

Matter of Brower (Brower)
2011 NY Slip Op 31358(U)
May 24, 2011
Sur Ct, Nassau County
Docket Number: 2010-362611
Judge: III., Edward W. McCarty
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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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 In the Matter of the Petition of Mitchell Brower, as Trustee
 of the Brower Family Trust f/b/o Mitchell Brower,
 Matthew Brower and Maynard Brower under the Estate of

File No. 2010-362611

EDWARD M. BROWER,

Dec. No. 27055

Deceased.

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Before the court is a petition commenced by the trustee of the Brower Family Trust to recover possession of real property and for related relief including a direction that the respondent Maynard Brower be directed to pay back rent for the period of his tenancy in the subject property. The subject property is located in Woodmere, Nassau County, New York. The petitioner Mitchell Brower is the trustee and one of the three remainder beneficiaries, along with his two brothers, Matthew Brower and Maynard Brower, of the Brower Family Trust. The trust term was for the life of the parties' father, Edward Brower. The Brower Family Trust instrument, dated March 30, 2004, provides that upon the death of Edward Brower, "the Trustee shall sell the Woodmere Residence and the net proceeds of such sale shall be distributed" one-third outright to Mitchell Brower, and one-third each to Matthew and Maynard Brower, but their shares are to be held in separate trusts for their respective benefits with Mitchell as trustee of those trusts.

Edward Brower died May 11, 2010.

The instant petition was filed August 11, 2010, and alleges that Maynard's refusal to vacate the premises and remove the 16 cats he houses there is an obstruction to attempts to show the home to potential buyers. In addition to the Brower Family Trust, a separate instrument, known as the Family Agreement, dated April 21, 2008, contains additional terms with regard to the use and occupancy of the subject premises, but it does not by its terms attempt to modify or

revoke the Brower Family Trust and the subject property remains titled in the name of the trust. The Family Agreement provides that the property is to be sold within six months of Edward's death and that each of the three brothers has a right of first refusal to purchase the property from his brothers before it is offered to third parties. Also, if any of the three reside at the premises, they are supposed to pay fair market rent to the others during the period of occupancy prior to sale. The petition alleges that Maynard remains at the premises but has not ever paid rent to either of his brothers for his use of the premises; his answer does not deny this allegation.

Maynard Brower has filed an answer to the trustee's petition in which he admits some allegations, denies others, and denies knowledge or information sufficient to form a belief as to others. His answer also contains what he denominates as six separate and complete defenses to the petition.

The first separate and complete defense is that this court does not have subject matter jurisdiction of this proceeding because it involves a lifetime trust rather than the administration of a decedent's estate. The subject lifetime trust has assets in this county. Therefore, the Surrogate's Court has jurisdiction of this proceeding and proper venue for the proceeding is in this county as the property is situate here (SCPA 207 [1]).

The second separate and complete defense avers that the Family Agreement is of no force and effect in determining the rights of the beneficiaries of the Brower Family Trust and the petitioner has therefore failed to state a cause of action upon which relief can be granted. Although the Family Agreement is mentioned in petitioner's papers, it is primarily upon the Brower Family Trust instrument that the petitioner bases his relief. Although not denominating as a motion to dismiss for failure to state a cause of action (CPLR 3211 [a] [7]), that is essentially

the relief sought by respondent. In considering such an application, the court need not concern itself with whether or not the petitioner has stated a cause of action, but rather whether he has a cause of action (Weinstein-Korn-Miller, NY Civ Prac, CPLR 3211.29). Clearly, the trustee of a lifetime trust charged with selling the real property of the trust has a cause of action for the eviction of a person in possession of the property, even if that person is a beneficiary of the trust (EPTL 11-1.1 [b] [5] [A], [B]; *Matter of Wellings*, NYLJ, Apr. 26, 1989 at 26, col 6 [Sur Ct, Suffolk County]).

The third separate and complete defense claims that pursuant to the terms of the trust, any beneficiary may reside at the Woodmere residence until it is sold. This provision is not in the trust, but rather in the Family Agreement which, as pointed out in the immediately preceding paragraph, Maynard argues is of no force or effect in determining the rights of the beneficiaries of the Brower Family Trust. Nevertheless,

“a fiduciary has a superior right to that of a beneficiary ... to possess and manage the decedent's realty so that [the fiduciary] may sell the property in accordance with the statutory authority with which estate fiduciaries are imbued, as well as to collect the rentals thereof, and otherwise preserve the asset and make it productive to all those with a beneficial interest therein” (*Matter of Pastorelli*, NYLJ, Nov. 21, 2002 at 25, col 5 [Sur. Ct. Suffolk County], and cases cited therein).

The fourth separate and complete defense maintains that Maynard, as well as his brothers, has a right of first refusal to purchase the property before it is sold to a third party. Again, this provision is in the Family Agreement, not the trust instrument, and while it was signed by Mitchell in his individual capacity, the Brower Family Trust is not a party to the Family

Agreement. Nonetheless, Mitchell, the petitioner, avers that he invited an offer of purchase from Maynard but Maynard indicated he was not interested in purchasing the property, an allegation which Maynard denies. In any event, having a right of first refusal is not the equivalent of a power to deny the trustee the right to market the property for sale. Once an offer to purchase the property has been made, the petitioner is directed to offer to Maynard and Matthew the right to purchase the property on the same terms as those contained in the proposed contract of sale.

The fifth separate and complete defense avers that Maynard has performed all of his obligations under the trust agreement and the trustee therefore lacks standing to bring the instant proceeding. As indicated above, the trustee has the authority to gain possession of the decedent's real property and sell it at private or public sale as he sees fit (EPTL 11-1.1 [b] [5] [A], [B]).

Finally, Maynard alleges, in essence, that Mitchell's commencement of the instant proceeding is evidence of Mitchell's breach of his duty of undivided loyalty to the beneficiaries of the trust and that he should therefore be removed as trustee. An application to remove a trustee is a plenary proceeding which must be commenced by a separate petition (SCPA 711). The court notes that the Brower Family Trust contains a direction that the property be sold after the death of Edward Brower and the net proceeds of sale be distributed in accordance with the terms of the trust. Mitchell has an obligation to all the beneficiaries, not just Maynard, to obey the law applicable to the trust and the express provisions of the trust itself. Mitchell would be violating his obligation to the trust and its beneficiaries if he were to permit Maynard to frustrate his attempts to sell the trust property by refusing to vacate the premises so that it can be readied for sale.

Accordingly, the petition is granted to the extent that an order may be entered granting possession of the subject property to the petitioner and the issuance of a warrant of eviction for the removal of Maynard Brower from the subject premises. The prayer for the imposition of back rent will require a hearing to determine the fair market rental value of the property. This matter will appear on the court's calendar for conference on April 6, 2011 at 9:30 a.m. to schedule the hearing.

Settle order.

Dated: March 24, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court