

Matter of Flender

2017 NY Slip Op 31146(U)

May 30, 2017

Surrogate's Court, New York County

Docket Number: 2012/2495 D

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Application of Co-Executors
of the Will of

New York County Surrogate's Court
Date: MAY 30, 2017

NORMA F. FLENDER,

File No. 2012/2495 D

Deceased,

For Possession of Real Property and a Final
Judgment of Eviction.

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ANDERSON, S.

The co-executors, JP Morgan Chase Bank, N.A. ("JP Morgan") and decedent's son, Charles (collectively, "petitioners"), move for summary judgment in this proceeding to obtain possession of real property (the "premises") owned by the estate of Norma F. Flender ("decedent"). Specifically, petitioners ask this court to issue a warrant of eviction to remove decedent's daughter, Sylvia ("Sylvia" or "objectant"), and her companion from the premises (petitioners' requests for additional relief were withdrawn without prejudice). Although Sylvia filed objections to the petition, she did not respond to the instant motion. Sylvia's companion was cited but did not appear in this proceeding.

Decedent died on June 14, 2012, survived by Charles and Sylvia. Under decedent's will, which contains several cash bequests, Charles and Sylvia are each bequeathed \$50,000, and they and their respective issue are the beneficiaries of individual pre-residuary trusts, of which Charles and JP Morgan are the designated co-trustees, having "sole and absolute" discretion to distribute income and principal to any beneficiary of either trust. Charles and Sylvia are also the sole beneficiaries of the residuary estate. The will was admitted to probate on July 19, 2012.

The major assets of decedent's estate are the subject premises (a house in East Hampton NY), and her cooperative apartment in Manhattan, valued at about \$1.6 million at decedent's

death. Article FIFTH of decedent's will directs petitioners to sell all decedent's residential property, but provides that, if Charles or Sylvia wishes to purchase either of the properties, he or she may do so at a price equal to the property's valuation "for federal estate tax purposes." Such purchase is conditioned upon: (1) the delivery to the fiduciaries of a written notice of election to purchase within six months after the issuance of the probate decree and (2) completion of the sale within nine months after decedent's death, *i.e.*, by March 14, 2013. The premises were valued at \$2.15 million on the federal estate tax return.

In late 2011, Sylvia moved into the premises pursuant to what petitioners refer to as an "oral license" from decedent. In September 2012, two months after the will was admitted to probate, JP Morgan and Sylvia agreed that she could continue to live in the house in exchange for her payment of \$3,000 per month plus utilities. However, Sylvia refused to sign a written agreement to that effect and never made any monthly payments. She continues to live in the house with her companion and their two minor children.

On February 8, 2013, petitioners served Sylvia and her companion (collectively, "respondents") with a 10-day notice to quit pursuant to § 713 of NY's Real Property Actions and Proceedings Law ("RPAPL"). After respondents refused to leave the premises, petitioners brought an eviction proceeding in the Justice Court of the Town of East Hampton, Suffolk County.

Thereafter, petitioners and respondents signed a stipulation of settlement on April 8, 2013, by which respondents agreed to vacate the premises within 15 days and consented to the entry of a judgment of possession and a warrant of eviction against them if they failed to do so. Sylvia remained in the house beyond the 15-day deadline and, in May 2013, she moved for a stay of eviction. The Justice Court denied her application on May 16, 2013, and Sylvia

appealed. On December 23, 2014, the Supreme Court, Appellate Term for the 9th & 10th Judicial Districts, reversed and granted a stay of eviction, noting Sylvia's right under the will to purchase the premises and positing that Charles "had frustrated that right by failing to disburse her share of the estate to her." The Appellate Term remitted the proceeding to the Justice Court for entry of a final judgment dismissing the petition without prejudice, having determined that the Surrogate's Court was the proper forum for adjudication of the matter.

The executors assert that they are entitled to the premises under the terms of both the will and the stipulation of settlement, which they contend is valid and enforceable. Sylvia objects, contending that she notified petitioners of her intention to purchase the premises within the will's six-month deadline, but that petitioners had "frustrated" her intent to proceed with the purchase by refusing "to facilitate the sale." Petitioners allege that Sylvia's failure to purchase the premises was due to her inability or unwillingness to secure the funds for the purchase price. They further argue that the distributions to which Sylvia is entitled under decedent's will would have been insufficient to enable her to purchase the premises.

