

Parker v Bernard
2017 NY Slip Op 31734(U)
July 26, 2017
Supreme Court, Queens County
Docket Number: 713704/16
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR
Justice

IAS Part 15

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RITA PARKER, as Guardian of Person and
Property of Edna Bernard,

Index No.: 713704/16

Plaintiff(s),

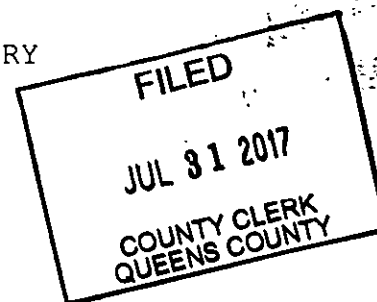
Motion Date: 5/2/17

- and -

Motion Cal. No.: 120

Motion Seq. No: 3

MICHELLE T. BERNARD, COTENANT AND ANY
AND ALL AND ALL OTHER PERSONS WHO MAY BE
DEVISEES OF DISTRIBUTEES OF SAID MICHELLE
T. BERNARD, COTENANT, ALL OF WHOM AND
WHOSE PLACES OF RESIDENCE ARE UNKNOWN TO
PLAINTIFF AND CANNOT AFTER DILIGENT INQUIRY
BE ASCERTAINED, AND IF ANY OF THE
ABOVE-MENTIONED DEFENDANTS BE DEAD, THEN
THEIR DISTRIBUTEES, DEVISEES, EXECUTORS,
TRUSTEES, ADMINISTRATORS AND SUCCESSORS
IN INTEREST,



Defendant(s).

-----x
The following papers numbered 1 - 7 read on this motion by the
plaintiff for an order issuing a declaratory judgment that
defendant Michelle T. Bernard is deceased, extinguishing her
interest in and permitting the sale of the subject property.

	<u>Papers Numbered</u>
Order to Show Cause-Affirmation-Exhibits-Service.....	1 - 4
Affidavit-Exhibits-Service.....	5 - 7

Upon the foregoing papers it is **ORDERED** that the motion is
decided as follows:

In 2014, Rita Parker petitioned the Supreme Court of the State
of New York, Westchester County to be appointed as Guardian of the
person and property of Edna Bernard, an Incapacitated Person. On

November 25 2014, Justice J. Emmett Murphy, J.S.C. granted the petition and appointed Rita Parker ("Parker" or "plaintiff")) as Guardian of the person and property of Edna Bernard, an Incapacitated Person ("Guardian"). By the filing of a summons and complaint, dated September 17, 2016, Parker, as Guardian, sought authorization from Justice Murphy for the sale of the property located at 128-55 233rd Street, Laurelton, New York. It is uncontested that the subject property is owned by Edna Bernard and defendant Michelle T. Bernard, her daughter, as tenants in common. On October 21, 2016, Justice Murphy appointed Robert A. Korren, Esq., as *Guardian Ad Litem* for defendant Michelle T. Bernard.

Plaintiff commenced this action on November 15, 2016 by the electronic filing of a summons and complaint. In her complaint, plaintiff asserts that she is the sister of Edna Bernard and that defendant Michelle T. Bernard is Edna Bernard's daughter. Plaintiff further alleges that Edna Bernard and defendant Michelle T. Bernard own the property located at 128-55 233rd Street, Laurelton, New York as tenants in common.

With the instant application, plaintiff seeks an order declaring defendant Michelle T. Bernard to be deceased and extinguishing her interests in the subject property. In the complaint, plaintiff asserts that defendant Michelle T. Bernard has been deceased for three years or more successive years. Estates, Powers and Trusts Law ("EPTL") §2-1.7, gives this court the authority to declare a person dead where it can be demonstrated, by clear and convincing evidence, that the person has been absent for a period of at least three years. In order to prevail on such an application, a movant must demonstrate that the person has been searched for using diligent means, that the person has not been seen nor heard from for at least three consecutive years and that their absence cannot be satisfactorily explained (see, EPTL §2-1.7). Once a ruling has been issued pursuant to EPTL §2-1.7, that a missing person is presumed dead, an estate may be opened to resolve the affairs of the deceased.

In support of the instant application, plaintiff submits a report prepared by Chris Drew, a licensed private investigator hired by the plaintiff. In his report, Mr. Drew states that he received the assignment to locate defendant Michelle T. Bernard on February 14, 2017, that he conducted a LexisNexis search and found several possible addresses for defendant Michelle T. Bernard. In his report, Mr. Drew also stated that, in 2015, defendant Michelle T. Bernard drove a 2005 Toyota Camry vehicle, which amassed several parking tickets, and that her whereabouts are currently unknown. Also submitted in response to this application is the affidavit of Robert A. Korren, Esq, the attorney appointed as *Guardian ad Litem* for Michelle T. Bernard in the Westchester proceeding. In his affidavit, Mr. Korren states that he conducted an online search for Michelle T. Bernard and that she has not had

any contact with her family, nor made any online postings since early 2015.

As previously stated, EPTL §2-1.7 gives this court the authority to declare a person dead where the person has been absent for a period of at least three consecutive years. While plaintiff in this action has submitted proof that Michelle T. Bernard has not been seen or heard from since 2015, plaintiff has failed to prove that she has been absent since at least 2014, the period required to satisfy EPTL §2-1.7.

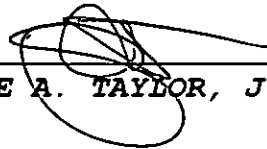
Assuming, *arguendo*, that this plaintiff had satisfied the requirements of EPTL §2-1.7, this court would still be without authority to grant plaintiff all of the relief now sought. After the issuance of a declaration that defendant Michelle T. Bernard is deceased, plaintiff, also seeks an order extinguishing Michelle T. Bernard's interest in the subject property and permitting plaintiff, as Guardian of Edna Bernard, to sell the property and distribute Michelle T. Bernard's portion gained from the sale into the court. However, such a finding made pursuant to the Estates, Powers and Trusts Law would only permit a party to probate a will or to commence a proceeding to distribute the assets of a deceased person who died intestate. A declaration made pursuant to EPTL §2-1.7 would not give this court the authority to direct a sale of the subject property. Thus, even if this court had ruled, pursuant to EPTL §2-1.7, that Michelle T. Bernard is deceased, the plaintiff may have been permitted to commence a proceeding in the Surrogates Court of the State of New York. However, additional steps including, the appointment of an Administrator, the required notification to any potential beneficiaries and debtors of Michelle T. Bernard of her death, and the payment of any court fees would still have been needed before the property can be sold.

As previously stated, plaintiff seeks an order permitting the sale of the subject property. Although plaintiff seeks this relief pursuant to the EPTL, it is the Real Property Actions and Proceedings Law ("RPAPL") which allows for the sale of property co-owned by a missing person to be sold. RPAPL §1211(1) states that where the court has reasonable grounds to find that a missing co-tenant is deceased, the sale of the property by a joint tenant, tenant in common or tenant by the entirety of jointly owned property may be permitted. Pursuant to RPAPL §1211(3), a finding of a reasonable belief may be made upon evidence that the co-tenant has been absent for a period of no less than seven (7) years.

In the instant action, plaintiff has failed to demonstrate that Michelle T. Bernard has been missing for either the three years mandated by EPTL §2-1.7 or for the required seven years mandated by RPAPL §1211. Consequently, plaintiff has failed to

prove that the relief sought is warranted. Accordingly, the instant application is denied in its entirety.

Dated: July 26, 2017



JANICE A. TAYLOR, J.S.C.

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