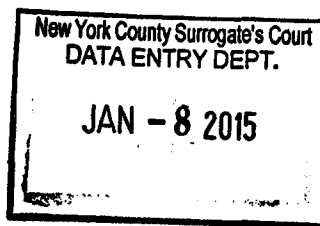


Matter of Carpenter
2015 NY Slip Op 30009(U)
January 8, 2015
Surrogate's Court, New York County
Docket Number: 1977-6048/B
Judge: Rita M. Mella
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK



-----X
In the Matter of the Trusts Created under the Last Will and
Testament of

CATHERINE H. CARPENTER,

DECISION
File No.: 1977-6048/B

Deceased.

-----X
M E L L A, S.

The following papers were considered in deciding this motion to dismiss pursuant to CPLR § 3211(a)(7) and (8):

<u>PAPERS</u>	<u>NUMBERED</u>
Amended Notice of Motion to Dismiss dated June 26, 2014	1
Affidavit of Respondent Mary E. Kaplan, dated June 24, 2014	2
Affirmation of Steven Kirkpatrick, Esq., dated June 24, 2014 (Exhs. A-F)	3
Petitioner's Memorandum of Law in Opposition to Respondents' Motion to Dismiss, dated July 8, 2014	4
Affidavit of Mark Vocaturo in Opposition to Motion to Dismiss, dated July 7, 2014 (Exhs. 1-2)	5

In this contested miscellaneous proceeding, respondent, Mary E. Kaplan, has moved to dismiss the underlying petition which seeks to collect rent payments and to recover possession of property. The motion is based on subparagraphs (7) and (8) of CPLR § 3211(a).

Under Article Eighth of the 1969 will of Catherine H. Carpenter, a trust was created for the benefit of her son, Samuel N. Hinckley. Upon his death in 2008, the trust was divided into two trusts, one for the benefit of testator's granddaughter, Helen H. Beekman, and the other for the benefit of her grandson, Samuel H. Hinckley. After Ms. Carpenter's death, an interest in a "ground lease" of property located at 25 Washington Square North was transferred from her estate to the original trust. This "ground lease" has been valued at \$2.4 million, while the whole property

(including the four-story residential building) has been valued at \$8 million. The record reflects that Ms. Kaplan has been a holder of the ground lease since 1994, when the former lessee assigned his interest under the lease to her.

In its petition, the Trustee alleges that Ms. Kaplan has violated the lease in several respects: 1) failure to pay rent since November 2013 (\$57,325); 2) failure to make requisite payment of taxes (\$133,667) and utilities (\$5,353) (for a combined total of \$196,346); 3) subletting the property without the Trustee's consent; and 4) allowing the property to fall into disrepair. Under the terms of the parties' ground lease, the Trustee claims, each of these breaches of the lease constitutes a ground for its termination and for the Trustee/lessor to recover possession, a relief the petition seeks.

Also in its petition, the Trustee alleges that it attempted to communicate with and demand payment from Ms. Kaplan on four separate occasions, that Ms. Kaplan does not reside in the premises and that, throughout the years, Ms. Kaplan has failed to pay rent timely knowing that the terms of the lease do not allow for late fees or interest. By acting in this manner, the Trustee maintains, Ms. Kaplan has in effect been "extracting interest-free loans" from the trust, as well as reducing the value of this trust asset by exposing it to tax liens, and preventing the regular collection and distribution of income to the trust beneficiaries.¹ All of these actions on Ms. Kaplan's part have caused a "chronic interference" with the administration of the trusts, the petition alleges.

Ms. Kaplan seeks to dismiss the Trustee's petition on the grounds that the court lacks personal jurisdiction over her, and that the Trustee has failed to state a cause of action.² In any

¹ The original lease was for a term of 21 years (1983 to 2004). The lease in effect at this time is also for a 21-year term (2004 to 2025), but it was executed in January, 2012.

² Movant's legal arguments are presented to the court in the Affirmation of her counsel, Steven Kirkpatrick, Esq. Failing to present legal arguments in a brief or memorandum of law

event, Ms. Kaplan avers that she is willing to pay the back rent, but has not done so because the Trustee is seeking to evict her. Thus, Ms. Kaplan takes the position that adjudication of the parties' respective rights and obligations under the lease should be the predicate for her making payments that she concedes are due and owing.

