

Matter of Deneny v VanRossem
2011 NY Slip Op 33446(U)
December 20, 2011
Sup Ct, NY County
Docket Number: 113205/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: J. JAFFE
BARBARA JAFFE
J.S.C.
JusticePART 5

INDEX NO.

113205710Taylor Francis DenDyke

- v -

MOTION DATE _____

Barbara Van Rossem

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2, 3, 4

Answering Affidavits — Exhibits _____

5, 6

Replying Affidavits _____

Cross-Motion: Yes No

UNFILED JUDGMENT

Upon the foregoing papers, it is ordered that this ~~judgment~~ judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER** ~~JUDGMENT~~

Dated: 12/20/11
DEC 20 2011B.J.
BARBARA JAFFE
J.S.C.Check one: FINAL DISPOSITION NON-FINAL DISPOSITIONCheck if appropriate: DO NOT POST REFERENCE SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

x

In the Matter of the Application of JOHN FRANCIS DENENY a/k/a SEAN DENENY, as Beneficiary and Co-Trustee, to Remove BARBARA VAN ROSSEM as Co-Trustee of THE 518 TRUST created under the John Deneny Living Trust dated February 28, 2002, pursuant to EPTL § 7-2.6(a)(2),

Index No. 113205/10

Motion Date: 9/27/11
Motion Seq. No.: 001

DECISION & JUDGMENT

Petitioner,

-against-

BARBARA VAN ROSSEM, as Co-Trustee of THE 518 TRUST,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Respondent.

x

BARBARA JAFFE, JSC:

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For respondent:

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By order to show cause dated November 9, 2010 and verified petition dated October 4, 2010, petitioner moves pursuant to CPLR 7701, *et seq.* and EPTL § 7-2.6(a)(2) for an order removing respondent as co-trustee of The 518 Trust (Trust). Respondent opposes and, by notice of cross motion dated September 1, 2011, moves pursuant to EPTL § 7-2.7 for an order directing petitioner to provide a full accounting of the Trust, and pursuant to EPTL § 7-2.2 terminating the Trust, directing the sale of all trust assets, and providing respondent with her beneficial share of the sale proceeds. Petitioner opposes the cross motion.

I. PERTINENT BACKGROUND

John Deneny, the parties' now-deceased [REDACTED], created a Living Trust for the purpose of holding in trust some of his real property, including the building located at 518 East 83rd Street in Manhattan (the property), a 20-unit apartment building. The Living Trust provides that upon Deneny's death and after his estate has been settled, the trustees are to dispose of and distribute the trust's interest in the property to The 518 Trust. Deneny appointed petitioner and respondent to serve as the Trust's co-trustees and primary beneficiaries. (Verified Petition, dated Oct. 4, 2010 [Pet.], Exh. A).

By deed dated March 29, 2005, petitioner and respondent acquired title to the property as co-trustees of the Trust. (*Id.*, Exh. B). Thereafter, respondent moved into the property as her primary residence, while petitioner, from June 2007 to August 2010, resided in California and, since August 2010, resides in Water Mill, New York. The parties agreed that respondent would be responsible for collecting rent checks from tenants residing in the property, addressing tenant-related issues, and keeping the property in good condition. (*Id.*).

II. CONTENTIONS

Petitioner alleges that respondent has failed to administer the Trust properly and maintain it in a safe and sanitary condition, alleging that approximately half of the apartments are not rented and are filled with excrement, vermin, and garbage. Moreover, he asserts, respondent claimed 10 of the 20 apartment units for her sole use and filled several of them with abandoned furniture and rotten food and garbage, leading to vermin, insects, and excrement, and depriving the Trust of substantial monthly rental revenue, thus eliminating the property's annual deficit. Due to the deficit, petitioner and respondent have funded the Trust approximately \$150,000 each,

the Trust is in default with certain third-party creditors and is at risk of defaulting on its mortgage, its bank account is almost empty, and any revenue collected by the Trust is used to pay Trust expenses or is spent by respondent for personal shopping. Petitioner thus contends that respondent has mismanaged the property and the Trust, including the following:

- (1) In July 2010, the New York City Water Board mailed respondent a new water bill, which she failed to pay, resulting in the Water Board accelerating all payments due by the Trust for the sum of \$21,426.74 due immediately. After partial payments were made, the balance due is approximately \$17,000;
- (2) In June 2010, respondent was notified that the Trust was required by file a Real Property Income and Expense report (RPIE) by September 1, 2010, with the failure to do so subjecting the Trust to a penalty consisting of up to three percent of the property's actual assessed value for the upcoming tax year. Upon respondent's failure to comply, a second and final notice dated July 29, 2010 was delivered to the Trust, warning that the RPIE was due on or before September 1, 2010. Respondent not only again failed to comply but mailed the notice to petitioner in a manner that did not permit him to receive it until August 30, 2010; and
- (3) Respondent has created dangerous, unsanitary, and deplorable conditions in the property, leading to tenants complaining, breaking their leases early, and vacating the property.

