

Matter of Scott

2023 NY Slip Op 31960(U)

June 5, 2023

Surrogate's Court, Bronx County

Docket Number: File No. 2020-506/B & E

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

June 5, 2023

ESTATE OF ROBERT SCOTT, Deceased
File No.: 2020-506/B & E

In this contested probate proceeding, Kim Wade, the decedent's stepdaughter and the estate's preliminary executor (the "petitioner"), seeks to remove the SCPA 805 (3) restriction on her preliminary letters so she can sell the estate's primary asset, a two-family house located at 942 East 220th Street, Bronx, New York (the "Realty"), pursuant to an executed contract of sale. Objections to the application have been filed by Lorri Scott, Robin Scott, Elaine Morton Scott, who are the decedent's biological children, and Ayanna Lee, who is the decedent's grandchild (collectively, the "Objectants"). In addition to the Objectants, there is one other distributee, an infant, whose interests are being represented in this proceeding by Joyce Randazzo, Esq., a court appointed guardian ad litem. Ms. Randazzo does not oppose the petitioner's request to remove the restriction on her preliminary letters.

BACKGROUND

Procedural History

The decedent died on January 30, 2020, at the age of eighty five. His estate consists primarily of the Realty which was appraised at \$550,000.00. The Realty is encumbered by a mortgage in the approximate amount of \$379,000. The Realty allegedly generates rental income that is insufficient to pay the property's carrying costs and the mortgage is currently in foreclosure. As set forth below, a long and complicated history of

court filings and litigation ensued after the decedent's death.

On May 8, 2020, Robin Scott (one of the Objectants) filed a petition to compel the production of the decedent's will (File No. 2020-506). Citation never issued in the compel proceeding. That proceeding was later rendered moot when the petitioner filed the decedent's purported will, dated December 21, 2019 (the "will"), with the court on June 16, 2020 (File No. 2020-506/A). The will is a two-page document bearing the signatures of two witnesses, one of whom is the attorney who supervised its execution. The instrument nominates the petitioner as the executor and distributes all of the decedent's assets in two equal shares to the petitioner and her brother, Errol Holloway who is the decedent's other stepchild and the will's nominated successor executor. The Realty is not specifically devised under the will and passes under its residuary clause.

On June 23, 2020, the petitioner commenced the instant proceeding to probate the will (File No. 2020-506/B, the "probate proceeding"). One day later, the court received an application from the petitioner for preliminary letters. In response, on July 15, 2020 Lorri Scott (one of the Objectants) filed a petition requesting to receive letters of temporary administration (File No. 2020-506/C). Approximately two weeks later, the court issued preliminary letters testamentary (the "letters") to the petitioner. The letters contained an SCPA 805 (3) restriction on the disposition of any interest in the Realty. The "C" proceeding has been held in abeyance.

On November 3, 2020, the Objectants filed an action sounding in fraud in the Supreme Court, Bronx County under Index No. 33035/2020 (the "Supreme Court action") against Kim, Kim's brother, Errol Holloway, and Kim's son, Robert Wade. The Objectants

filed a notice of pendency against the Realty with the County Clerk in conjunction with the Supreme Court action.

On January 5, 2021, Objectants Robin Scott and Lorrie Scott filed objections in this proceeding to the will's probate (File No. 2020-506/B). Those objections allege, *inter alia*, that (i) petitioner is unfit to serve as a fiduciary; (ii) the decedent lacked testamentary capacity when the will was executed; (iii) the will was a product of undue influence and fraud; and (iv) the decedent's signature on the will is a forgery.

On January 20, 2021, the Hon. Wilma Guzman, J.S.C., issued a decision and order transferring the Supreme Court action to this court, where it was filed as a miscellaneous proceeding (File No. 2020-506/D). Thereafter, on November 15, 2022, this court issued a decision and order granting petitioner's motion to dismiss the "D" proceeding and vacate the Objectants' notice of pendency against the Realty (*Matter of Scott*, 2022 NYLJ LEXIS 2222 [Sur Ct, Bronx County 2022]).

On April 13, 2023, the petitioner filed the instant application to remove the SCPA 805(3) restriction on her letters. The parties' positions relative to the application have been fully briefed and on May 5, 2023 the matter was marked submitted for a decision, with the parties' consent.

The letters

The petitioner has applied for and received three six-month extensions of her letters since their issuance on July 31, 2020. The first extension was vehemently opposed and litigated by the Objectants, and is the subject of a pending appeal. In response to the second extension application, the Objectants did not oppose the court issuing an order

extending the letters for another six months without an SCPA 805(3) restriction. Instead, they demanded that letters should only be extended if the petitioner filed a bond in the penal sum of at least \$560,000.00. Ultimately, the court granted the second extension request by an order dated October 18, 2022 which maintained the letters' SCPA 805(3) restriction and did not require a bond. The letters were once again extended on April 5, 2023 on application of the petitioner, without opposition. To date, the letters remain in effect, due to expire on September 24, 2023.