Legal Standard on a Motion for Summary Judgment

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to show the absence of any disputed material facts (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Westhill Exports, Ltd v Pope*, 12 NY2d 491 [1963]). Since a summary ruling eliminates an opposing party's recourse to a trial, summary relief is to be regarded as a "drastic measure," with all reasonable inferences to be drawn in favor of the party opposing the motion (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]). The movant has the initial burden to submit admissible evidence which establishes a prima facie case for

dismissal of objections (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). If the movant is successful, the burden then shifts to the party opposing summary judgment to demonstrate a genuine issue of material fact requiring trial (*id.*). The parties' respective proofs must consist of more than mere conjecture or unsubstantiated allegations (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Matter of Molnar*, 76 Misc 2d 126 [Sur Ct, NY County 1973]).

Analysis

Certain matters are undisputed. Objectant, on the one hand, does not dispute that the estate owns the premises, and that the executors are entitled to evict her absent her election to purchase the premises for \$2.15 million pursuant to Article FIFTH of decedent's will.

Petitioners, on the other hand, do not dispute that objectant timely expressed an intent to acquire the premises in compliance with Article FIFTH.

Petitioners allege that objectant lacked the requisite funds to purchase the premises, thus rendering her request to do so ineffective. Liberally construing objectant's pleading, as required by CPLR § 3026, her position is that she could afford to purchase the premises-- even if only by using her inheritance from decedent-- but was prevented from doing so by petitioners' refusal to transfer the premises to her as either (1) a partial or full distribution of her half share of the residuary or (2) a good-faith exercise of their discretion as trustees of the aforementioned trust for the benefit of her and her issue.

First, the court rejects petitioners' argument that, by signing the stipulation of settlement in the civil court eviction proceeding, objectant waived any right to the premises that she had under the will. Objectant's concession in the stipulation to vacate the premises does not constitute a waiver of her ultimate claim to the premises as an estate beneficiary that she now asserts in her present pleading.

The court must next consider whether petitioners have made a prima facie case for the proposition that objectant's interest in the estate would not have been large enough to support a distribution of the premises to objectant as part or all of her interest in the distributable estate. The evidence in the record establishes that: (i) Charles and Sylvia each received more than \$500,000 from decedent's IRA, and (ii) decedent's gross estate was valued at \$5,558,427 on the estate tax return, which includes the value of decedent's IRA (\$1,010,550) and the pre-residuary cash bequests to individuals other than Charles and Sylvia (\$35,000). Petitioners have not supplied sufficient information for the court to determine the extent to which administration expenses and debts reduced the distributable estate; thus, Sylvia's one-half share of the estate could have been sufficient to enable her to purchase the premises for \$2.15 million.

Moreover, as noted above, the will establishes pre-residuary trusts for the benefit of Charles and Sylvia and their issue, which were to be funded with an amount equal to decedent's "unused GST exemption," defined as the maximum generation-skipping-tax exemption available at decedent's death reduced by the amount of such exemption that she or her executors had allocated to other property. Petitioners' filings are silent as to whether decedent had previously used part, all, or none of the generation-skipping-tax exemption which, under the will's provisions, is the critical factor in calculating whether some or all of the distributable estate passes to the trusts. The court therefore cannot determine the extent to which the distributable estate passes to a trust for the benefit of objectant and her issue or, instead, to objectant outright as one of the two residuary beneficiaries. In the absence of such information from petitioners, the court must consider the facts in the light most favorable to objectant as the nonmoving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]) and assume that objectant may be entitled to an outright distribution of over \$2 million. Furthermore, even if objectant's entire

interest in the estate (excluding the specific bequests to her) passed to the trust for her and her issue's benefit, petitioners' motion papers do not establish whether their refusal to transfer the premises to her was based upon either (a) the insufficiency of the value of her interest in the estate when coupled with her other available funds or (b) a good-faith determination that such transfer would not be in the best interests of the trust beneficiaries.

Accordingly, the executors have failed to make a prima facie case for summary dismissal of the objections and their motion for summary judgment is denied.

This matter is scheduled for a hearing on [June 20, 2017].

This decision constitutes the order of the court.

Dated: *May 30*, 2017



SURROGATE