

Browne v Rock

2020 NY Slip Op 31120(U)

April 29, 2020

Supreme Court, Kings County

Docket Number: 500946/2019

Judge: Francois A. Rivera

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At an IAS Term, Part 52 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 29th day of April, 2020

HONORABLE FRANCOIS A. RIVERA
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IRVINE BROWNE, as Co-Trustee of the ESTHER ROCK-ALLEYNE TRUST,

DECISION AND ORDER
Index No. 500946/2019

Petitioner,
- against -

KAREN ROCK, as Co-Trustee of the ESTHER ROCK-ALLEYNE TRUST, and individually,
Respondents.
-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of petition and petition of Irvine Browne (hereinafter Browne), as co-Trustee of the Esther Rock-Alleyne Trust (ERA Trust) and Individually filed on January 15, 2019, for an order pursuant to the Estate, Powers and Trust Law (hereinafter EPTL), sections 7-1.13, 7-1.17, 7-1.18, 7-2.4, 7-2.6 and 7-2.7 and Article 3 of the ERA Trust dated December 6, 2012.

- Notice of Petition
- Petition
- Exhibits A to E
- Respondent's verified answer
- Exhibit A to C
- Reply Affirmation in Support

Recitation in accordance with CPLR 2219 (a) of the papers considered on the order to show cause of Browne filed on January 15, 2019, seeking an order pursuant to CPLR 6301; EPTL sections 7-1.17, 7-2.4, 7-2.6, 7-2.7 and the common law for, inter alia, a preliminary injunction enjoining respondent Karen Rock (hereinafter K. Rock), as Co-Trustee. Browne seeks a preliminary injunction enjoining K. Rock (1) from marketing and selling the subject property; (2) from collecting rents or other monies for the subject matter property; (3) from acting on behalf of or distributing and/or disbursing any assets or funds of the ERA Trust; and directing K. Rock (4) to provide Browne with information pertaining to any potential sale of the subject property; (5) to provide Browne with information pertaining to the occupancy and/or rental of the subject property, including tenant information, rental receipts, and utilities information; and an order (6) assessing damages to Browne attributable to the transaction; (7) granting Browne leave to sell the subject matter property under the supervision of the Court to a disinterested third-party for the benefit of the life tenant and to hold the net proceeds the subject property in escrow until the Court approves disbursement of the proceeds. This application is opposed by K. Rock.

- Order to Show Cause
- Emergency Affirmation in Support
- Affirmation in Support
- Exhibit 1
- Respondent's Affidavit in Opposition

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of cross petition and petition of K. Rock, filed on June 14, 2019, for an order: (1) denying Browne's petition; (2) removing Browne as co-trustee of the ERA Trust and appointing Roseanne Rock Callender (hereinafter R. Rock) as successor co-trustee in his place and stead; (3) granting damages, costs, disbursements and attorney's fees to K. Rock.

- Notice of Cross Petition
- Affidavit in Support
- Affirmation in Support
- Exhibits A to E
- Verified Answer of Browne
- Reply Affirmation in Support
- Exhibit A to C

BACKGROUND

On January 15, 2019, Browne commenced the instant special proceeding pursuant to EPTL sections 7-1.13, 7-1.17, 7-1.18, 7-2.4, 7-2.6 and 7-2.7 by electronically filing a notice of petition, verified petition with accompanying documents, and a request for judicial intervention with the Kings County Clerk's Office (hereinafter KCCO). On the same day, Browne also filed an order to show cause seeking, among other things, to enjoin K. Rock.

On February 25, 2019, K. Rock interposed a verified answer to the petition.

The Browne Petition

Browne alleges the following facts. Esther Rock-Alleyne, the grantor of the ERA Trust, died in August 2014. Browne is the grantor's brother, K. Rock is the grantor's daughter and both are co-trustees of the ERA Trust. R. Rock is also the grantor's daughter and an alternate trustee. K. Rock and R. Rock are also remainderman beneficiaries and Earl Wilbert Alleyne, Jr. (hereinafter Alleyne) the grantor's son, is a lifetime tenant pursuant to the ERA Trust.

