

Matter of Gray

2019 NY Slip Op 34858(U)

October 15, 2019

Surrogate's Court, Kings County

Docket Number: File No. 2003-4544/B

Judge: Margarita López Torres

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS:**

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**In the Matter of the Public Administrator of Kings County
as the Temporary Administrator of the Estate of**

CLARICE GRAY,

**DECISION and ORDER
File No.: 2003-4544/B**

Deceased,

**To Determine the Disposition of Certain Real Property
Pursuant to Article 19 of the Surrogate’s Court
Procedure Act and for a Preliminary Injunction Pending
the Outcome of this Proceeding Pursuant to CPLR 6301.**

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LÓPEZ TORRES, S.

The following papers were considered in determining this contested motion:

Notice of Motion and Affirmation of PA Counsel in Support, with Exhibits	1, 2
Affirmation in Support by Counsel to Sanford Claimants	3
Affirmation in Opposition by Counsel to the Corporation, with Exhibits	4
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In this contested miscellaneous proceeding, the Public Administrator of Kings County (the PA), as temporary administrator of the estate of Clarice Gray (the decedent), moves i) pursuant to CPLR §3215 for an order granting a default judgment against Stephen S. Spain (Spain) in the instant proceeding and declaring null and void a deed dated October 23, 2015 (the 2015 deed), which purports to transfer ownership of certain real property located at 591 Carlton Avenue, Brooklyn, New York (the real property) from Paula Sanford (Sanford) to Spain, ii) pursuant to CPLR §3212 for summary judgment dismissing the objections (other than those relating to kinship) interposed by 591 Carlton Avenue Corp. (the corporation) to the PA’s petition to determine the disposition of the real property, iii) for an order declaring null and void a deed dated January 25, 2018 (the 2018 deed), which purports to transfer ownership of the real property from Loraine Gray (Lorraine) to the corporation, iv) for an order of the court granting the PA leave to sell the real property, and v) for an order of the court directing the corporation to account for and turn

over any and all property belonging to the decedent's or Sanford's estate which it has removed from the real property.

Background

The decedent died on September 16, 2003. A written instrument, dated January 5, 1968 (the testamentary instrument), which purports to be the decedent's last will and testament, was filed with the court on November 19, 2003; however, the testamentary instrument has not been offered for probate. Pursuant to its terms, the testamentary instrument names Sanford, identified therein as the decedent's "adopted daughter," as the sole beneficiary of her estate, and specifically devises the real property to her.¹ Sanford died on April 20, 2017, and the PA was issued temporary letters of administration in both the decedent's and Sanford's estates on February 14, 2018.

The instant petition initially sought to vacate the 2018 deed and was brought by order to show cause seeking a temporary restraining order against the corporation and its principal, Yuval Golan (Golan). The PA asserts that the 2018 deed is invalid as it was executed by Loraine, a resident of Guyana, in her capacity as "the sole intestate heir of [the decedent]," in exchange for payment of \$50,000.00. The PA asserts that Loraine has not demonstrated that she is in fact the decedent's "sole" distributee, and that at the time the 2018 deed was executed the real property was valued by the City of New York for real estate tax purposes at \$3,645,000.00. The court granted the temporary restraining order against the corporation and its agents, enjoining them from, *inter alia*, taking any action to encumber, sell or transfer any interest in the real property. The restraining order remains in effect.

The instant petition was amended on March 16, 2018, to include as interested parties Kareem Medas, Kenneth Medas, Jr., Keith Medas (together, the Medas claimants), Hensley Scotland (Hensley) and Maxine Scotland-Slater (Maxine), as additional alleged intestate distributees of the decedent. The petition was also amended to include Spain as an interested party and to request the additional relief of an order voiding the 2015 deed.² The PA stated that he had recently become aware of the 2015 deed, which was recorded in the Kings County Clerk's Office

¹ The testamentary instrument also provides, in Article FIFTH, for a bequest of \$1.00 to Ernest Gray, identified as the decedent's "present husband," who "has caused me nothing but heartache and troubles since we were married." It is alleged that the decedent and Ernest Gray were divorced, and that he pre-deceased her.

