

Matter of Eugene

2023 NY Slip Op 31018(U)

March 29, 2023

Surrogate's Court, Bronx County

Docket Number: File No. 2010-93/H

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

March 29, 2023

ESTATE OF MARCO EUGENE, Deceased
File No.: File No. 2010-93/H

In this vigorously contested estate, the executor, the decedent's son, Dominick Eugene ("Dominick")¹, filed a pre-answer motion pursuant to CPLR 3211 (a) (4) and (7) (the "motion") seeking to dismiss the amended verified petition (the "petition") filed by Arthur J. Kremer, Esq., the Temporary Receiver ("the Receiver") appointed pursuant to a counter-order dated March 17, 2017 to marshal all assets of the estate and pay ongoing expenses (the "counter-order"). The motion is opposed by the Receiver and the decedent's two daughters, Denise Schumacher and Arnette Walker (the "daughters") who, along with Dominick, equally share in the residuary estate.

The Receiver's petition seeks multiple relief against Dominick with regard to commercial property owned by the decedent located at 1190

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Although there are multiple spellings of his name in various proceedings, e.g., "Domnic" and "Domnick," the given name of "Dominick" Eugene, to whom letters testamentary were awarded, is utilized herein.

Commerce Avenue in the Bronx ("1190") and a lease between the decedent and Dominick on October 8, 2009 (the "2009 Lease") concerning 1190, the subject of the within proceeding. The relief sought includes, inter alia, the vacating of a TRO entered with regard to the 2009 Lease, determining that Dominick violated the terms of the 2009 Lease, voiding a subsequent (sub) lease entered into between Dominick and Marco Eugene Realty LLC, a company wholly-owned by Dominick ("Marco Realty"), and ultimately awarding a judgment of possession and warrant of eviction against Dominick and Marco Realty with regard to 1190. Dominick asserts that the petition must be dismissed because there is an action pending in the Supreme Court, Bronx County (Index No. 29780/2019/E) involving the same parties and issues, and moreover, the notice to cure served upon him fails to comply with a condition precedent for asserting a claim for breach of the 2009 Lease. The Receiver's petition has been held in abeyance pending determination of this motion.

Background

The decedent died on January 7, 2010. Dominick was appointed preliminary executor of his estate pursuant to an order dated March 1, 2010 and was awarded letters testamentary by decree dated August 24, 2011 that admitted the decedent's will dated October 8, 2009 to probate. The will nominates Dominick as executor and, after devising the decedent's Bronx residence to Dominick, leaves the residuary estate equally to Dominick and each daughter. The decedent owned four commercial

properties located in the Bronx, including 1190.

On January 25, 2012, the daughters commenced a compulsory accounting proceeding against Dominick as executor, alleging that he failed to comply with a stipulated 90-day order dated March 19, 2012 directing him to account. It was not until the daughters filed an order to show cause seeking a contempt order that Dominick filed an account on April 9, 2013 and several supplemental accounts, all of which allegedly omit substantial revenues generated by the four commercial properties. After Dominick continued to fail to account for those revenues, breached a stipulation requiring that all of the realty was to be sold and admitted in court documents that he commingled estate accounts, the court determined that there was self-dealing by Dominick as executor to the detriment of the estate and the other beneficiaries and issued the counter-order appointing the Receiver (see *Matter of Eugene*, NYLJ, Mar. 8, 2017 at 24, col 1 [Sur Ct, Bronx County 2017], *affd* *Matter of Eugene*, 160 AD3d 506, 507 [1st Dept 2018]; *lv dismissed by Schumacher v Eugene*, 32 NY3d 1070 [2018]).

