

Matter of Kaplan

2018 NY Slip Op 31820(U)

June 26, 2018

Surrogate's Court, Nassau County

Docket Number: 2013-376563/D

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**Proceeding to Terminate Life Estate and
Sell Real Property in the Estate of**

DECISION & ORDER

**BERNARD L. KAPLAN,
a/k/a BERNARD KAPLAN,**

**File No. 2013-376563/D
Dec. No. 34333**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Verified Petition to Terminate Life Estate & Exhibits.	1
Verified Affidavit in Support and Exhibits.	2
Verified Affidavit Identifying Interested Parties.	3
Verified Objections.	4
Affirmation in Opposition & Exhibits	5
Affirmation of Property Value	6
Verified Affidavit in Reply	7

Before the court in this miscellaneous proceeding, is a petition which seeks a decree:

(1) terminating the executor Patsy Ram Kaplan’s life estate in the real property known as 3688 Berne Road, Wantagh, New York; (2) ordering the sale of the real property pursuant to SCPA § 1902; (3) granting the petitioners limited letters testamentary for the purpose of marketing and selling the real property pursuant to SCPA § 702 (8), (9), subject to satisfaction of the costs and fees associated with the outstanding mortgage and foreclosure action, and upon the execution and filing of oaths and designations; and (4) directing the executor Patsy RamKaplan to file an accounting within thirty (30) days of the service of a decree to be settled herein. The petitioners are Keren Brown and Debra Raymond, the

decedent's children. The petition is opposed.

The decedent died on July 3, 2013. He was survived by his wife, Patsy Ram Kaplan, and two daughters, Keren Brown and Debra Raymond. The decedent and his wife executed a prenuptial agreement on November 11, 1999. In the agreement, the decedent acknowledged that his wife was the sole owner of real property known as 10 Alfred Road West, Merrick, New York. Patsy Ram Kaplan acknowledged that her husband was the sole owner of real property known as 3688 Berne Road, Wantagh, New York. Article V of the prenuptial agreement entitled "Real Property" provides in pertinent part:

- “(e) HUSBAND agrees that WIFE shall be entitled to possession of HUSBAND's real property for as long as she is alive and HUSBAND shall reserve a life estate in said property for the benefit of the WIFE. HUSBAND further agrees that he shall not alienate the property in any manner such as to deprive the WIFE of her life estate, except with WIFE's express written consent. HUSBAND shall implement said life estate by the execution of a Bargain and Sale Deed, together with any and all implementing documents evidencing said life estate.

- (f) HUSBAND agrees to provide to the WIFE a life insurance policy on his life with a face value of \$250,000.00, wherein the WIFE shall become the sole owner of said policy and the irrevocable beneficiary thereof. During the lifetime of the policy, the parties agree to be equally responsible for the payment of the premium thereof.”

The decedent's will dated May 24, 2013, was admitted to probate by decree dated August 17, 2015 and letters testamentary issued to Patsy Ram Kaplan. Article Third of the will provides:

“I hereby bequeath the sum of Two Hundred and Fifty Thousand (\$250,000.00) dollars to my Trustee hereinafter named to be held in Trust and administered as follows:

- (i) During the lifetime of my spouse, PATSY D. KAPLAN, the Trustee shall pay taxes, insurance, and mortgage payments on the property located at 3688 Berne Road, Wantagh, New York (the “Property”). Upon the death of PATSY D. KAPLAN, or in the event that the Property is sold, any remaining Trust net principal and accumulated income shall be distributed to my daughters, DEBRA RAYMOND and KEREN BROWN, in equal shares, per stirpes.
- (ii) I hereby appoint PATSY KAPLAN and STEVE FEMMINELLO, as Co-Trustees of the Trust created under this Article.”

The residue was divided equally between the decedent’s two daughters.

Steven Femminello, by letter dated June 25, 2015, declined to act as trustee. Letters of trusteeship never issued.

It is undisputed that Patsy Kaplan occupies the real property and that the real property is encumbered by a mortgage. It is also undisputed that the mortgage was paid for the period of July through October of 2013, but not since that time, and the property is the subject of a foreclosure proceeding. Finally, it is undisputed that the petitioners executed a deed conveying their remainder interest to themselves as tenants in common. The deed does not refer to the life estate of Patsy Kaplan in the real property.

The petitioners allege that the pay-off amount owed to the bank is \$196,102.14. Patsy Kaplan alleges that she can reinstate the mortgage loan if she pays \$116,694.84. She further alleges that the estate assets, exclusive of the house, consists of an account worth

approximately \$111,618.82. The value of the real property is estimated to be \$450,000.00.

Patsy Kaplan objects to the relief requested. Despite the fact that Patsy Kaplan is both the sole executor and the only remaining nominated trustee, the other nominated trustee having renounced, she argues that the trust was obligated to pay for the upkeep of the house and the trust was never established. She further argues that the sale of the house is contrary to the provisions of the will and the prenuptial agreement and that she is under no obligation to pay the upkeep as the decedent's primary purpose was to ensure that she had a place to live. She further argues that sufficient assets remain to pay the claims and that in the alternative, an application should be made to terminate the trust as uneconomical. Finally, she argues that if the application is granted, she must be given the value of her life estate.