² The temporary restraining order was extended to enjoin Spain from taking any steps to encumber, sell or transfer the real property, and remains in effect.

on February 19, 2018, and purports to transfer ownership of the real property from the decedent's "adopted daughter" Sanford to Spain for consideration of \$10,000.00.³

On June 18, 2018, the petition was amended to include additional alleged distributees, namely Louise Sanford-Spence, Gem Sanford-Johnson and George Sanford. On November 20, 2018, the petition was again amended to include further alleged distributees, namely Lilith Thompson, Dorothy Ann Tullock, and Joy Christine Sanford (together with Louise Sanford-Spence, Gem Sanford-Johnson and George Sanford, the Sanford claimants), as well as Rudolph Scotland, Clinton Scotland, Gladstone Wicks, Wendy Scotland, Bridget Scotland, Denise Marks, Rhoda Marks, Precious Marks, Latoya Marks, Ruschell Arita Richardson, Orin Anthony Richardson, and Devon Richardson (together with Hensley, the Scotland respondents).

Objections to the petition have been filed by the Medas claimants, Maxine and the Sanford claimants, each asserting their status as the decedent's distributee(s).⁴ Other than asserting their status as distributees, the claimants, other than the corporation, join in the PA's request to void both the 2015 and 2018 deeds. While jurisdiction has been obtained over Loraine, she has neither appeared nor interposed objections to the relief requested in the instant petition. A guardian *ad litem* (the GAL) has been appointed for unknown distributees.

The corporation has interposed objections asserting that Loraine is in fact the decedent's sole distributee, that there is "no other living family," that the temporary letters of administration issued to the PA should be revoked in favor of Loraine's designee,⁵ and that the conveyance of the real property pursuant to the 2018 deed was lawful.

By its objections, the corporation asserts that the decedent was born in Guyana on December 18, 1915, to Sarah Phillips (Sarah) and an unnamed father. It asserts that fifteen years later the decedent's brother, Charles Gray (Charles), was born to Sarah and her husband, also named Charles Gray. The corporation asserts that Charles post-deceased the decedent, and that

³At the time of execution of the 2015 deed, the real property had an assessed value for real estate tax purposes of \$2,000,000.00.

⁴Neither Hensley nor any of the other Scotland respondents have filed objections asserting kinship, although they have appeared by counsel herein. Their assertion, as articulated by the PA, is that they are great-nephews and great-nieces, or issue thereof, of the decedent.

⁵The corporation asserts that Loraine, as the "lone proven distributee," has the authority, as a non-domiciliary alien, to serve as fiduciary with a resident co-fiduciary pursuant to SCPA §707, and to appoint a non-distributee who is eligible to serve pursuant to SCPA §1001. As noted above, Loraine has neither appeared in this proceeding nor filed a cross-petition for issuance of letters of administration to herself or a designee.

Loraine is Charles' only child. The corporation also asserts that Sanford was in fact adopted by the decedent, and that Loraine is the sole surviving distributee of both the decedent and Sanford.

The corporation attaches, *inter alia*, copies of three documents which purport to be birth records issued by the Republic of Guyana (the Guyanese records) for each of the decedent, Charles and Loraine, as well as an affidavit of heirship from Cephil DeFlorimonte (the DeFlorimonte affidavit). Pursuant to her affidavit, DeFlorimonte asserts that she was acquainted with the decedent, Sarah and Charles for over seventy years, that Sanford was the decedent's adopted daughter, that Charles was the decedent's only sibling and that Loraine is the only child of Charles.

Based on these purported proofs, the corporation claims that the temporary letters of administration issued to the PA must be revoked and the 2018 deed must be concluded to have validly passed the entirety of the decedent's ownership interest to the corporation.

The Instant Motion

The PA moves on two grounds. First, the PA moves pursuant to CPLR §3215 for an order granting the PA a default judgment against Spain, and as a result thereof an order directing that the 2015 deed to Spain be vacated and expunged from the records of the Kings County Clerk's Office. Second, the PA moves pursuant to CPLR §3212 for summary judgment dismissing the corporation's objections which relate to the validity of the 2018 deed, asserting that the corporation's objections raise no triable issue of fact, as well as an order directing that the 2018 deed also be vacated and expunged from the records of the Kings County Clerk's Office. In support of his motion for summary judgment dismissing the corporation's objections, the PA asserts, *inter alia*, that the corporation lacks standing to oppose the relief requested, as Loraine's claim to be the decedent's sole distributee is contested by numerous kinship claimants. Counsel to the Sanford claimants has submitted an affirmation in support of the instant motion, and other than the corporation, no other claimant has interposed opposition to the PA's motions.