The counter-order authorized the Receiver to manage all four commercial properties, control estate revenues, collect rents, pay maintenance, and retain a forensic accountant and broker to market all of the realty. Since being appointed, the Receiver has sold three of the properties, including one with court approval to Dominick for the appraisal amount. Only 1190 remains unsold and Dominick continues to offer to purchase this

property. The order appointing the Receiver also directed Dominick to transfer all of the realty, leases, estate books and records, rents, funds and estate tax returns within 45 days to the Receiver, who acts as the de facto executor of the estate (see Matter of Eugene, NYLJ, Mar. 8, 2017 at 24; *affd* Matter of Eugene, 160 AD3d 506, 507; *lv dismissed by* Schumacher v Eugene, 32 NY3d 1070). In affirming the Receiver's appointment, the Appellate Division held that:

The court did not improvidently exercise its discretion in granting the motion where potential objectants demonstrated by clear and convincing evidence that continued control by respondent executor would result in irreparable harm to their interests . . . [and] submitted evidence showing, among other things that the executor commingled funds, delayed the proceedings, failed to comply with the stipulation regarding sale of the estate properties, engaged in self-dealing and failed to account for the revenues generated by the estate properties, all of which endangered the properties and potential objectants' interests therein..." (See Matter of Eugene, 160 AD3d at 506, 507).

The Appellate Division also noted Dominick's admissions in an affidavit that he used personal funds to pay a portion of the estate's taxes; paid his company for services rendered to the estate without judicial approval; submitted invoices to the estate for services allegedly rendered by his spouse but denied that she was paid; could not substantiate his efforts to sell the estate properties and that his conduct was dilatory (*id.*).

After Dominick did not respond to the Receiver's demands for production pursuant to the Court's order directing him to do so, the Receiver filed an order to show cause seeking to punish him for contempt. By order

dated September 27, 2018, the court granted the Receiver's application, finding Dominick to be in contempt, and issued a warrant of commitment on November 8, 2018 that remains unexecuted. Thereafter, Dominick claimed that relevant records were accidentally destroyed in a fire and produced only a portion of the outstanding estate records. Document production to the Receiver remains outstanding.

The Receiver thereafter brought the petition that is the subject of this motion to dismiss which specifically seeks an order/decree:

(1) vacating a temporary restraining order ("TRO") issued on June 15, 2020 by the Supreme Court, Bronx County (Miles, J.) in a declaratory judgment action commenced by Dominick concerning the 2009 Lease, which action was transferred to this court pursuant to a second supreme court order (Miles, J.) dated August 24, 2020;

(2) determining that Dominick violated the terms of the 2009 Lease by failing to utilize 1190 as a transfer station for the recycling of commercial construction materials and subletting it without the Landlord's prior written consent;

(3) finding that Dominick also violated the 2009 Lease by failing to pay rents since August 2016 and/or not turning over rents received from sub-tenants at the premises and disallowing his claims for offsets as unsupported and unauthorized by the court;

(4) voiding the 2009 Lease and a subsequent sub-lease concerning 1190 between Dominick individually and Marco Realty for

self-dealing under "the no further inquiry rule"; and

(5) issuing a judgment of possession and warrant of eviction in favor of the Receiver against Dominick and Marco Realty, authorizing the Receiver to take possession of 1190 in order to sell it, and other related relief.

The October 8, 2009 Lease

The 2009 lease between Marco Eugene, the decedent, as Landlord, and Dominick Eugene, as Tenant (but signed by Domnick Eugene on behalf of Eugene Trucking & Excavating, Inc.) had a term of 25 years from September 1, 2009 through August 31, 2034. Monthly rent was \$500 for the first nine months and \$1000 thereafter. That lease explicitly directed that the premises was to be exclusively utilized as a transfer station for the recycling of commercial construction materials, such as dirt, concrete, stone, etc., and no other uses were permitted without the prior written consent of Landlord. It could not be assigned and was to terminate if Dominick did not obtain a transfer station operating license within twelve months. No changes, alterations or construction were to be made to 1190 without Landlord's written authorization. Tenant was to keep the premises insured, cure any violations at his own expense, and was solely responsible for all repairs, maintenance, utilities, insurance premiums and increases in real estate taxes or levies charged on the rents payable by Tenant to Landlord.

For a one-year period commencing on September 1, 2009, Landlord's consent to Tenant's subleasing would not be unreasonably

withheld. 1190 was not entirely rented to Dominick. Landlord retained a certain portion and, along with any other tenant designated by Landlord, had the right to enter the premises, including Tenant's space, to gain access into Landlord's retained space. Dominick allegedly timely secured the requisite transfer station operating license.

