

Matter of Farquharson

2009 NY Slip Op 33490(U)

June 18, 2009

Surrogate's Court, Bronx County

Docket Number: File No. XXXXX

Judge: Lee L. Holzman

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June 18, 2009

ESTATE OF CLAYTON FARQUHARSON, Deceased

In this proceeding by one of the decedent's two sons seeking, inter alia, to revoke the limited letters of administration that issued to the decedent's daughter, the petitioning son now moves for an order revoking the limited letters that issued to the administratrix based on her alleged mismanagement of realty belonging to the estate and violation of an order dated November 3, 2008, and granting related relief (see Matter of Farquharson, NYLJ, Nov. 7, 2008, at 36, col 2). The administratrix opposes the motion, asserting there is no basis to grant the motion.

The decedent died on May 6, 2006. His distributees are the administratrix and two sons, one of whom is the petitioner. At the time of his death, the decedent owned real property located in the Bronx, which was then the subject of a foreclosure action (see Matter of Farquharson, NYLJ, Aug. 20, 2008, at 34, col 5). The administratrix and her husband refinanced the property by obtaining a mortgage and now hold title to the property as tenants by the entirety. They also live at the property.

The genesis of the son's revocation proceeding was the administratrix' underlying application for letters of administration limited by SCPA 702 (1), wherein she represented that the sole asset of the estate was a cause of action and failed to list the Bronx property as an estate asset. Thereafter, the parties entered into a stipulation on the record in open court which was embodied in a decision and order dated November 3, 2008 providing, inter alia, that: (1) the limited letters of administration that issued to the administratrix would be enlarged to include the Bronx property and amended so they were subject to SCPA 805 (3) with respect to the disposition of that realty; (2) the administratrix was to offer the realty for sale by a broker acceptable to both parties and accept the best offer in excess of \$400,000, except that she was to have a right of first refusal to match any such offer on identical terms; (3) upon the sale of the realty, if there were sufficient assets after paying closing costs and no outstanding debts or obligations owed to creditors having priority, the sum of \$15,000 could be distributed from the proceeds of sale to each of the three distributees, for a total of \$45,000; and, (4) otherwise, the sale proceeds or the balance thereof were to be held in an interest-bearing escrow account in the names of the daughter as administratrix and her attorney until all interested parties consented to further distribution or the further order of the court (see Matter of Farquharson, NYLJ, Nov. 7, 2008, at 36, col 2).

Frustrated with the administratrix' efforts or lack thereof to sell the property, the son previously moved for various relief; however, that

motion was withdrawn and replaced by the instant supplemental motion (see Matter of Farquharson, April 1, 2009, at 37, col 2). The son's supplemental motion incorporates by reference the requests for relief in his original motion. Based upon correspondence between his attorney and that of the administratrix, the son contends that the administratrix refused to accept the exclusive agency listing he proposed, she never retained any broker to sell the premises, and she continues to enjoy the use of the premises without making any distributions and advised him that foreclosure is imminent because she is unable to pay the mortgage.

As a result, the son seeks an order: (1) granting his petition to revoke the limited letters that issued to the administratrix based upon her failure to comply with the decision and order dated November 3, 2008 and her misrepresentation of her financial ability to pay all mortgage and other expenses on the property, and the issuance of limited letters of administration to himself; (2) modifying the order dated November 3, 2008 to change the sales price of the property from \$400,000 to fair market value, to provide that all sales proceeds are to be held in escrow by his attorney, and to eliminate the preliminary \$15,000 distribution to the administratrix and other distributees from the proceeds of sale; (3) directing the administratrix to turn over the keys to the premises, grant access to the premises for a broker retained by him to sell the premises and vacate the premises four weeks prior to any closing; (4) directing the administratrix to file and serve an account which includes all funds she received upon refinancing the property;

(5) directing the administratrix to pay all monthly mortgage and other expenses on the property until it is sold; and, (6) sanctioning the administratrix for her willful failure to comply with the order dated November 3, 2008 and for her misrepresentations as to her financial status.