The corporation, however, does oppose that portion of the motion seeking to dismiss its objections to the instant petition. It asserts, variously, that i) summary judgment is premature, as the decedent's kinship has yet to be established, ii) Loraine has been conclusively demonstrated to be the decedent's sole heir, iii) Sanford's status as the decedent's formally adopted daughter has not been established, iv) the testamentary instrument has not been probated, v) there is "no other proven family member," and vi) there is "no compelling reason" for the sale of the real property.

In reply, the PA points to inconsistencies between the corporation's assertions in its objections to the instant petition and in its opposition hereto. He asserts that a sale of the real property is in the best interest of the estate due to its deteriorating condition and the lack of estate

funds to ensure maintenance and repairs. The PA further notes that all claimants other than the corporation have consented thereto.

Counsel to the Sanford claimants further supports the instant motion for summary judgment, asserting that documents proffered by the corporation in support of Loraine's kinship status are of doubtful validity. Finally, the GAL has filed an affirmation in support of the instant motion for summary judgment, consenting to the relief requested and noting, *inter alia*, that the burden of proof of kinship resides with a claimant, rather than the PA.

Discussion

The CPLR §3215 Motion for Judgment of Default

With respect to the PA's motion pursuant to CPLR §3215 for an order granting a default judgment against Spain and expunging the 2015 deed, no opposition has been interposed to this relief by any party. Jurisdiction has been obtained over Spain in the instant proceeding, and he has neither appeared, in person or by counsel, nor interposed opposition. The PA notes the *de minimis* consideration of \$10,000.00 purportedly paid by Spain to Sanford for a property valued at approximately \$2,000,000.00, and finds that fact, together with a number of other disturbing facts,⁶ to generate the suspicion of fraud. Further, the PA notes, no proof has yet been offered that Sanford was in fact legally adopted by the decedent, and if such cannot be proven, Sanford would have had no interest in the real property to convey by the 2015 deed absent probate of the testamentary instrument.

As such, the PA having secured jurisdiction over Spain and upon his failure to appear herein, the motion for a judgment to void the 2015 deed is granted.

The CPLR §3215 Motion for Summary Judgment

The PA also seeks an order granting summary judgment dismissing the corporation's objections, vacating the 2018 deed and permitting the sale of the real property. Summary judgment is a drastic remedy that may be granted only where there is an absence of any material issue of fact requiring a trial. *See* CPLR §3212(b); *Vega v Restani Const. Corp.*, 18 N.Y. 3d 499, 503 (2012). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence to demonstrate the absence of any material issues of fact. *Alvarez v Prospect Hosp.*, 68 N.Y. 2d 320, 324 (1984). In reviewing the

⁶ For instance, the 2015 deed was recorded almost three-and-a-half years after its purported execution, and almost one year after Sanford's death. Moreover, the stamp used by the notary acknowledging Sanford's signature shows the notary's term as expiring in 2021; however, notary stamps are renewed on a four-year basis, in which case the longest date of expiry possible would be 2019. Further, although the deed does not reflect Spain's signature, there is a notary acknowledgment completed therefor.

sufficiency of the proponent's submissions, the facts must be carefully viewed "in the light most favorable to the non-moving party." *Ortiz v Varsity Holdings, LLC*, 18 N.Y. 3d 335, 339 (2011). The court's function on a motion for summary judgment is issue-finding, rather than issue-determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y. 2d 305, 404 (1957).

The PA asserts that Loraine's status as the decedent's "sole heir," or indeed as a distributee at all, has not been established. The PA notes that the purported proofs proffered by the corporation, including the Guyanese documents, are neither certified originals nor properly authenticated. The PA also notes that, in its objections, the corporation specifically avers that Sanford was formally adopted by the decedent, and indeed proffers the DeFlorimonte affidavit in support of that assertion. If such is determined to be the case, the real property would have passed by operation of law upon the decedent's death to Sanford, as her daughter and sole distributee. As a consequence of the corporation's own assertion as set forth in their objections, to wit, that Sanford was formally adopted by the decedent, it cannot now be asserted that Loraine acted properly to transfer the real property, as she purports to do in the 2018 deed, in the capacity of the *decedent's* sole heir.