The parties do not dispute that the decedent gave Patsy Kaplan a life estate in the real property. There is also no question that the trust pursuant to Article Third of the decedent's will was to pay the taxes, insurance and mortgage payments on the real property. The trust was never established and the expenses related to the real property were not paid. The petitioners now ask the court to determine that Patsy Kaplan's life estate terminated due to waste.

With regard to the obligations of a life tenant, "[i]t is a general rule that a tenant for life, since he enjoys the rents and profits of the land, must pay the taxes and make all ordinary, reasonable and necessary repairs required to preserve the property and prevent its going to decay or waste, unless the instrument creating his tenancy expressly provides otherwise" (*Matter of Gaffers*, 254 AD 448, 451 [3d Dept 1938]). Here, the life tenant was

the nominated trustee of the trust under the will to pay the taxes, insurance and mortgage payments on the real property. She never took any steps to establish, fund or pay any of the expenses from the trust or from the estate.

SCPA § 1904 (1) provides that a proceeding to dispose of real property may be instituted by the filing of a verified petition by a fiduciary or any person interested. A person interested, in turn, includes “[a]ny person entitled or allegedly entitled to share as beneficiary in the estate . . .” (SCPA § 103 [39]). Where ownership of the property is divided into one or more possessory interests and one or more future interests, the owner of any interest in the real property may apply to the court for an order directing the sale of the real property (RPAPL § 1602). “An application may be granted if the court is satisfied that the ‘act to be authorized is expedient’” (RPAPL § 1604; *Matter of Sauer*, 194 Misc 2d 634, 638 [Sur Ct, Nassau County 2002]). Expedient is defined as “characterized by suitability, practicality, and efficiency in achieving a particular end; fit, proper or advantageous under the circumstances” (*Matter of Talmage*, 64 AD3d 662, 663 [2d Dept 2009] [internal quotation omitted]). As the real property is the subject of a foreclosure proceeding, the sale is expedient and the application to sell the real property is **GRANTED**.

Granting the sale of real property subject to a life estate, however, does not result in a forfeiture of the value of the life estate. A life tenant is “entitled to have a proportion of the proceeds of the sale invested, secured or paid over, in such manner as the court deems calculated to protect the rights and interests of the parties” (RPAPL § 967). Further, an owner may be entitled to a sum in gross or shall receive the earnings, in the discretion of the court (RPAPL § 968).

The petitioners, however, argue that the actions of Patsy Kaplan establish waste which should result in a forfeiture of her life estate. “Under New York law, there is a substantive cause of action for waste against one in control of real property who does no more than allow the property to deteriorate and decrease in value. . .” (*United States v Miller*, 400 F. Supp. 1080, 1084 [SD NY 1975]) New York courts also recognize a cause of action for waste by a mortgagee against a mortgagor who impairs the mortgage (*Travelers Ins. Co. v 633 Third Assocs.*, 14 F.3d 114, 120 [2d Cir 1994]).

In the instant proceeding, the affidavit of the Bank in support of summary judgment in the foreclosure proceeding which is attached as an exhibit, sets forth the following escrow deficiencies-real estate taxes: \$14,948.44 for prior years; \$15,645.66 for 2015; \$14,714.56 for 2016; and \$7,585.36 for 2017. Further, the affidavit shows outstanding hazard insurance premiums in the amount of \$10,658.00. “The mere failure to pay principal and interest. . . will not constitute waste. Such failure does not impair the mortgage. . . By contrast the intentional failure to pay property taxes does impair the mortgage” (*Travelers Ins. Co. v 633 Third Assocs.*, 14 F3d 114, 123 [2d Cir 1994] [applying New York law]). Where the life tenant intentionally failed to pay property taxes and hazard insurance on the property, the court found that “the remainder interest in the subject property is in constant danger of forfeiture in a tax lien sale” (*Main Omni Realty Corp. v Matus*, 124 AD3d 604, 606 [2d Dept 2015]). Because the life tenant was unjustly enriched by the remainder persons payment of these expenses, the court held that equity warranted extinguishing the life estate (*id*). Although it is clear that Patsy Kaplan has not paid the real estate taxes and the hazard insurance, the petitioners have not established that the non-payment was intentional which

would require a hearing. Furthermore, if the waste to the property does not equal the value of the estate held by the one committing the waste, forfeiture may not be allowed (*see, e.g. Perry v Perry*, 183 AD 234 [3rd Dept 1918]; *see also* 14 Warren's Weed, New York Real Property § 150.08 [2018]).

In conclusion, the application to sell the real property pursuant to SCPA § 1902 is **GRANTED**. The application to appoint the petitioners as limited administrators to sell the real property pursuant to SCPA § 702 is **GRANTED**. Patsy Kaplan is directed to file her account as executor within sixty (60) days of the date of service upon her of this decision and order (SCPA § 2205).

A conference is scheduled for August 23, 2018 at 10:00 a.m. to set up a discovery schedule with regard to the question of whether there was a forfeiture of the life estate.

This constitutes the decision and order of the court.

Dated: June 26, 2018
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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