The instant application to remove the SCPA 805(3) restriction

The petitioner has entered into a written contract to sell the Realty for \$565,000.00. The petitioner now asks the court to remove her letters' SCPA 805(3) restriction upon filing a bond equal to the selling price. According to the petitioner, it is urgent to sell the Realty as quickly as possible because it is subject to a mortgage, with a payoff of \$371,936.82 as of March 31, 2023, that has accumulated significant arrears. The holder of the mortgage has commenced a foreclosure action in the Supreme Court, Bronx County, under Index No. 804589/2023/E.

The petitioner contends that the Realty needs to be sold immediately to (i) preserve the estate's diminishing equity in the property and (ii) create a reserve to pay the estate's mounting debts and administrative expenses, including the outstanding mortgage balance; the petitioner's continuing legal fees and attorney disbursements (estimated to be \$90,000.00 and \$2,127.00 to date, respectively); the guardian ad litem fees (to be determined) and fiduciary commissions (calculated at \$20,9850).

The objections

The Objectants assert four objections to the removal of the letters' SCPA

805(3) restriction. Their first objection (“Objection One”), which consists of multiple arguments, maintains, inter alia, that:

(i) The Realty should not be sold until there “has been a decision on the merits of the Objectants’ claims against Ms. Wade and the estate,” regarding the invalidity of the proffered will and their allegations that the petitioner has committed fraud, malfeasance, grand larceny and other crimes;

(ii) The Realty should not be sold until “a criminal murder investigation pending in the 77th Precinct of NYPD” which allegedly involves the petitioner and Gary Henricksen, a now deceased will witness, is resolved;

(iii) The Realty should not be sold and the net sale proceeds placed in escrow because the property is “[t]he home of their ancestors...their legacy”;

(iv) Allowing the sale of the Realty to occur would be “in essence, aiding and abetting” the petitioner’s alleged fraud and rewarding the petitioner for mishandling and delaying the estate’s administration; and

(v) The Objectants, who were named in the foreclosure action as parties in their capacity as potential heirs at law, will be fully litigating the matter in the Supreme Court, asserting counterclaims and demanding discovery.

The second objection (“Objection Two”) contends that the SCPA 805 (3) restrictions should not be removed because the Objectants have begun the process of perfecting their appeal of the court’s November 15, 2022 decision/order dismissing the “D” proceeding and vacating the Objectants’ notice of pendency against the Realty. The notice of appeal was filed with this court on January 3, 2023.

In their third objection (“Objection Three”), the Objectants oppose the

petitioner's application on the basis that they have not received sufficient information "needed to make an informed decision about the [proposed] sale" of the Realty. Such information includes, but is not limited to, background information on the proposed purchaser; a detailed estimate of the closing costs; and an itemized disclosure of the proposed disbursement of the net sales proceeds.

Finally, as a fourth objection ("Objection Four"), the Objectants only state that they intend to challenge any request made by the petitioner for commissions or the payment of legal fees from estate funds.

DISCUSSION

In the absence of contrary or limiting language in letters of appointment, a preliminary executor has the right to sell real property without the authorization of the court and on such terms as in the opinion of the fiduciary will be most advantageous to those interested in the estate, unless such property has been specifically devised under the decedent's will (EPTL 11-1.1 [b] [5] [B]; SCPA 1412 [3]; *Matter of Way*, 56 Misc 2d 552 [Sur Ct, Jefferson County 1967]). Despite the wide grant of discretion given to a fiduciary to determine the time, price and sale of real property, however, the fiduciary's actions must always be consistent with the best interests of the estate (see *Matter of Kane*, 98 AD2d 851 [3rd Dept 1983]).

Here, there are no restrictions in the will which would prohibit the petitioner from selling the Realty. The letters' only limitation upon the petitioner's authority in this regard is the requirement, pursuant to SCPA 805(3), that she file a bond in the amount of proceeds to be received from the Realty's sale before she closes on the transaction.

The Objectants did not oppose the petitioner's most recent application (the

“extension application”) for an order to extend the letters without any encumbrance upon her ability to sell the Realty, notwithstanding the petitioner clearly indicated her intent to sell the property. Under the court’s order granting the extension application, dated April 5, 2023 (the “April 5th order”), the petitioner received the authority to sell the Realty provided she posted a bond for the gross sales price. Had the court decided to impose additional restrictions on the broad authority granted under EPTL 11-1.1 [b] [5] [B] and SCPA 1412 [3], the court would have included them in the April 5th order, something the court did not do. Insofar as the Objectants have not stated any grounds under CPLR 5015 for relief from the April 5th order, that determination stands. Accordingly, the court finds that the petitioner has the statutory authority to sell the Realty, and she may do so upon filing a bond in the amount of \$565,000.00, the Realty’s sale price under the petitioner’s executed contract of sale for the property.