Further, as noted by the PA, Loraine's assertion of kinship rests on her status as the decedent's niece and Sanford's maternal cousin. The PA asserts, correctly, that the corporation has proffered neither genealogical evidence or family tree, and has failed to demonstrate that no other distributees exist who are not of equal or superior class. Indeed, numerous claims of kinship are asserted by those parties who have been cited and have appeared herein.

For instance, Maxine asserts that she, as well as Sanford, was adopted by the decedent. She asserts that her adoption was finalized in Guyana in 1970, and that thereafter she resided in the United States with the decedent for over 20 years.⁷ She asserts that, as Sanford's adopted sibling, she has priority over all other claimants, as the sole surviving distributee of both the decedent and Sanford.

On the other hand, the Medas claimants assert that the decedent's maiden name was Medas, and that she assumed the surname Gray upon marriage to her spouse, Ernest Gray. The Medas claimants assert that, at best, Loraine's father Charles may simply have been the decedent's brother-in-law. They assert that the decedent had one brother, Oscar Medas (Oscar), who pre-deceased the decedent. They assert that Kenneth Medas, Sr. (Kenneth Sr.), was Oscar's only son, and that Kenneth Sr. post-deceased the decedent; hence, the Medas claimants assert their status as

⁷ Maxine asserts that many of the documents upon which she relies for support have been destroyed by the actions of the corporation in removing the decedent's and Sanford's personal belongings from the real property.

issue of the decedent's surviving nephew. Thus, their claim, if true, is as members of the same class of distributees as Loraine.

Finally, the Sanford claimants assert that Maxine has no interest as a distributee of the decedent's estate as she was not formally adopted by the decedent. Rather, they assert, the decedent was simply granted custody of Maxine pursuant to an order of a Guyanese civil court in 1970, and that she was the guardian of Maxine's person and property pursuant to such order during her infancy.⁸ They also assert that the decedent's surname Gray was not her maiden name, and they dispute any kinship claimed by Loraine to the decedent and Sanford. The Sanford claimants also dispute the kinship allegations of the Medas claimants, asserting that they have proffered no support for their assertion that the decedent was born Clarice Medas.

The Sanford claimants assert that the decedent was born to Sarah and Edward Oswald Bourne, and that the decedent married their father, Louis de Clairmont Sanford (Louis), on August 25, 1945, in Guyana. The Sanford claimants assert that the decedent and Louis had no biological children together, but that Sanford was Louis' daughter from an extra-marital relationship. They assert that the decedent adopted Sanford in Guyana shortly after Sanford's birth, that the decedent and Louis divorced in 1956, and that the decedent and Sanford immigrated to the United States together in 1963.

Finally, the PA asserts that the poor condition of the real property requires that it be sold in order to protect the interests of the distributees. The PA asserts, and it is undisputed, that the real property is the sole asset of the estate, and that there are no estate funds available for repair, maintenance, payment of insurance or taxes. The PA asserts that the best course of action, to preserve the benefit to the estate, is to permit sale of the real property, as it is vacant and poses a threat of liability to the estate in the event of an accident on the premises.

The PA has made a *prima facie* showing of entitlement to summary judgment on the issue of the validity of the 2018 deed. The safety of the real property is insecure, and there has been no demonstration by the corporation that Loraine is the "sole intestate heir" of the decedent. In opposition to the motion, the corporation simply proffers an affirmation of counsel which is not only internally inconsistent but diametrically opposed to the substance of its objections. For example, counsel asserts both that Loraine is the demonstrated "sole heir" of the decedent, and yet that summary judgment is premature given that kinship has not been established. Further, counsel asserts, in contrast to the corporation's position as articulated in its objections, that there is no proof of Sanford's status as the decedent's adopted daughter.

⁸A copy of the order of the Guyanese court is appended to Maxine's objections.

