

Matter of Walton

2019 NY Slip Op 33553(U)

December 4, 2019

Surrogate's Court, New York County

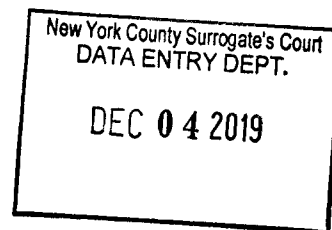
Docket Number: 2019-683

Judge: Rita M. Mella

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This opinion is uncorrected and not selected for official publication.

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



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Probate Proceeding, Will of

ANTHONY J. WALTON,

DECISION and ORDER

File No.: 2019-683

Deceased.

-----X
In the Matter of the Application of Gary S. Hett, as
Preliminary Executor of the Estate of

ANTHONY J. WALTON,

File No.: 2019-683/D

Deceased,

For an Order Directing Jennifer Gao, Respondent, to Vacate
The Premises at 197 East 76th Street, New York, NY and to
Turn Over Tangible Personal Property, Including
Decedent's Automobiles, pursuant to SCPA 2103.

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M E L L A, S.:

The court considered the following papers in determining this motion for partial summary judgment in the turnover proceeding and the motion for a protective order, etc., in the probate proceeding:

Papers Considered

Numbered

Notice of Motion, dated September 13, 2019, by Petitioner for Partial Summary Judgment in Turnover Proceeding and Dismissal of the Counterclaim	1
Affidavit, dated September 9, 2019, of Merrilee Cichy, in Support of Motion	2
Affidavit, dated September 10, 2019, of Thomas J. Cunningham III, in Support of Motion	3
Affidavit, dated September 9, 2019, of Drummond Bell, in Support of Motion	4
Affidavit, dated September 11, 2019, of John E. Oden, in Support of Motion	5
Affidavit, dated September 12, 2019, of Gary S. Hett, Esq., in Support of Motion, attaching Exhibit 1	6
Memorandum of Law, dated September 13, 2019, in Support of Motion	7
Affirmation, dated September 13, 2019, of Megan H. Daneshrad, Esq., in Support of Motion, attaching Exhibits 1 through 18	8
Memorandum of Law, dated October 7, 2019, in Opposition to Motion	9
Affidavit, dated October 7, 2019, of Susan Ricci Stebbins, in Opposition	10
Affidavit, dated October 7, 2019, of Theodore E. Stebbins, Jr., in Opposition	11

<u>Papers Considered</u>	(continued)	<u>Numbered</u>
Reply Memorandum of Law, dated October 16, 2019, in Further Support of Motion		12
Reply Affirmation, dated October 16, 2019, of David Rabinowitz, Esq., in Further Support of Motion, attaching Exhibits 1 through 3		13
Amended Notice of Motion, dated August 5, 2019, by Will Proponent, Gary S. Hett to Vacate Discovery Demands of Jennifer Gao, etc., in Probate Proceeding		14
Affidavit, dated July 20, 2019, of Gary S. Hett, in Support of Motion, attaching Exhibits A through C		15
Memorandum of Law, dated August 1, 2019, in Support of Motion, attaching Exhibit A		16
Affirmation, dated October 7, 2019, of Yelena Rapoport, Esq., in Opposition to Motion to Vacate Discovery Demands, etc., attaching Exhibits 1 through 4		17
Memorandum of Law, dated October 7, 2019, in Opposition to Motion		18
Reply Memorandum of Law, dated October 16, 2019, in Further Support of Motion, attaching Exhibit 1		19

At the call of the calendar on October 18, 2019, the court ordered a continuance, pursuant to CPLR 3212(f), of a partial summary judgment motion by the preliminary executor of the estate of decedent Anthony Walton. The motion was made in an SCPA 2103 proceeding commenced by the preliminary executor and sought an order directing respondent Jennifer Gao, decedent's surviving spouse, to vacate a Manhattan townhouse and dismissing a counterclaim for undue influence interposed by Gao. Decedent died on January 18, 2019, at age 76, survived by Gao and two adult sons from a prior relationship.

At issue in the SCPA 2103 proceeding is whether an "operative event" occurred under the September 11, 2008 prenuptial agreement that Gao executed with decedent, prior to their marriage on December 23, 2008. Upon the occurrence of an operative event, Gao's rights to participate in and receive assets from decedent's estate are foreclosed and she loses a lifetime interest, via a trust, in their marital residence, the townhouse which Gao continues to occupy and from which decedent's preliminary executor seeks her removal. Two occurrences are stated by

petitioner to have been “operative events.” One is decedent’s sending of an acknowledged letter dated December 18, 2017, expressing his intention to live separate and apart from Gao. The other is the commencement of an action for divorce on or about October 5, 2018, in Supreme Court, New York County.

Gao’s counterclaim in the turnover proceeding asserts that these alleged “operative events” under the prenuptial agreement were the product not of decedent’s wishes but instead of the undue influence of decedent’s sons. Prior to any discovery and shortly after issue was joined, the preliminary executor filed the instant motion for summary dismissal of this counterclaim and the ouster of Gao from the townhouse. This motion is premature, as Gao, in opposition, provided a basis for going forward with discovery (*see Aurora Loan Services, LLC v LaMattina & Assoc., Inc.*, 59 AD3d 578 [2d Dept 2009]).

On the record, on October 18, 2019, the court adjourned the partial summary judgment motion to the court’s April 7, 2020 calendar, called at 10 a.m. (CPLR 3212[f]). All discovery regarding the questions of whether the December 18, 2017 letter or the October 2018 commencement of the divorce action was the product of undue influence shall be demanded and noticed promptly, but in any event made no later than December 6, 2019. Examinations should be scheduled as soon as possible. All discovery shall conclude no later than February 26, 2020.

Further submissions in support of summary judgment shall be filed and served no later than March 11, 2020; further submissions in opposition shall be filed and served no later than March 25, 2020; and further submissions in reply shall be filed and served no later than April 1, 2020.

Deadlines set forth in this decision may be extended on the stipulation of all parties, filed prior to the expiration of a deadline, provided that such stipulation shall require the last reply

submissions to be filed no later than five business days prior to any date the adjourned motion is returnable before the court, or by further order of the court.

Also before the court on October 18, 2019, was the motion of the preliminary executor to vacate the discovery demands of Gao in the separate proceeding to probate an August 27, 2018, instrument as decedent's will. This motion essentially sought an order striking Gao's appearance in the probate matter due to her lack of standing based on the occurrence of an "operative event" under the prenuptial agreement. Because that issue will be determined in the turnover proceeding, the court held the probate proceeding in abeyance pending the resolution of the question of the occurrence of an "operative event" under the prenuptial agreement or further order of the court.

This decision, together with the transcript of the October 18, 2019 proceedings, constitutes the order of the court.

Dated: December 4, 2019


S U R R O G A T E