According to the petitioner, it is her business judgment as a fiduciary that the Realty needs to be sold to salvage the value of the estate’s equity in the property and to obtain sufficient funds to pay the estate’s legal and administrative estate expenses. Absent extraordinary circumstances demonstrating that the sale would not be in the best interests of the estate, the court is not empowered to substitute its judgment for that of a fiduciary exercising a statutory power (*see Matter of Osterdorf*, 75 Misc2d 730 [Sur Ct, Nassau County 1973; *Matter of McGuire*, 2021 N.Y. Misc. LEXIS 90 [Sur Ct, Erie County 2021]).

The Objectants have not demonstrated that the anticipated sale of the Realty fails to comport with the estate’s best interests. The court is mindful that the Objectants oppose the sale of the Realty, which they describe in their papers as their “ancestral home.” However, the Realty, which the court notes had been jointly owned by the decedent and the

petitioner's mother as tenants by the entirety,¹ is the subject of a foreclosure proceeding and any remaining equity held by the estate is at risk.

The court is not persuaded by the arguments asserted in Objection One that the removal of the SCPA 805 (3) restriction should be delayed until there has been: (i) a final determination "on the merits of the Objectants' claims against Ms. Wade and the estate" including the validity of the will and their allegations that the petitioner has committed multiple crimes; (ii) a resolution of what the Objectants claims, without even providing a scintilla of evidentiary support, is a murder investigation being conducted by the 77th Precinct of NYPD related to the death of Gary Henricksen, a now deceased witness to the will's execution; (iii) the final outcome of the pending Supreme Court foreclosure action against the Realty. The court notes that the Objectants are named defendants in the foreclosure action as potential heirs at law. In that action, the Objectants have asserted cross-claims against the petitioner, filed another notice of pendency against the Realty and, according to their papers, intend to file discovery demands.

While the Objectants claim that the petitioner is the sole cause of delay in the progress of this proceeding, it appears to the court that both sides bear culpability in this regard. Whatever the reasons for the delays to date, it is clear that deferring a determination on the removal of the Realty's SCPA 805 (3) restriction as requested in Objection One would only jeopardize the estate's primary asset, as it continues to accrue carrying costs and the litigation surrounding it generates legal fees and other administrative expenses for the estate. As such, the court is unpersuaded by Objection One's argument

¹The petitioner's mother predeceased the decedent.

that the court should wait until this proceeding, the foreclosure action and the purported murder investigation are completed.

Objection Two is unavailing for the same reason. That objection seeks to delay a decision here pending the determination of the Objectants' appeal of this court's prior ruling which, inter alia, vacated a lis pendens that the Objectants previously filed against the Realty (*Matter of Scott*, 2022 NYLJ LEXIS 2222 [Sur Ct, Bronx County 2022]). According to the Objectants, they have begun the process of perfecting this appeal. As an initial matter, the court notes that there is no mandated stay in connection with that appeal, by statute or otherwise, which requires the court to forestall its decision here (CPLR 5919 [a] and [b]). Nor have the Objectants provided a basis for the court to issue a stay of the proceedings pursuant to CPLR 5519 [c]. Moreover, the court finds that the delay requested in Objection Two would not be in the estate's best interest as it would put its principal asset at risk. Accordingly, the court rejects Objection Two and its argument against removing the letters' SCPA 805(3) restriction.

As for Objection Three, a copy of the sales contract has been filed. The petitioner has no obligation to provide the Objectants, who are not named beneficiaries under the will, with any additional information regarding the Realty's proposed sale as a condition precedent to selling the property. Likewise, Objection Four is of no moment, as the Objectants lack any standing to contest the estate's anticipated expenses, and the potential of such a future challenge in an accounting or other appropriate proceeding is not a basis for delaying the sale of the Realty.


Finally, it is apparent that there is a great deal of hostility and animus

between the Objectants and the petitioner. This is not an excuse, however, for the Objectants' suggestion that the court would be "aiding and abetting" the petitioner's alleged crimes and malfeasance if it did not rule in favor of the Objectants' claim. Both sides are cautioned to refrain from using such palpably improper statements going forward. While the parties may take the litigated issues personally, they are represented by counsel who should be able to proceed objectively and zealously advocate without resort to unnecessary hyperbole and rhetoric that is disrespectful to the court and to each other.

CONCLUSION

In order to preserve the estate's assets and expedite the estate's administration, this decision, constituting the order of the court, grants the petitioner's instant application and dismisses all of the objections to same. The letters' SCPA 805 (3) restriction shall be removed upon the petitioner filing a bond in the penal sum of \$565,000.00. The court's determination in no way constitutes judicial approval of the terms, conditions, sufficiency or purchase price contained in the current contract of sale for the Realty. The letters shall be amended to authorize the preliminary executor to collect assets having a total value of \$565,000.00.

Order amending decree signed.


Hon. Nelida Malave-Gonzalez,
Surrogate