Notwithstanding the apparent change in the corporation's position,⁹ the court notes that the corporation proffers only an affirmation of counsel in opposition to the instant motion. "[W]here the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do, and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement." *Zuckerman v New York*, 49 N.Y. 2d 557, 560 (1980). See also *King v Tanner*, 142 Misc.2d 1004 (Sup Ct Westchester County 1999) (in opposing a motion for summary judgment, a party may not rely solely upon the affirmation of his attorney, who is without personal knowledge of [the] facts); *Araujo v Mercer Sq. Owners Corp.*, 33 Misc. 3d 835 (Sup Ct New York County 2011) ("the bare affirmation" of an attorney with no personal knowledge of the facts "is without evidentiary value"); *Estate of Rodriguez*, 2012 N.Y.L.J. LEXIS 3606 (Surr Ct Kings County). The corporation proffers no affidavit in opposition from any of its principals, including Golan, or from Loraine or any individual with personal knowledge of Loraine's relationship to the decedent. Although the DeFlorimonte affidavit is proffered in support of its objections, the corporation appears no longer to rely on that proof, as counsel now asserts that Sanford has not been demonstrated to have been adopted.

Although counsel avers that, in his capacity as counsel to the corporation, he has personal knowledge of the facts, his affirmation is unsupported by admissible evidence of Loraine's kinship to the decedent. No evidence is proffered regarding the corporation's or its principals' interaction with Loraine, the circumstances of her discovery as "sole intestate heir," or the corporation's agreements with her. Counsel simply attaches copies of the pleadings with exhibits, copies of his correspondence with counsel to the PA, a copy of the 2018 deed, and copies of the Guyanese records. As stated above, the Guyanese records, the sole evidence proffered in support of the corporation's assertion that Loraine is the demonstrated "sole intestate heir" of the decedent, are not in admissible form, as they are not certified originals and have not been properly authenticated. Although an affirmation of counsel without personal knowledge may serve as a vehicle for submission of "acceptable attachments," those attachments must be "evidentiary proofs in admissible form" in order to prevail. See *Zuckerman, supra*, at 563. As a result of this defect in opposition, the corporation has failed to demonstrate the existence of any triable issue of fact

⁹ The PA correctly notes that the time in which to amend objections as of course (CPLR §3025[a]) has long expired, and that the corporation has made no application to the court for leave to amend or supplement its pleadings (CPLR §3025[b]).

sufficient to defeat summary judgment. As such, the motion by the PA for summary judgment seeking to void the 2018 deed dated January 25, 2018, from Loraine Gray to 591 Carlton Avenue Corp. is granted.

Accordingly, it is hereby

ORDERED, that jurisdiction having been obtained over Stephen S. Spain and upon his failure to appear and oppose the relief requested, judgment is granted and the deed, dated October 23, 2015, between Paula Sanford and Stephen Spain, which purports to convey the real property known as 591 Carlton Avenue, Brooklyn, New York, is declared null and void; and it is further

ORDERED, that the Clerk of Kings County is directed to expunge from its records the deed dated October 23, 2015, and recorded in the City Register on February 26, 2018, which purports to transfer ownership of certain real property located at 591 Carlton Avenue, Brooklyn, New York from Paula Sanford to Stephen Spain; and it is further

ORDERED, that the objections interposed by 591 Carlton Avenue Corp. to vacatur of the deed, dated January 25, 2018, from Loraine Gray as purported "sole intestate heir to Clarice Gray" to 591 Carlton Avenue Corp., which purports to convey the real property known as 591 Carlton Avenue, Brooklyn, New York, are dismissed, and such deed is declared null and void; and it is further

ORDERED, that the Clerk of Kings County is directed to expunge from its records the deed dated January 25, 2018, and recorded in the City Register on February 7, 2018, which purports to transfer ownership of certain real property located at 591 Carlton Avenue, Brooklyn, New York from Loraine Gray to 591 Carlton Avenue Corp.; and it is further

ORDERED, that the Public Administrator of Kings County is granted leave to sell the real property known as 591 Carlton Avenue, Brooklyn, New York.

All other arguments in opposition to the instant motion have been considered and found unavailing. The request by the PA for an accounting by the corporation and its principals is denied, with leave to renew.

The Clerk of the court is directed to mail copies of this decision and order to the parties.

HON. MARGARITA LÓPEZ TORRES
Surrogate

Date: October 15, 2019
Brooklyn, New York