The petition further alleges that Alleyne is a disabled person and that K. Rock has been acting as his de facto guardian since the grantor's death. The primary asset of the ERA Trust is a property located at 656 Liberty Avenue, Brooklyn, New York (hereinafter the subject property). The subject property is a two-family residential property of which the ERA Trust holds a 99% ownership interest and the remaining interest is owned by R.

Rock. The petition alleges that the subject property has two units, one of the units is referred to as a family unit. The family unit was previously occupied by the grantor and her children prior to her death. Since the grantor's death, her children continue to reside there. The other unit is occupied by a tenant and generates rental income. The petition further alleges that the terms of the ERA Trust dictate that the rental unit income be used to pay the mortgage and the remainder of \$200.00 be provided to the life tenant and/or the other occupants of the family unit.

The petition alleges that K. Rock has violated the ERA Trust. K. Rock, as co-trustee, allegedly collects the rental income, Alleyne's social security benefits and monies from R. Rock, but has failed to use these funds to pay the mortgage for the subject property as required by the ERA Trust. The subject property is subject of a foreclosure action in the matter of *Nationstar Mortgage LLC v K. Rock, et. al.*, under Index Number 506774/2017, filed on April 5, 2017 (hereinafter the foreclosure action). The date of default was December 1, 2014 and the balance due on the mortgage is \$175,000.00, according to the foreclosure action's summons and complaint. Browne alleges that the default occurred approximately four months after the grantor's death.

Browne states that he was not served with process in the foreclosure action. K. Rock was served with process and has answered the foreclosure action's complaint, without his participation or advice as co-trustee. Browne alleges that there was an insurance policy in the amount of \$80,000.00 that was to fund the ERA Trust. However, K. Rock is alleged to have received the insurance proceeds and used them to

pay other expenses. Browne contends that K. Rock intends to sell the subject property, which violates the ERA Trust. The value of the subject property is estimated to be \$500,000.00. K. Rock allegedly intends to purchase a motor home in upstate New York ranging from \$50,000.00 to \$70,000.00.

The petition requests that K. Rock be removed as trustee and R. Rock be substituted as trustee. It also demands that K. Rock turnover any funds in her custody and be enjoined from collecting any monies or rent. Furthermore, the petition also seeks to amend the ERA Trust to provide supervision and care for Alleyne, the life tenant. Browne seeks attorney's fees and costs in the amount of \$8,000.00 for commencing this legal action on behalf of the ERA trust.

K. Rock's Cross-Petition

On June 14, 2019, K. Rock electronically filed a notice of cross petition with the KCCO, which included an affirmation by counsel, a verified cross petition, an affidavit by R. Rock and supporting papers. On July 19, 2019, Browne interposed a verified answer to the cross petition.

K. Rock's cross petition alleges the following salient facts. On December 6, 2012, the grantor executed a trust that transferred 99% interest in the subject property into the trust. K. Rock and Browne are co-trustees of the ERA Trust. Prior to the grantor's death, K. Rock stopped working to become Alleyne's primary caretaker as the grantor was in poor health. The subject property is the subject of a foreclosure action.

However, the verified cross petition alleges that, pursuant to paragraph 12 of the

ERA Trust, the trust terminated upon the death of grantor. Furthermore, the ERA Trust assets were to be transferred to the direct beneficiaries of the trust, which are alleged to be K. Rock and R. Rock. Any remainder interest to Alleyne is subject to the trustee's discretion.

K. Rock alleges that Browne has frustrated her efforts to dissolve the ERA Trust according to its terms. Due to the impending foreclosure of the subject property, K. Rock seeks to sell the property and use the proceeds to purchase a new home, in an affordable location to preserve the life estate for Alleyne.

K. Rock alleges that she attempted to work with Browne, who was previously willing to step down as co-trustee. On December 28, 2018,¹ K. Rock, R. Rock and Browne met at the Stewart Law Firm, where K. Rock believed documents were being prepared for Browne's resignation and R. Rock's substitution. Instead, K. Rock alleges that the Stewart Law Firm incorrectly advised Browne to commence an action against her to sell the subject property. K. Rock alleges that the Stewart Law Firm sent a letter to the subject property's tenant and the New York City Housing Authority (hereinafter NYCHA) which caused the unit to stop generating income from the tenant and the Section Eight subsidy from NYCHA.