The 2012 Lease

On January 1, 2012, Dominick, as Landlord, individually, and not as Executor or on behalf of Eugene Trucking & Excavating, Inc., entered into a 20-year "Commercial Lease Agreement" for 1190 with Marco Realty as Tenant (the "2012 Lease") commencing on January 1, 2012 and ending on January 31, 2032. The base monthly rent was \$1,500. Landlord, "Dominick Eugene," granted Marco Realty the exclusive right to assign that lease and sublet 1190 to any entity solely at Tenant's discretion. Unlike the 2009 net lease, the 2012 Lease provided that Landlord was responsible for maintaining the premises, including the air conditioning system and roof.

Sub-Tenants at 1190

Annexed to the motion are copies of the following subleases entered into by Marco Eugene Realty, LLC as Landlord with: (1) C J Car Care, Inc as Tenant, for a two-year term beginning November 1, 2013 with base rent of \$60,000 increasing annually; (2) A & A Marble & Granite Corp. as Tenant for a three-year term commencing January 1, 2018 with a base rent of \$63,654, increasing annually; and (3) JD's Collision, Inc. as Tenant

for a two-year term commencing on October 1, 2018 with base rent of \$72,000 increasing annually. Each of those subleases provided for additional annual rent increases for holdovers beyond their stated terms.

The Supreme Court Proceedings

On July 29, 2019 the Receiver, as de jure Landlord of 1190, served a notice to cure (“the Notice”) upon Dominick stating that he was in violation of the 2009 lease, inter alia, because he: (a) failed to utilize 1190 as a transfer station for the recycling of commercial construction materials in violation of Paragraph Second; (b) sublet a portion of the premises without obtaining the Landlord’s prior written consent as required by Paragraphs Fourth and Thirty-Six; and (c) failed to pay the rent stipulated in the Preamble to the Lease commencing in or about August 2016, in violation of Paragraph Third. The Notice also afforded a ten-day period to cure all of the foregoing violations and breaches, or the Landlord would seek to terminate the tenancy and recover possession of the premises pursuant to Articles Third and Seventeenth.

In response, Dominick filed an order to show cause in the Supreme Court, Bronx County seeking a Yellowstone injunction enjoining the Receiver from attempting to terminate the 2009 lease and its tenancy, use and occupancy (see *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]). He also commenced a separate action in Supreme Court seeking a determination that: (1) he did not breach the use or subletting restrictions of the 2009 Lease and fully paid the rents; (2) the 2009 lease

cannot be voided based upon a monetary default; (3) the Notice was invalid as it provided an insufficient ten-day notice period to cure any alleged breaches; and (4) the Receiver's request for termination was generally unsupported. By decision and order dated June 15, 2020, the Supreme Court, Bronx County (Miles, J.) determined the order to show cause only to the extent that a "TRO pending determination of the matter" was granted and the TRO remains in place to date.

The Supreme Court then transferred all pending matters concerning 1190 to this court pursuant to a decision and order dated August 24, 2020 (Miles, J.), reasoning that a declaratory judgment would affect a substantial estate asset, and it is Surrogate's Court that should determine, inter alia: (1) the validity of the lease made shortly before the decedent's death; (2) an alleged oral waiver by the decedent of the use and subletting clauses therein; (3) whether the Dead Man's Statute (CPLR 4519) bars reliance on Dominick's testimony as to alleged oral modifications thereto; and (4) whether the additional (sub) leases executed by Dominick, as executor, constitute impermissible self-dealing and are void. After summarizing the First Department's decision affirming the Receiver's appointment (see Matter of Eugene, 160 AD3d at 506, 508), the decision and order continues that:

. . . "it is questionable whether Dominick, as executor, had the authority to, in effect, appropriate to his sole benefit a stream of income from the subtenants of approximately \$11,000 monthly and his allegations in mitigation that he revitalized the premises were

unsupported and conclusory, since the premises was rented 'as-is'."