Based only on the affirmation of her attorney and three annexed exhibits, the administratrix opposes the motion contending that: (1) she and her husband, apparently a pastor, are "committed" to selling the realty as evidenced by the "for sale" sign on their property, their word-of-mouth advertising, and their provision of information to "many organizations like her church;" (2) in 2009, only one property in the neighborhood sold for \$380,000, while all others sold for \$330,000 to \$300,000 or less; (3) to date, the only offers for the property at issue were for \$300,000 or below; (4) due to the prior refinancing, the amount due on the mortgage on the property is over \$310,000, and there is another \$30,000 owed in accrued mortgage payments and fees, so she listed the property at a negotiable price of \$380,000; (5) there is no basis for an accounting, as she provided all documents in response to discovery demands, the property has not appreciated in value due to the economic downturn, and the two sons never invested in the property; (6) the use of an exclusive broker would be counterproductive to the goal of showing the property to as many buyers as possible, and would result in a higher commission than that charged by other brokers; and, (7) therefore, her goal is to refinance the property and extract equity to make distributions to the two sons. In support, she annexes to her

attorney's affirmation a list of sales of alleged comparable neighboring properties, a contract of sale for a different, nearby property, and a May 3, 2009 facsimile from a realty company indicating a 3% commission would be imposed by that company for the sale of the property pursuant to an open listing. In reply, the son's attorney notes, inter alia, that the administratrix failed to come forward with any documented efforts to sell the premises through a broker, and he argues that her violation of the order dated November 3, 2008 warrants the grant of his motion and petition.

Where letters are sought to be revoked on the ground of waste or impropriety or mismanagement, a movant must demonstrate that the estate suffered harm and that the respondent's alleged misconduct was such that it establishes her unfitness to administer the estate (see SCPA 711 [2]; Matter of Jordan, 52 AD3d 328 [2008]). Where revocation is sought for failure to obey a court order, a movant must demonstrate that the fiduciary wilfully refused or without good cause neglected to obey any lawful direction of the court contained in any decree or order (see SCPA 711 [3]; Matter of Chase, 44 AD3d 1180 [2007]).

Here, the administratrix concedes, through her counsel, that she is \$30,000 in arrears on the mortgage and other expenses for the property. Moreover, although more than seven months have now passed since the issuance of the order dated November 3, 2008, the administratrix' papers fail to demonstrate that she has listed the property with any broker at all, let alone one agreeable to the movant. Although the administratrix claims

that she intends to refinance the property to make distributions to her brothers, she has failed to do so during these past seven months. Finally, although the administratrix claims that there were offers on the property of \$300,000 or less, she failed to submit any proof in support of this allegation in the affirmation of her attorney. As a result, although the administratrix indicates that she intends to exercise her best efforts to sell the property or refinance it, her opposition to the motion is devoid of any documentary evidence demonstrating the exercise of such efforts to date. If, in fact, her intentions are good this is not a valid excuse for the failure of the administration to honor the terms of a stipulation or to comply with a court order.

Based upon this state of the record, the movant has demonstrated that the administratrix neglected, without good cause, to comply with the order dated November 3, 2008 by listing the property with a broker mutually agreeable to the parties, and is unfit to administer the estate as she failed to either pay reasonable use and occupancy or maintain the property by making mortgage and other payments (see SCPA 711 [2], [3]; Matter of McPherson, 34 AD3d 813 [2006]; Matter of Berry, NYLJ, Dec. 17, 2007, at 29, col 3). Accordingly, there is a basis to revoke the limited letters of administration that issued to the administratrix, as enlarged and amended by the order dated November 3, 2008. Furthermore, the administratrix has failed to set forth any valid reason to support her contention that she should not be required to account.

Accordingly, the former administratrix shall file her account, a petition for its judicial settlement, and all of the papers required to obtain the issuance of a citation in the accounting proceeding within 45 days of personal service upon her of a certified copy of the decree to be entered in this proceeding. The former administratrix shall then, without delay, cause the citation to be served upon all parties required to be served in an accounting proceeding pursuant to SCPA 2210 and appear before the court from time to time as required for the purpose of the settlement of her account. The account to be filed by the former administratrix shall include information concerning the payoff of the former mortgage that existed at the time of the decedent's death and the refinancing of the premises to date.

All parties now agree that it may not be possible to sell the property at the \$400,000 price previously stipulated to and ordered. Therefore, the prior order dated November 3, 2008 is hereby modified to grant the former administratrix until August 17, 2009 to either enter into a contract of sale for the property at a fair market value acceptable to all parties or established to the satisfaction of the court, or obtain sufficient financing to purchase the interests of the two sons on terms acceptable to them. Should the administratrix fail to so contract or refinance and purchase the interests of the two sons in the realty by August 17, 2009, a decree may be settled hereon at the expiration of that time period granting all branches of the son's motion, other than the branch of the motion seeking to impose sanctions on the administratrix, and granting the son's underlying petition.

This decision constitutes the order of the court with respect to the modification of the sale price for the realty and the, in effect, stay until August 17, 2009 of the determination that the letters issued to the administratrix shall be revoked and that letters of administration, d.b.n., subject to the provisions of SCPA 702 (1) and 805 (3) may then issue to the petitioner upon his filing an oath and designation. The Chief Clerk shall mail a copy of this decision and order to counsel for the former administratrix and the movant.

Proceed accordingly and settle decree.



SURROGATE