K. Rock seeks the removal of Browne as co-trustee and the appointment of R. Rock as successor trustee. K. Rock also seeks damages, costs, disbursements and attorney's fees.

¹ The verified petition states that a meeting occurred at the Stewart Law firm on December 19, 2019. This

THE PETITIONS AND MOVING PAPERS

Petitioner's commencement papers consist of a notice of petition, a petition and five annexed exhibits labeled A through E. Exhibit A is a copy of the Certificate of Trust of ERA Trust, dated December 6, 2012. Exhibit B includes a copy of the deed for 656 Liberty Avenue, Brooklyn, New York; a copy of a city register endorsement page; and a copy of the recording and endorsement cover page for the quitclaim deed to the ERA Trust. Exhibit C includes a copy of a summons and notice in the matter of *Nationstar Mortgage LLC v Karen Rock, et. al.*; a copy of a mortgage foreclosure complaint under the aforementioned caption. Exhibit D is a copy of a verified answer by K. Rock in the Nationstar matter. Exhibit E is a copy of a letter dated December 28, 2018 from Charmaine M. Stewart, Esq. to trustees, K. Rock and Browne, and to alternate trustee, R. Rock.

Browne's order to show cause papers consist of an order to show cause, a verified petition, an emergency affirmation and affirmation by counsel, and one annexed exhibit. Exhibit 1 is a copy of Browne's notice of petition, petition, and exhibits. The respondent's opposition consists of an affidavit by K. Rock.

Respondent's cross petition papers consist of a notice of cross petition, a verified cross petition, an affidavit of R. Rock, an affirmation of counsel and six annexed exhibits labeled A to F. Exhibit A includes a copy of the deed for 656 Liberty Avenue,

is a typographical error as the cross petition was filed on June 14, 2019.

Brooklyn, New York and a copy of a city register endorsement page. Exhibit B includes a six-page copy of the ERA Trust. Exhibit C is a copy of the recording and endorsement cover page for the quitclaim deed to the ERA Trust. Exhibit D is a copy of a letter dated December 28, 2018 from Charmaine M. Stewart, Esq. to trustees, K. Rock and Browne, and to alternate trustee, R. Rock. Exhibit D is a duplicate of petitioner's exhibit E. Exhibit E is a copy of a letter to Arlene King from the Stewart Law Firm dated January 31, 2019. Exhibit F is a copy of letter from Mohammed Muneeruddin, MD, FACC, dated May 21, 2019.

Respondent's reply affirmation in support of the verified cross petition consists of an affirmation of counsel and three annexed exhibits labeled A through C. Exhibit A is a copy of letter from Mohammed Muneeruddin, MD, FACC, dated May 21, 2019. Exhibit A is a duplicate of respondent's Exhibit F in the cross petition. Exhibit B is a copy an affidavit of service filed on April 25, 2017 in the matter of *Nationstar Mortgage LLC v Karen Rock, et. al.* Exhibit C is a copy of an order of this Court dated June 14, 2019 in the matter of *Nationstar Mortgage LLC v Karen Rock, et. al.*

LAW AND APPLICATION

Pursuant to CPLR 2218, the Court conducted an evidentiary hearing on the issue of K. Rock's alleged mismanagement of the assets of the ERA Trust. The hearing was conducted on April 9, May 29 and June 16, 2019. Browne testified and called R. Rock and K. Rock as witnesses.

The following facts are undisputed. On December 6, 2012, Esther Rock-Alleyne

executed an irrevocable inter vivos trust (the ERA Trust) between herself as grantor and K. Rock and Browne as trustees, with R. Rock as an alternate or successor trustee. The primary asset of the ERA Trust is a property located at 656 Liberty Avenue, Brooklyn, New York. The subject property is a two-family residential property of which the ERA Trust holds a 99% ownership interest and the remaining interest is owned by R. Rock. K. Rock resides in one of the units (hereinafter the family unit) with her siblings, R. Rock and Alleyne and with her nephew, Shaquille Rock. The second unit is rented to a tenant (hereinafter the rental unit). Browne is the grantor's brother; K. Rock and R. Rock are her daughters and Alleyne is her son.