While not determining the propriety of a Yellowstone injunction at that time, Justice Miles also addressed the Receiver's contentions in the Notice pointing out that:

. . . "the notice to cure raised issues of payment of rent, and violations of the use and subletting clauses of the lease. Payment of rent is not a proper subject of a notice to cure. As to the breach of the use and subletting clauses, the issue is the ability to cure. An assignment of a lease has been held to constitute a breach not capable of being cured (Pergament Home Ctrs. v Net Realty Holding Trust, 171 AD2d 736 [2d Dept 1997]). On the other hand, violation of a use clause by a subtenant was held to be a proper basis for seeking Yellowstone relief (Reade v Highpoint Assoc. IX, LLC, 1 AD3d 276, 277 [1st Dept 2003])."

The August 24, 2020 decision and order concludes that the Supreme Court would not rule on the necessity for an injunction, the TRO was not to be deemed to be a determination of the merits in any manner, and directs the County Clerk to mark the declaratory action as having been transferred for all purposes to the Surrogate's Court, Bronx County.

Dominick's Pre-Answer Motion

In support of dismissal of the Receiver's petition, Dominick reiterates the four causes of action that he asserted in the supreme court declaratory judgment proceeding: (1) the 2009 Lease's use restriction was waived; (2) its subletting restriction was also waived; (3) the ten-day cure period violated RPAPL § 711(2) that requires a minimum of 14 days' notice; and (4) there is no monetary breach since he paid over \$200,000 toward rent

due for which he was never credited. Should the court find that he owes rent, Dominick is prepared to pay any alleged arrears, and, in any event, opines that is not a basis to void a lease. Annexed in support of Dominick's pre-answer motion are copies of the subject leases and subleases and the documents that he filed in the supreme court proceedings, including an affidavit asserting, inter alia, that the decedent verbally authorized Dominick to control all aspects of 1190, he did so only after discussing this with his two sisters and obtaining their consent and that the 2012 Lease between himself and his company Marco Eugene Realty LLC is not a sublease but a permissible written modification of the 2009 Lease authorized by him as Executor.

Dominick also avers that the petition is premature, since the cure period remains stayed by the TRO pending determination of his order to show cause seeking a Yellowstone injunction. Additionally, Surrogate's Court cannot vacate a supreme court order or determine whether the subleases violated the terms of the Lease, and, at best, can only issue an advisory opinion. He continues that dismissal is also warranted pursuant to CPLR 3211 (a) (4), since there is another action involving the same parties and issues transferred from the Supreme Court, and determination of the petition would violate the first-in-time rule, that "the court which has first taken jurisdiction is the one in which the matter should be determined" and the principal of comity. He concludes that by referring to the alleged breached lease provisions in the Notice, the Receiver actually acknowledged

the 2009 lease, yet refuses to concede its validity.

The Receiver's and Daughters' Opposition

In addition to the allegations contained in the petition, the Receiver notes Dominick's blatant attempts to delay all proceedings, refusal to settle his account or comply with document production, and that he continues to control 1190 to the exclusion of the interests of the estate and the Receiver. After being served with the Notice, instead of attempting to cure the alleged breaches of the Lease, Dominick sought a declaratory judgment and Yellowstone injunction preventing cancellation of the 2009 lease. Although the Supreme Court determined that the Surrogate's Court should decide those issues and transferred all of the pending matters to that court, Dominick continues to erroneously assert that the supreme court action constitutes a "prior action pending" and the TRO must be vacated in order for the Lease to be terminated. In further support of his petition, the Receiver annexes a copy of the supreme court action history from the New York State Courts Electronic Filing System ("NYSCEF") stating that the Supreme Court action was marked "disposed," and emphasizes that there is no other action pending. As the transferred action was procedurally not in the form required by the Surrogate's Court, the Receiver was directed to reformat a previously submitted motion seeking the identical relief herein as a petition, and the contentions raised by Dominick in his application for a Yellowstone injunction are to be restated in the form required by Surrogate's Court.