Petitioner also asserts that the relationship between him and respondent has deteriorated over the years, that respondent is physically, emotionally, and verbally abusive toward him and his children, has refused to reveal Trust expenses and pay the property's mortgage payments timely, and, until recently, refused to permit petitioner access to the property. Petitioner thus asserts that respondent's mismanagement and conduct warrants her removal as co-trustee of the Trust. (*Id.*).

Respondent denies petitioner's allegations, and contends that when the Trust took possession of the property, the rental units were in a state of disrepair, and there were ten vacant

units that were not fit for habitation. She asserts that petitioner was in charge of the Trust's finances but failed to pay for the repairs necessary to repair the units, and thus she attempted to rehabilitate the property on her own and with limited resources and was able to repair all but four of the units as of August 2010, and she disputes the condition of the units as reflected in petitioner's photographs. Respondent also alleges that petitioner failed to manage the Trust's finances properly, that he was responsible for paying vendors and taxes and filing the RPIE and failed to do so, and that he has refused to provide her with a full accounting of the Trust's finances. Finally, respondent claims that as she has received no income from the property, the purpose of the Trust has ceased to exist, and she thus seeks its termination and that any proceeds from it be equally divided between her and petitioner. (Affidavit of Barbara Van Rossem, dated Sept. 1, 2011).

In reply, petitioner maintains that when respondent took over the management of the property, all of the units were rented and the property was in good condition, but thereafter and due to respondent's actions, only half of the units were rented and the property is in a poor and unsafe condition. He denies having had financial control of the property or that he mismanaged the finances, and asserts that since he took over managing the property, he has substantially rehabilitated it, rented five vacant units, thereby increased the income generated by the property, and eliminated unnecessary expenses and paid costs and bills. Petitioner alleges that as the property is now able to generate a profit, there is no basis upon which to terminate the Trust. (Affidavit of John Francis Deneny, dated Sept. 21, 2011).

III. ANALYSIS

Pursuant to CPLR 7701 *et seq.*, a special proceeding may be brought to determine a

matter relating to an express trust, and pursuant to EPTL § 7-2.6(a)(2), this court has the power, on the application of any person interested in the trust estate, to suspend or remove a trustee who has violated or threatens to violate the trust or who for any reason is unsuitable to execute the trust.

Here, whether or not the property was in good or poor condition before respondent took over its management, it is essentially undisputed that respondent has been unable to maintain the property sufficiently or manage the property's finances, leading to unsanitary conditions, loss of revenue, and the potential default of the property's financial obligations. Respondent also does not dispute petitioner's allegations concerning her actions toward him. Consequently, petitioner has established that respondent has impeded his efforts to manage and maintain the property. (*See Matter of Mergenhagen*, 50 AD3d 1486 [4th Dept 2008] [court should have removed trustee as hostility between him and other beneficiaries of trust conflicted with his duty toward trust as hostility interfered with proper administration of trust, and as he failed to fulfill trust duties]; *Matter of Hall*, 275 AD2d 979 [4th Dept 2000] [co-trustees should have been removed as their actions prevented petitioner from performing duties as co-trustee]).

It is also undisputed that the relationship between him and respondent has deteriorated, that they are unable to co-manage the property, and that respondent has behaved in an abusive and threatening manner toward him. (*See Matter of Duell*, 258 AD2d 382 [1st Dept 1999] [court properly removed co-trustee upon showing of antagonisms between co-trustee and his co-trustee and trust beneficiaries, which resulted in co-trustee's actions that interfered with proper administration of estate, and that future cooperation was unlikely]; *Matter of Angell*, 268 AD 338 [3d Dept 1944], *affd* 294 NY 923 [1945] [removal of co-trustee justified where differences of

opinion between co-trustees made future cooperation improbable]).

Petitioner has thus shown that respondent's actions have violated the Trust and/or that she is unable to execute the Trust as a co-trustee with him, thus warranting her removal as co-trustee. And, absent any dispute that the property is now generating an income, there is no ground upon which to terminate the Trust. (EPTL § 7-2.2 [when purpose of express trust ceases, estate of trustee also ceases]).

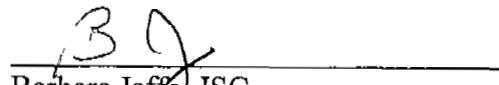
IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is granted, and respondent is hereby removed forthwith as co-trustee of The 518 Trust; and it is further

ORDERED and ADJUDGED, that respondent's cross motion is denied.

ENTER:


Barbara Jaffe JSC
BARBARA JAFFE J.S.C.

DATED: December 20, 2011
New York, New York

DEC 20 2011

UNFILED JUDGMENT

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