The trust directed the distribution of the trust assets to Alleyne, K. Rock and R. Rock upon the grantor's death in accordance with paragraph twelve of the ERA Trust. The distribution to Alleyne, a disabled person, was to be pursuant to paragraph 13(A)(3) under Supplemental Needs Trust as to (a) interest in real property known as 656 Liberty Avenue, Brooklyn, New York 11207, for the duration of his life (i.e. life estate) and (b) 30% in interest in all other assets to be held in a supplemental needs trust in accordance with N.Y. EPTL § 7-1.12 and/or 42 U.S.C. 1396. The remainder of the trust corpus was to be distributed to K. Rock and R. Rock equally. Esther Rock-Alleyne died in August 2014 triggering the distribution mandate of the ERA Trust.

Browne alleges that K. Rock mismanaged the rental income of the subject property as well as other household income and did not apply it properly toward the mortgage payments due on the subject property. As a result, she defaulted on the

mortgage payments, went into arrears and caused the subject property to go into foreclosure. Browne also alleged that K. Rock did not do an accounting of her management of the ERA Trust assets. Furthermore, she allegedly did not distribute to the trust beneficiaries any of the funds she received from the proceeds of an insurance payment of approximately \$80,000.00, an asset of the trust.

Findings After the Hearing

Although Browne is a co-trustee, he has had no involvement in the management of the ERA Trust assets since its inception. He does not reside in the subject property and has no beneficial interest in the trust assets. After the grantor's death in 2014, he contacted K. Rock to inquire about, inter alia, the funding of the supplemental needs trust for Alleyne.

K. Rock admitted that she has been collecting rental income from the tenant of the subject property since at least 2014 of no less than \$1,330.00 monthly. K. Rock further testified that Alleyne receives Social Security benefits of \$1,047.00 deposited into a bank account in which she is a joint account holder. She has access to those benefits and testified that she used those funds for his needs acting as his de facto guardian. K. Rock has been employed since at least 2014 when she stopped working to care for her disabled mother, the grantor. She has remained unemployed and is now the care giver for Alleyne, her disabled brother R. Rock and Shaquille Rock, both of whom are employed. K. Rock admittedly has not paid the monthly mortgage on the subject property of approximately \$1,477.00 for some time. As a result, in 2017 a foreclosure action was

commenced against the subject property.

K. Rock testified that the expenses and maintenance costs for her household exceeded the rental income of subject property. K. Rock did not give specific information regarding these costs but did include food and monthly bills. Browne did not contend that K. Rock improperly used the subject property's rental income and her brother's social security benefits for her personal use. Rather, he claimed, among other things, that she did not manage the household income and expenses to avoid placing the subject property at risk of foreclosure.

There is no dispute that K. Rock has not done an accounting of her management of the trust assets. However, it is also undisputed that the beneficiaries of the trust, the only parties with the right to seek an accounting, have never asked for K. Rock to do an accounting. In fact, R. Rock testified at the evidentiary hearing that she neither needs nor wants an accounting. She also expressed her full and complete confidence and trust in K. Rock's management of the trust assets, the family unit's expenses, and her beneficial interest.

With regard to K. Rock's alleged misappropriation of insurance proceeds that were paid out after the grantor's death, it was Browne's evidentiary burden to show that K. Rock did not use those funds in a manner consistent with the ERA Trust objectives. Browne correctly contended that the ERA Trust called for 30% of the insurance proceeds to be used to fund a supplemental needs trust for the benefit of Alleyne. However, neither he nor K. Rock created a supplemental needs trust for his benefit. There is no

dispute that K. Rock did not set any portion of the insurance proceed aside for that purpose. R. Rock testified that K. Rock gave her a portion of those funds to help her with about \$8,000.00 in rent arrears for her prior residence before she moved into the subject property. Browne testified that he was reimbursed from those funds for the cost he expended toward the grantor's funeral expenses. K. Rock testified that the balance of the funds was exhausted in the cost of repair, maintenance and household expenses of the family unit. Under the broad powers granted to K. Rock, as a co-trustee of the ERA Trust, she had the discretionary authority to use those funds in any manner she saw fit for the benefit of the beneficiaries. Browne did not show that K. Rock diverted the funds for her personal use and not for the benefit of the beneficiaries of the trust.

