

<b>Vizzini v Vizzini-Oswald</b>
2018 NY Slip Op 31529(U)
June 28, 2018
Supreme Court, Kings County
Docket Number: 501133/14
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of June, 2018.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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TINA M. VIZZINI, Individually and as Executor of the Estate of Eleonora M. Vizzini, as Co-Trustee of the Eleonora Maria Vizzini Living Trust, as Trustee of the Vizzini Family Trust and as Member of Celluzziele LLC,

Plaintiff,

- against -

Index No. 501133/14

GINA VIZZINI-OSWALD, Individually, as Co-Trustee of the Eleonora Maria Vizzini Living Trust, CHARLES VIZZINI, Individually, as Co-Trustee of the Eleonora Maria Vizzini Living Trust, and CHARLES JOSEPH VIZZINI, Individually and as the Managing Agent of 1618 East 15th Realty LLC,

Defendants.

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The following papers numbered 1 to 10 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-2 3-4 5-7</u>
Opposing Affidavits (Affirmations) _____	<u>8, 10 9</u>
Reply Affidavits (Affirmations) _____	_____

Upon the foregoing papers, plaintiff, Tina M. Vizzini (Tina), individually, and as Executor of the Estate of Eleonora M. Vizzini, as Co-Trustee of the Eleonora Maria Vizzini Living Trust (Living Trust), as Trustee of the Vizzini Family Trust (Family Trust) and as

Member of Celluzziele LLC, moves, by order to show cause (in motion sequence No. 11), for an order: (1) restraining and prohibiting her sister, Gina Vizzini-Oswald (Gina), from accessing and/or occupying the real property at 8015 21st Avenue in Brooklyn (21st Avenue Property), and (2) lifting the stay on the sale of the 21st Avenue Property.

Gina moves, by order to show cause (in motion sequence No. 12), for an order: (1) granting her leave to reargue and renew the court's July 14, 2017 decision and order to the extent that it granted Tina's cross motion for a construction of the Family Trust confirming Tina's authority to sell the 21st Avenue Property free and clear of all interests, including the rights to occupancy by the named trust beneficiaries and, upon granting such leave, denying that branch of Tina's cross motion; (2) directing the joinder of St. Jude Children's Research Hospital (St. Jude) as a necessary party; (3) granting the Family Trust beneficiaries or their representatives a right to inspect the 21st Avenue Property; and (4) enjoining and restraining Tina, her agents, employees and/or representatives or any appointed fiduciary of the Family Trust from taking any action to sell, hypothecate, transfer, encumber or otherwise dispose of the assets of the Family Trust, including but not limited to the 21st Avenue Property, which would alter, effect, terminate or otherwise prevent Gina from exercising her life estate as set forth in the Family Trust.

Douglas Rosenberg, the court-appointed Receiver (Receiver Rosenberg) of the real property at 1618 East 15<sup>th</sup> Street in Brooklyn (15th Street Property), moves, by amended order to show cause (in motion sequence No. 13), for an order: (1) settling and approving his interim accounting for the 15th Street Property for the period of April 7, 2015 through September 20, 2017; (2) authorizing and allowing him to pay himself the sum of \$29,408.13 for his interim commissions for the period of April 7, 2015 through September 20, 2017; and (3) authorizing him to pay his counsel, Michael J. Ficchi, Esq., the sum of \$9,140.00 for interim legal services rendered and anticipated fees for the filing, service, presentment and future court appearances relating to this application.

### *Background*

Eleonora Maria Vizzini (Decedent), who died on August 13, 2012, was survived by her husband, Charles Joseph,<sup>1</sup> and their 3 children, Tina, Gina and Charles Vizzini, Jr. (Charlie). This intra-family dispute involves the management and administration of the 15th Street Property and the 21st Avenue Property under the terms of the Living Trust and Family Trust, respectively.

