

Matter of Fleisher

2015 NY Slip Op 31909(U)

October 14, 2015

Surrogate's Court, New York County

Docket Number: 2012-4187/A

Judge: Rita M. Mella

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: October 14, 2015

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SCPA 1809 Petition of Adrian East to Determine the
Validity of a Claim, Estate of

HAROLD FLEISHER,

DECISION

File No.: 2012-4187/A

Deceased.

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M E L L A, S.:

The court considered the following submissions:

	<u>Date Filed</u>
1. Notice of Motion for Summary Judgment	April 3, 2015
2. Affirmation of Victor A. Carr in Support of Motion	April 3, 2015
3. Notice of Cross-Motion for Summary Judgment	May 14, 2015
4. Affirmation of Alak Shah in Support of Cross-Motion	May 14, 2105
5. Memorandum of Law in Support of Cross-Motion	May 14, 2015
6. Affirmation of Victor A. Carr in Reply and in Opposition to Cross-Motion	May 28, 2015
7. Affidavit sworn to on May 22, 2015 by Adrian East	May 28, 2015
8. Further Memorandum of Law in Support of Cross-Motion	June 10, 2015

In a proceeding commenced by Adrian East to determine the validity of her claims against Herbert Fleisher, administrator of the estate of Harold Fleisher (*see* SCPA 1809), petitioner has moved, and respondent has cross-moved, for summary determination (*see* CPLR 3212).¹ Ms. East, the surviving joint tenant of certain real property of which decedent was the co-tenant, contends that the outstanding balances on two Home Equity Lines of Credit ("HELOC") secured by such real property represent the deceased tenant's personal obligations and must be satisfied by the fiduciary of his estate. By contrast, the fiduciary of decedent's estate argues that, upon

¹ Petitioner's allegations set forth in her petition are somewhat inconsistent with those set forth in her motion papers. This decision is premised on allegations set forth in the motions.

decedent's death, Ms. East received the real property subject to any encumbrance that ran with it.²

Harold Fleisher died intestate on November 2, 2012, survived by his brother, Herbert Fleisher, as his sole distributee. On December 11, 2012, letters of administration issued to Herbert Fleisher.³

The dispute concerns encumbrances on real property, located at 225 Old Northwest Road, in East Hampton, New York, which decedent and Ms. East purchased on May 31, 2002 for \$1,030,000 as joint tenants. Ms. East avers that she "contributed approximately \$55,000 toward the purchase of the property." The purchase was an investment, from which decedent and Ms. East derived rental income.

In December 2007, decedent obtained a \$330,000 HELOC from Citibank, N.A., and used such sum to satisfy an existing lien on the real property. In February 2008, a \$250,000 HELOC was obtained from Wells Fargo Bank, N.A. Ms. East testified at her deposition in this proceeding that she and decedent had divided the proceeds of the \$250,000 Wells Fargo Bank, N.A., HELOC between themselves, equally. Although there is a purported dispute about whether Ms. East was a borrower along with decedent on the Wells Fargo Bank, N.A., HELOC, it is undisputed that Ms. East, along with decedent, signed the Wells Fargo Bank, N.A., HELOC

² The claim appended to the petition in the underlying proceeding refers, in addition, to a claim for the sum of \$1,486.94 plus interest; however, this claim is not mentioned in the petition and, therefore, is not before the court.

³ The letters were amended on December 18, 2014 to authorize collection of an increased amount.

mortgage instrument. Indeed, Ms. East averred, in an affidavit sworn to on May 22, 2015 — with respect to each of the two HELOCs — that: “because Harold and I were both on the deed for the house, the mortgage had to be signed by both of us.” Ms. East also testified at her deposition in this proceeding that she reported on her personal income tax returns 50% of the income generated by the real property and 50% of the deductions, including the interest deductions on all the mortgages against the real property.

EPTL 3-3.6 (a) provides:

“Where any property, subject, at the time of decedent’s death, to any lien, security interest or other charge . . . is specifically disposed of by will or passes to a distributee, . . . the personal representative is not responsible for the satisfaction of such encumbrance out of the property of the decedent’s estate”

Margaret V. Turano explains in the Practice Commentaries to EPTL 3-3.6: “Where the decedent owned the property jointly with another at his death, this statute does not expressly apply, but the courts treat the mortgage as running with the land” (Margaret V. Turano, Practice Commentaries, McKinney’s Cons Laws of NY, Book 17B, EPTL 3-3.6, at 175 [citations omitted]). As noted decades ago (in connection with a tenancy by the entirety): “it would seem that equity and good sense would require that anyone receiving the entire title to property, whether by descent, devise or as a surviving tenant . . . should take the property in the condition in which it exists at the date of the death of the person who makes their title complete” (*Matter of Ryan*, 44 Misc 2d 477, 478 [Sur Ct, Broome County 1964]). Were it otherwise, the consequence to a mortgagee — of the death of a mortgagor whose sole asset was the mortgaged real property — would be untenable.

Petitioner’s motion for summary determination is denied, and respondent’s cross-motion for summary determination is granted (*see Matter of Mischler*, 30 AD3d 859 [3d Dept 2006];

Matter of Griffith, 183 Misc 2d 210 [Sur Ct, Nassau County 2000]). Accordingly, the petition is dismissed. The balance of the relief requested in the cross-motion is denied.

This decision constitutes the order of the court.

Dated: October 14, 2015

remf
S U R R O G A T E