As to specific lease violations, there is no indication that 1190 was ever used for recycling commercial construction materials. In further support, annexed are copies of entity information from the Secretary of State demonstrating business addresses for Bronx City Recycling, Inc. other than 1190. Dominick also forfeited any rights to continued possession for failing to pay rent for more than ten days and the 2009 Lease explicitly prohibits subletting without the Landlord's prior written consent. The Notice also specified violations of Articles Second, Third and Fourth of the 2009 Lease. The Receiver emphasizes that the ten-day notice period was proper pursuant to Article Seventeenth, that also provides that . . . "should the Tenant fail to discontinue the alleged violations within ten days of receipt of the Notice, the lease shall become null and void, and the Landlord may re-enter the premises without further notice or demand."

As to the validity of the asserted lease violations, the Receiver opines that there is ample authority that chronic nonpayment of rent is incurable, and in that case, service of a notice to cure is not even necessary, as the tenant's mere assurances of future payments do not eradicate the Landlord's claims. Likewise incurable are Dominick's assigning the 2009 Lease and impermissible subletting intended to enable him to collect rents that would otherwise be due to the Landlord and the estate. The 2012 Lease is not a restated lease, as Dominick maintains, but a proscribed sublease altering the salient terms of the original 2009 Lease between the decedent as Landlord, and Dominick as Tenant, in favor of his wholly owned

corporation, Marco Eugene Realty, LLC, solely for Dominick's benefit.

The Receiver urges that the amended petition does not seek collection of rents owed to the estate arising from the "illegal sublease" between Marco Eugene Realty LLC and its purported "tenants", only an order declaring the subleases void as prohibited by Article Fourth of the 2009 lease. He concludes that Surrogate's Court is authorized to vacate the TRO issued by the Supreme Court, as the Yellowstone injunction proceeding was transferred to Surrogate's Court for all purposes, and all parties and issues are now before the court.

In further opposition, the daughters allege that Dominick has abrogated his fiduciary duties as executor for over 12 years, and delayed resolution of all of the issues raised herein. They calculate that, as of three years ago, Dominick diverted rental income from all of the rental properties that should have been paid to the estate in sums ranging from \$1,949,816 to \$2,821,016, and he continues to withhold rents and rental information for 1190. They also contend that the Receiver's petition correctly specifies Dominick's lease violations, inter alia, non-conforming use, illegal subletting and failure to rent pursuant to the terms of his "Sweetheart Lease." In contrast, Dominick's motion recites only the general legal principles of real property law. It does not address the Receiver's arguments concerning the straightforward lease violations and omits any reference to Paragraph Third of the 2009 lease concerning the Landlord's right to re-enter and relet the premises should the rent remain in default for ten days after becoming due.

The daughters also assert that there is no other action pending, as the Supreme Court transferred all proceedings to Surrogate's Court, and it is Dominick who violated the first-in-line rule by taking dilatory actions in the Supreme Court ten years after the matter was pending in this court. There is also no identity of issues and parties in the Yellowstone action and the Receiver's petition. The Yellowstone action excluded the two daughters who have an equal interest in the residuary estate as Dominick, it does not encompass the myriad of issues raised by the Receiver in the petition, and addresses only Dominick's individual interests and not those of the estate.

As corroborated in their affidavits in support of the petition, the daughters emphasize that they never consulted with Dominick concerning the complained of acts or entered into any agreement with him regarding the "illegal" subletting of 1190. They conclude that Dominick's self-serving statements contained in his pre-answer motion must be precluded by the Dead Man's Statute (CPLR 4519) as he is an interested witness.

Dominick's Reply

Dominick replies that the daughters' ad hominem attacks should be disregarded, as they have no connection to the 2009 lease between the Receiver as Landlord, and Dominick as Tenant, and the petition does not assert any claims against them. In any event, the 2009 lease does not permit termination based upon a monetary default, only a right of re-entry for failure to pay, which differs from terminating the Lease and seeking a

judgment of possession and warrant for holdover. The Notice also fails to state the predicate for a demand for rents required by RPAPL § 711 (2). It does not contain an unequivocal demand for payment of the rent due or surrender of possession of the property, the approximate amounts due, or state what the tenant must do in order to avoid litigation that could result in eviction.