A trustee may be removed if he or she has violated or threatens to violate his or her trust or is otherwise unsuitable to execute the trust (*Matter of James H. Supplemental Needs Trusts*, 172 AD3d 1570, 1572–73 [2nd Dept 2019]) citing *Matter of Joan Moran Trust*, 166 AD3d 1176, 1179 [2nd Dept 2018]; see EPTL 7–2.6 [a] [2]). When evaluating a trustee's conduct, the relevant inquiry is whether the trustee has negatively impacted the trust or failed to serve the purpose of the trust (*Matter of James H. Supplemental Needs Trusts*, 172 AD3d 1570, 1572–73 [2nd Dept 2019] citing *Matter of Levinson*, 166 AD3d 1196, 1197–1198 [3rd Dept 2018]).

An individual seeking removal of a trustee bears the burden of demonstrating that the trustee has violated or threatens to violate his or her trust or is otherwise unsuitable to execute the trust (*Matter of Joan Moran Tr.*, 166 AD3d 1176, 1179 [2nd Dept 2018])

citing *Matter of Giles*, 74 AD3d 1499, 1503 [3rd Dept 2010]). Removal of a fiduciary is appropriate where it is established that the fiduciary does not possess the qualifications required of a fiduciary by reason of ... dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office SCPA 711 [8]). Removal of a trustee, however, is a drastic action, and courts are generally hesitant to exercise the power to remove a fiduciary absent a clear necessity (*Id.*).

The Court credits K. Rock's testimony that the cost of maintaining the subject property and the household's expenses far exceeded the income from the rental unit. Browne did not submit any evidence demonstrating that K. Rock misappropriated the trust assets for her personal use. Nor did he present any evidence refuting K. Rock's claim that the expenses of the household and family unit exceeded the subject property's rental income. The fact that the subject property faces foreclosure does not alone provide a sufficient basis for removal of K. Rock as co-trustee. For the foregoing reasons, Browne's petition to remove K. Rock as trustee is denied.

CPLR 6301 states in pertinent part as follows:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

The party seeking a preliminary injunction must demonstrate a probability of success on

the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Browne did not demonstrate a likelihood of success on the merits.

Consequently, his application for a preliminary injunction against K. Rock is denied.

Assuming for the sake of argument that the claims made in the K. Rock's cross petition are true and fully crediting K. Rock's testimony, the only arguable basis for removing Browne as trustee was his refusal to unconditionally cooperate with K. Rock's plan to sell the subject property. Browne was not averse to the sale so long as the proceeds were properly distributed in accordance with the ERA Trust. Upon learning of the foreclosure action pending against the subject property, Browne understandably no longer had confidence that K. Rock was properly managing the trust assets or that she would properly distribute the proceed of such a sale in accordance with the ERA Trust. The fact that he left K. Rock with the management of the trust assets and was not involved in its management is also not a sufficient basis for removing him as trustee.

CONCLUSION

Inasmuch as the two co-trustees will remain within their positions, they must cooperate to distribute the trust assets in accordance with the grantor's wishes. In the Court's view the foregoing decision renders the matter concluded. However, upon the mutual agreement of the parties, the Court may assist the parties with further settlement discussion. In light of COVID 19, the Court will be communicating by email and using Skype for Business for conferencing. If the matter requires a conference, please make

the request to bjjacque@nycourts.gov with a copy to milperez@nycourts.gov on notice to your adversaries. A conference with the Court via Skype for business may be set for a later date.

The foregoing constitutes the decision and order of this Court.

Enter:



J.S.C.