed the contract and delivered it to the attorney for Patricia Skrynecki with a \$10,000 down payment which has been deposited in escrow.

Section J of the Rider to the contract of sale provides "This contract shall not be deemed an offer and shall not be binding on the seller until seller shall have delivered to purchaser's attorney a fully executed copy of this contract." Even if the instrument were to be considered an offer to sell, acceptance of an offer is a prerequisite to the formation of a contract (*Barber v Greene Co. v M.F. Dollard, Jr., Inc.*, 239 App Div 655 [3d Dept 1934], *affd* 267 NY 545 [1935]). Where the death of the offeror precedes acceptance the contract cannot be finalized (*De Kovessey v Coronet Properties Co.*, 69 NY2d 448 [1987]; 1 Williston, Contracts [Lord] 5:19 [4th ed. 2007]).

The Statute of Frauds does not require an acceptance to be in writing (GOL 5-703[3]; *Mor v Fastow*, 32 AD3d 419 [2d Dept 2006]). Generally, where real property is the subject of a written contract acceptance can be verbal (*Tymon v Linoki*, 16 NY2d 293 [1965]); *see also Morton's of Chicago/Great Neck LLC v Crab House, Inc.*, 297 AD2d 335 [2d Dept 2002]). However, an acceptance, to conclude an agreement, must in every respect meet and correspond with the offer (*Barber v Greene Co. v M.F. Dollard, Jr., Inc.*, 239 App Div 655 [3d Dept 1934] *affd* 267 NY 545 [1935]; *Willis v Ronan*, 218 AD2d 794 [2d Dept 1995]; *Roer v Cross Country Medical Center Corp.*, 83 AD2d 861 [2d Dept 1981]).

Where the proposed contract requires execution and delivery by the purchasers the execution and delivery are conditions precedent to formation of the contract (*Brois v DeLuca*, 154 AD2d 417 [2d Dept 1989]; *Felipe v 2820 West 36th Street Realty Corp.*, 20 AD3d 503; [2d Dept 2005]). Here, petitioners did not comply with the conditions precedent prior to the death of the decedent.

Respondent Kathleen Falciano does not cross-move for an order granting summary judgment on behalf of the estate. However, on one party's motion for summary judgment, the court can search the record and grant summary judgment to a non-moving party (CPLR 3212[b]; *Preferred Mortgage Brokers, Inc. v. Byfield*, 282 AD2d 589 [2d Dept 2001]; *Bartley v Accu-Glo Elec. Corp.*, 272 AD2d 352 [2d Dept 2000]). On the issue of validity of the contract, summary judgment is granted to the estate.

Title to the subject real property descended by operation of law to the distributees of the estate as tenants in common (*Waxson Realty Corp. v Rothschild*, 255 NY 332 [1931]; *Kraker v Roll*, 100 AD2d 424 [2d Dept 1984]). The issue concerning payment of rent following decedent's death is therefore a dispute between living persons and not within the jurisdiction of this court.

Accordingly, petitioners' motion for summary judgment is denied. The contract is invalid and unenforceable and summary judgment is granted to the estate. The court declines to entertain the counterclaim, on jurisdictional grounds.

Settle order.

Dated: March 18, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court

SAVED OLD LANGUAGE

The rider provides at Section A:

“The down payment shall be held in escrow by the office of John T. Roesch, Esq. in IOLA account ...”

The rider provides at Section J:

“This contract shall not be deemed an offer and shall not be binding on the seller until seller shall have delivered to purchaser’s attorney a fully executed copy of this contract.”

Petitioners allege that decedent signed the contract and rider. Petitioner testified at an examination before trial that she received the contract from decedent in the mail. She further testified that it was not executed by petitioners nor was it delivered to decedent or any other person.

In their answer, respondents deny that decedent executed the contract. As an affirmative defense, respondents allege that petitioners unilaterally altered the purchase price in the contract by eradicating the original number and substituting \$100,000 in its place.

Respondents raise as an additional affirmative defense the failure of petitioners to sign the contract and deliver the contract. Further, respondents counterclaim for the rental value of the premises following decedent’s death.

Petitioners argue that the contract complies with the requirements of the statute of frauds (GOL 5-703) and is therefore a valid and enforceable contract.

).