He continues that the Receiver improperly attempts to cure these deficiencies by stating that he is not seeking rents at this time and termination based upon alleged non-monetary defaults. The allegation that a notice to cure for a monetary default is not required in situations involving chronic nonpayment of rents is meritless with the TRO in place, as the time to cure monetary defaults has not expired. Likewise, the chronic nonpayment doctrine, which is usually utilized in a residential lease, does not generally apply to a commercial lease unless the lease expressly provides for that remedy, which is not the case herein. In any event, chronic nonpayment must be predicated upon numerous prior nonpayment proceedings, and none has been filed. Dominick continues that subletting is a curable default in that the tenant can either obtain the consent of the Landlord or agree to end the sub-tenancies.

For all these alleged violations, it is not necessary to “erase the past” so long as there is demonstration that Tenant can bring itself back into compliance without vacating the premises. Moreover, the Receiver is not in privity with any of the parties to Marco Eugene Realty and has no standing

to intervene in its affairs.

Dominick concludes that the transferred Yellowstone injunction action has not yet been assigned a file number by Surrogate's Court, but even if it were administratively reformatted, it continues as a separate proceeding and cannot be dismissed without a court order or a stipulation of discontinuance. Instead of filing an amended petition concerning the same transactions and issues of fact, the Receiver should have amended his answer in the transferred action.

Determination of the Pre-Answer Motion

On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must accept the facts as alleged in a complaint as true, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (see *Doe v Bloomberg L. P.*, 36 NY3d 450 [2021]; *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]; *Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995]). Accepting the allegations as true, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (see *Doe v Bloomberg L. P.*, 36 NY3d at 450, 460; *Polenetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]).

Dominick's argument that this court does not have jurisdiction to determine the declaratory judgment proceeding, which was transferred by

the Supreme Court for all purposes, is not supported, given that the Supreme Court and Surrogate's Court have concurrent jurisdiction over the issues raised herein (see *Gaentner v Benkovich*, 18 AD3d 422 {2d Dept 2005}). Specifically, SCPA 209 (10) gives Surrogate's Court all of the powers that the Supreme Court would have in like actions and proceeding, specifically, authority to determine a decedent's interest in any property claimed to constitute a part of the gross estate and to determine the rights of any persons claiming an interest therein, and to construe any instruments affecting such property (see *Matter of Kiejliches*, 292 AD2d 530 [2d Dept 2002]; *Matter of Langfur*, 198 AD2d 355 [1993]).

The contention that the declaratory judgment action and order to show cause seeking a Yellowstone injunction filed by Dominick constitute prior pending proceedings is also unavailing, as the Supreme Court transferred that action and the order to show cause to this court, and marked both proceedings "disposed of" in the supreme court NYSCERS database (File No. 29780/209019/E). Both proceedings are to be reformulated as surrogate's court proceedings as hereinafter directed.

It is "black-letter law" that a person standing in the relation of a fiduciary capacity cannot deal with or purchase the property, in reference to which he holds that relation (see *Matter of Kinzler*, 195 AD2d 464 [2d Dept 1993], quoting *Forbes v Halsey*, 26 NY53, 65 [1962]). The Receiver asserts that, after the decedent's death on January 7, 2010 and Dominick's appointment as a fiduciary of the estate commencing on March 1, 2010,

Dominick entered into various transactions that were not authorized by the court or the Receiver that operate to void not only the 2009 Lease but the 2012 (Sub) Lease between “Dominick” as Landlord and Marco Eugene Realty, a company in which he has an ownership and controlling interest, as (Sub) Tenant, and all sub-leases by Marco Eugene Realty as Landlord, including sub-leases entered into after the Receiver’s appointment on March 17, 2017. Had Dominick continued to operate within the constraints of the original 2009 Lease, that lease would have remained inviolate until August 31, 2034. However, the Receiver contends that Dominick changed the terms of the 2009 Lease, a net lease, in his own favor, made substantial improvements and repairs, charged the estate for these improvements and 1190’s carrying costs and sublet 1190 to third parties who clearly did not utilize the premises as a transfer station for the recycling of construction materials, all without the court’s or Receiver’s approval. Although Dominick apparently obtained the requisite business license, it is not established whether he or Marco Realty ever operated the premises as a transfer station, as expressly required by the 2009 Lease.