#### *The 15th Street Property*

Decedent died leaving a single non-probate asset, the 15th Street Property, a 23-unit residential apartment building which is owned by 1618 East 15th Street Realty LLC (1618 LLC). 1618 LLC is the only asset of the Living Trust.

#### *The Living Trust*

Decedent was the Grantor and the Trustee of the Living Trust until her death, after which Tina, Gina and Charlie became the Successor Co-Trustees of the Living Trust.

The Living Trust provides, in relevant part, that “[s]ubsequent to the death of the Grantor . . . such property shall be allocated among the Grantor’s issue who shall be then living, per stirpes . . .” The Living Trust further provides that “[i]f none of the Grantor’s issue shall be then living, such property shall be disposed of as provided in Article 6 hereof.” Article 6 provides, as an “Alternative Disposition,” that “such property shall be paid to ST. JUDE CHILDREN’S RESEARCH HOSPITAL . . .”

#### *The 21st Avenue Property*

Decedent held a life estate in the 21st Avenue Property, a 2-family residence owned by Celluzziele LLC, which is the only asset of the Family Trust. Tina is the managing member of Celluzziele LLC.

#### *The Family Trust*

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<sup>1</sup> Charles Joseph subsequently died on May 30, 2017 during the pendency of this action.

The preamble of the Family Trust provides that Tina is the Grantor and Trustee of the Family Trust “for the benefit of ELEONORA MARIA VIZZINI, as Lifetime Beneficiary . . .”

The Family Trust provides that “[t]he Lifetime Beneficiary shall have the right to the exclusive use and enjoyment of the Trust Premises . . .” and that “the Trustee . . . *may* terminate this trust after the death of the Lifetime Beneficiary . . . at any time and upon such termination, the trust corpus shall be distributed in three equal, per stirpital, shares to” the “named remaindermen,” Tina, Charlie and Gina (emphasis added). The Trust further provides that “[t]he trust shall terminate upon the death of the survivor of the remaindermen . . . or *upon the mutual consent* of the surviving remaindermen which consent shall be in writing . . .” (emphasis added).

The Family Trust also provides that “[u]pon the death of the Lifetime Beneficiary” the remaindermen “shall have the right to reside in the [21st Avenue Property] for their lifetimes *provided* they . . . pay any and all . . . taxes . . . any mortgage or other encumbrance on such property; all costs of repair (and improvements) thereon and/or other expenses/costs essential to the property” (emphasis added).

The Family Trust further provides that “[i]n the further event all of the above named remaindermen predecease the termination of the trust leaving no surviving issue . . . then the remaining trust corpus and any undistributed income shall be given to ST. JUDE CHILDREN’S RESEARCH HOSPITAL . . .”

### ***The Instant Action***

On February 10, 2014, Tina commenced this action against Gina, Charlie and Charles Joseph by filing a summons and complaint seeking: (1) damages for the conversion of funds; (2) the turnover of documents and information regarding the Decedent’s Estate, 1618 LLC and the Living Trust; (3) the appointment of a receiver for 1618 LLC; (4) an accounting of 1618 LLC’s assets and disbursements; (5) damages for defendants’ alleged transfer and conversion of Trust assets and defendants’ physical and financial waste of the 15th Street and 21st Avenue

Properties; (6) damages for defendants' unjust enrichment by converting the Living Trust's and the Family Trust's assets; (7) rescission of the Family Trust and/or a declaration that the transfer of the 21st Avenue Property is void; and (8) partition and sale of the 21st Avenue Property.

On April 14, 2014, Gina and Charles Joseph separately answered the complaint, denying the material allegations therein and asserted affirmative defenses and counterclaims against Tina. On May 2, 2014, Charlie answered the complaint denying the material allegations therein and asserted several affirmative defenses and counterclaims against Tina. On May 2, 2014, Tina filed her reply denying defendants' counterclaims.

By an April 7 2015 order, the court (Solomon, J.) appointed Receiver Rosenberg to manage the 15th Street Property, including the collection of rental income derived therefrom.

#### *The July 2017 Order*

On August 9, 2016 Tina cross-moved for an order, pursuant to CPLR 7701: (1) constructing the Family Trust "confirming Tina's authority to sell, to a bona fide purchaser for value, the [21st Avenue Property] free and clear of any interests described in the trust agreement, including rights to occupancy by named trust beneficiaries; to terminate the [Family] Trust, in her discretion, and to distribute the trust corpus to the beneficiaries," and (2) constructing the Living Trust "confirming that the [15th Street Property] can be sold and authorizing the appointed receiver, Douglas Rosenberg . . . to sell it or, in the alternative, appointing [him], pursuant to SCPA § 702 (10) as a special fiduciary and granting him limited restricted authority to sell the 15th Street Property, administer the proceeds, pay the debts, expenses and estate tax liabilities of the Estate and Trust, including administration expenses, and distribute the balance of the trust to the Trustees of the Continuing Trusts under Article Four of the trust instrument . . ."

By a July 14, 2017 order (July 2017 Order), the court granted Tina's cross motion: (1) confirming her "authority to sell [the 21st Avenue Property] to a bona fide buyer . . . free and

clear of any interests described in the [Family] trust agreement *including rights to occupy by named trust beneficiaries . . .*;<sup>2</sup> (2) “confirming that the [15th Street Property] can be sold and authorizing the appointed receiver, Douglas Rosenberg to sell the property . . .”; and (3) “order[ing] that Douglas Rosenberg is authorized to select and retain a real estate broker to list the [15th Street Property] for sale in an open market transaction” (emphasis added). The July 2017 Order, which was entered with the Kings County Clerk on November 16, 2017, provided that it was “stayed for 30 days” so that Gina had an opportunity to file an appeal therefrom.<sup>3</sup>

***Gina Advised the Vizzini Family That She Intends To Reside at the 21st Avenue Property***

Meanwhile – one week after the July 2017 order was issued – Gina advised the parties, by a July 21, 2017 email to the Vizzini family, that she intended to move into the 21st Avenue Property by the end of the month, and requested keys to gain access to the 21st Avenue Property.

***The Instant Motions***

***A. Tina’s Motion for an Injunction***

One week later, on July 28, 2017, Tina moved, by order to show cause, for an order: (1) restraining and prohibiting Gina from accessing and/or occupying the 21st Avenue Property, and (2) lifting the stay on the sale of the 21st Avenue Property. Tina argues that:

“Gina’s professed intent to immediately occupy the [21st Avenue] Property is a transparent maneuver to undermine and render moot this Court’s [July 2017] order authorizing the sale of the [21st Avenue] Property. By taking up residence, Gina will effectively impede Plaintiff’s ability to market the [21st Avenue] Property or enter into a contract for sale, because her occupancy will render it impossible to

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<sup>2</sup> Although Charlie currently resides in the 21st Avenue Property, he allegedly agreed to move out of the 21st Avenue Property once a purchaser was secured.

<sup>3</sup> Gina subsequently filed a notice of appeal from the July 2017 Order with the Appellate Division, Second Department on December 13, 2017. To date, Gina’s appeal has not been perfected.

guarantee delivery of the [21st Avenue] Property, broom-clean and vacant to a bona fide purchaser for value.

Tina further argues that she would be irreparably harmed if Gina is permitted to occupy the 21st Avenue Property because “she will undoubtedly encounter difficulty in her efforts to evict Gina, due to Gina’s alleged life-threatening disabilities.”

***B. Gina’s Motion To Reargue and Renew Regarding the Court’s July 2017 Order***

On August 11, 2017, Gina moved, by order to show cause, for an order: (1) granting her leave to reargue and renew the court’s July 2017 Order “to the extent the Order granted Plaintiff’s cross motion for a construction of the . . . Family Trust confirming Tina[’s] authority to sell [the 21st Avenue Property] free and clear of all interests, including the rights to occupancy by the named trust beneficiaries, and upon granting of the instant application, denying that branch of Plaintiff’s cross-motion”; (2) directing the joinder of St. Jude as a necessary party; (3) granting the Family Trust beneficiaries or their representatives a right to inspect the 21st Avenue Property; and (4) enjoining and restraining Tina, her agents, representatives and/or employees “from taking any action to sell, hypothecate, transfer, encumber or otherwise dispose of the assets of the . . . Family Trust, including, but not limited to, [the 21st Avenue Property], which would alter, effect, terminate or otherwise prevent Gina from exercising her life estate as set forth in the . . . Family Trust.”

Gina argues that the court erred in granting the branch of Tina’s cross motion by which she sought authority to sell the 21st Avenue Property “free and clear of any interest” of the named beneficiaries of the Family Trust, including their right to occupy the 21st Avenue Property, because “it is contrary to the plain language contained within the . . . Family Trust.” Gina asserts that assuming, arguendo, that the 21st Avenue Property can be sold under the terms of the Family Trust, “it can only be sold subject to the life estates of Tina, Gina and Charl[ie].”

**C. Receiver Rosenberg's Motion**

On September 28, 2017, Receiver Rosenberg moved, by order to show cause, for an order: (1) settling and approving his interim accounting for the 15th Street Property for the period April 7, 2015 through September 20, 2017; (2) authorizing him to pay himself \$29,408.13 for his interim commission for that same period; and (3) authorizing him to pay his counsel \$9,140.00 for legal services rendered.

None of the parties filed opposition to Receiver Rosenberg's motion.

***The Court Stayed All Sales of Property***

On October 19, 2017, St. Jude, as "a party interested in the above-entitled proceedings" filed a notice of appearance in this action.

That same day, the court (Solomon, J.) issued an October 19, 2017 order directing that "[a]ll sales of the properties in this matter are stayed pending further order of this court" (October 2017 Stay).

***Discussion***

The court recently discovered that defendant Charles Joseph Vizzini died on May 30, 2017, during the pendency of this action. According to the Kings County Surrogate's Court, Tina M. Vizzini filed a petition for letters of administration for the Estate of Charles Joseph Vizzini on November 21, 2017 under File No. 2017-4958, and letters of administration have not yet been issued.<sup>4</sup>

"It is well settled that the death of a party stays the action as to him or her pending the substitution of a legal representative, and any determination rendered without such a substitution is generally deemed a nullity" (*Reed v Grossi*, 59 AD3d 509, 511 [2009] [internal quotations omitted]; *see also Manto v Cerbone*, 71 AD3d 1099, 1100 [2010] [same]). "Generally, the death

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<sup>4</sup> This court may take judicial notice of proceedings in the Surrogate's Court (*see People v Simari*, 25 AD2d 485, 485 [1966], *affd.*, 29 AD2d 920 [1968]).

of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a legal representative for the decedent pursuant to CPLR 1015 (a)" (*Aurora Bank FSB v Albright*, 137 AD3d 1177, 1178 [2016] [internal quotations omitted]).

Thus, by operation of law, this action has been automatically stayed since the death of Charles Joseph on May 30, 2017. Consequently, all orders issued after the death of Charles Joseph – including the court's July 2017 Order and the October 2017 Stay – are deemed to be nullities and are, therefore, vacated because the court lacked jurisdiction to issue those orders. In addition, the court cannot entertain any of the motions that were filed while this action was stayed. Accordingly, it is

**ORDERED** that Tina's motion (in motion sequence No. 11) is denied as moot due to the automatic stay; and it is further

**ORDERED** that Gina's motion (in motion sequence No. 12) is denied as moot due to the automatic stay; and it is further

**ORDERED** that Receiver Rosenberg's motion (in motion sequence No. 13) is denied due to the automatic stay without prejudice to renewal after the stay of this action is vacated.

This constitutes the Decision and Order of the Court.

E N T E R,



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Sylvia G. Ash, J.S.C.