For the reasons that follow, the motion to dismiss the Trustee's petition is denied in its entirety. First, contrary to Ms. Kaplan's allegation, the court acquired personal jurisdiction over her when the citation issued by the court was personally served upon her, as provided for in sections 203, 306, 307 and 309 of the Surrogate's Court Procedure Act (SCPA). Second, the petition clearly states grounds for relief, i.e., breach of a lease's terms. On a motion to dismiss for failure to state a claim (CPLR §3211[a][7]), the court must "accept the facts as alleged in the [pleading] as true, accord [petitioner] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*see Braddock v Braddock*, 60 AD3d 84, 86 [1st Dept 2009], *quoting Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Ms. Kaplan's denial of the petition's factual allegations does not constitute grounds for dismissal (*see McCarthy v Young*, 57 AD3d 955 [2d Dept 2008] [whether plaintiffs will ultimately be able to prove their claims plays no part in the determination of a pre-discovery motion to dismiss]).

Here, the Trustee has stated grounds for relief based on Ms. Kaplan's alleged interference with the administration of one of the trusts' assets resulting from her breach of at least two provisions of the parties' lease agreement: 1) failure to pay rent; and 2) failure to make non-rent

constitutes a violation of the Uniform Rules of the Surrogate's Court § 207.7[e] which states "Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law." In order to expedite the resolution of the parties' dispute, the court will disregard movant's failure to comply with this rule and consider the merits of the motion at this time.

payments. Ms. Kaplan's assertion that she will at some future point pay the rent arrears, hardly eliminates the existing grounds for relief. Moreover, such payment would satisfy only part of the relief requested in the petition which alleges that the Trustee is entitled to terminate or cancel the ground lease based on Ms. Kaplan's breach of other lease provisions.

Movant's additional arguments are equally unavailing. Even if Ms. Kaplan is correct that the Civil Court is the "preferred" forum for the resolution of landlord and tenant disputes, dismissal is not mandated. Ms. Kaplan does not dispute that this court has jurisdiction over matters relating to the affairs of decedents, such as the interests of the testamentary trusts at the heart of this case. In addition, this court clearly has the power to determine the issue of whether the trusts are entitled to ownership of the building as a consequence of Ms. Kaplan's alleged breach of the terms of the lease (*Matter of Piccione*, 57 NY2d 278 [1982]; *Matter of Barrie*, 134 Misc 2d 440, 443 [Sur Ct, Nassau County 1987] ["The proceedings enumerated in the Surrogate's Court Procedure Act are not deemed exclusive and the court is empowered in any proceeding, whether or not specifically provided for, to exercise any of the jurisdiction granted to it by that act or other provision of law (SCPA 202)."]).

Finally, contrary to Ms. Kaplan's argument, the lease is not void against public policy merely because it provides petitioner with the right to reenter the premise in the event of the tenant's breach of the lease.³ In any event, the Trustee's petition does allege that Ms. Kaplan was

³ The clause in question does not create a conditional limitation, as respondent argues, but rather a "condition subsequent," giving the Trustee the option to cancel the lease "as permitted by law" if the tenant breaches any of its provisions (*451 Rescue LLC v Rodriguez*, 15 Misc 3d 1140[A] [Civ Ct, New York County 2007]; Scherer and Fisher, *Residential Landlord-Tenant Law in New York* § 8:49 [2014-2015]; Menachem J. Kastner and Ally Hack, *To Eject or Evict: a Lease's 'Conditional' Dilemma*, NYLJ, Aug. 30, 2010 at 4, col. 1).

[* 5]

served with several notices, at least one of which demanded payment of the rent arrears and alerted her to the commencement of court proceedings if she failed to cure her breach.

In view of the denial of the motion to dismiss, Ms. Kaplan is directed to file and serve a verified answer no later than January 26, 2015. The Trustee is permitted to file and serve a verified reply no later than February 6, 2015. This matter will be referred to the Law Department on that day.

This constitutes the decision and order of the court. Clerk to notify the parties of this decision.

Dated: January 8, 2015



SURROGATE