The Receiver continues that all of these acts are tainted by conflicts of interest and lack of impartiality, to the detriment of the estate and the other testamentary beneficiaries, and to Dominick’s personal advantage. There is no showing at this juncture that the decedent authorized Dominick to change the explicit terms of the 2009 lease during his lifetime, or that these transactions were authorized by the Court or the Receiver.

Accordingly, the Receiver's allegations in this regard are facially adequate.

The allegation of nonpayment of rent, by itself, would not normally warrant voiding the subject Leases and subleases, as that issue could ordinarily be resolved in nonpayment and accounting proceedings maintained by the Receiver. The 2009 Lease does not provide for the turnover of rents received from subtenants, since it expressly prohibits subleasing. If the 2012 (Sub) Lease and the sub-leases are held to be invalid, the rents from the sub-tenants must be disgorged and Dominick's claims of offset for repairs, improvements and carrying costs would similarly be disallowed. Finally, the 2009 Lease provides for the Landlord's right of reentry after 10 days of nonpayment of rents. The Receiver seeks to eject Domnick, Marco Realty and the subtenants from the realty and exercise the right of reentry for failure to pay any rents for many years, effectively terminating all of the leases. Accordingly, the Receiver's allegations of nonpayment are germane and should not be stricken at this juncture.

On this state of the record, affording the Receiver's amended petition a liberal construction, accepting the allegations therein as true and providing the Receiver with the benefit of every favorable inference and finding that it is possible that the Receiver can succeed upon any reasonable view of the facts stated, (see *Cortlandt St. Recovery Corp. Bonderman*, 31 NY3d 30, 38 [2018]; *Aristy-Farer v State of New York*, 29 NY3d 501, 509 [2017]), Dominick's motion to dismiss the Receiver's amended petition is denied in all respects.

The court has not required the declaratory judgment action and the order to show cause to be reformulated as surrogate's court proceedings until recently. The court previously directed the Receiver to amend a motion seeking a declaratory judgment and refile it in the form of a petition seeking the same relief. Dominick's supreme court action seeking a declaratory judgment that he did not violate the terms of the subject leases and subleases (Index No. 29780/2019/E) is to likewise be reformulated into the anticipated objections to the Receiver's amended petition, which contains additional allegations, and will be more responsive to all of the issues raised herein. The reformulation is also required to add the two daughters, who share equally with Dominick in the estate, as necessary parties.

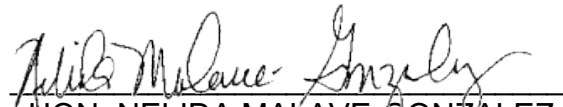
This a propitious time for Dominick to renew his motion seeking a Yellowstone injunction. He is to expeditiously file an amended motion by order to show cause listing all necessary parties in the surrogate's court proceedings as interested parties and detail facts evidencing an intent and ability to cure the subject breaches. The TRO directed by the Supreme Court on June 15, 2020 is to be continued in the renewed order to show cause seeking a Yellowstone injunction and is to remain in place pending determination of the Yellowstone application. Opposition, if any, to the Yellowstone application is to be served and filed within 30 days of service thereof and a reply, if any, is to be served and filed within 15 days thereafter.

Objections to the amended petition, if any, are to be served and filed within 30 days of the date of this decision, which constitutes the order

of the court. A reply, if any, is to be served and filed within 15 days thereafter. The supreme court declaratory action and motion seeking a Yellowstone injunction are to be reformulated into surrogate's court proceedings as heretofore directed.

The Chief Clerk shall mail a copy of this decision and order to all counsel.

Proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE