

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

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In the Matter of the Estate of

**MILTON MICHAEL GOEDREY NEDD a/k/a
MILTON NEDD,**

DECISION
File No. 2015-4093/D

Deceased.
-----X

LÓPEZ TORRES, S.

The following papers were considered on this motion for summary judgment:

PAPERS:	NUMBERED:
Notice of Motion, Affirmation, and Affidavit with Exhibits.....	1, 2, 3
Affidavit and Affirmation in Opposition with Exhibits.....	4, 5
Affirmation in Opposition.....	6

In this contested turnover proceeding¹, the executor of the estate, Devida Nedd (executor), moves for an order i) directing Gail Nedd-Soogrim (respondent) to vacate and deliver possession and control of real property located at 1339 East 99th Street in Brooklyn (property) to the estate; ii) directing the issuance of a warrant of eviction or other directive to effectuate respondent's eviction from the property forthwith; iii) directing that all attorney's fees and costs of this proceeding be paid exclusively by respondent from her beneficial share of the estate; and iv) granting such other and further relief as the court deems appropriate.

BACKGROUND

Milton Nedd (decedent) died on September 13, 2015. He was survived by three children – the executor, the respondent, and Julian Nedd. Without objection, the decedent's Will dated October 8, 2012 was granted probate by a decree dated January 4, 2016. The respondent filed a waiver and consent to probate of the Will.

The property is the primary asset of the estate, which the executor seeks to sell and distribute the proceeds equally amongst the decedent's three children. However, the respondent is residing on the first floor of the property and will not vacate the property so that it may be sold.

¹ Although not denominated as such, the court deems this a proceeding pursuant to SCPA 2104 since there was no need for SCPA 2103 discovery.

Consequently, the executor commenced a turnover proceeding in May 2016, seeking an order directing the respondent to deliver possession and control of the property to the executor, a warrant of eviction to effectuate the respondent's removal from the property, and that the respondent pay the costs of the proceeding from her share of the estate. The respondent filed objections, which mostly raised issues not at all relevant to the proceeding and otherwise summarily objected to the request that she turnover the property without asserting any claim of ownership through purchase, gift, or any rights as a lessee.

THE INSTANT MOTION

As described above, the executor seeks summary judgment granting possession of the property to the estate and a warrant of eviction to remove the respondent. The executor avers that there is a mortgage on the property, which she and her brother, Julian Nedd, have been paying. The papers reveal that the amount of the outstanding mortgage is \$46,000.00. An exhibit attached to the moving papers also shows that an offer to purchase the property for \$560,000.00 has been made.

In opposition to this summary judgment motion the respondent concedes that the property is an asset of the estate. Black Aff. at ¶3; Black Aff. at ¶20. The respondent also concedes that the executor and Julian Nedd have paid expenses on behalf of the estate which require reimbursement. Black Aff. at ¶12. The respondent's sole opposition to the motion is that she be allowed to live in the property until the closing date of any sale.

The court's function on a motion for summary judgment is issue finding, rather than issue determination. *See, e.g., In re Bank of New York*, 269 A.D.2d 112 (1st Dep't 2000). Although the general proposition that summary judgment is a drastic remedy and is to be granted sparingly (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986)), it is often stated that, nonetheless, "[c]ourts have of late been more liberal in granting such motion where a *prima facie* case has been established and the objectant has failed to raise any triable issue of fact." *Matter of Zimmerman*, N.Y.L.J., May 28, 1998, at 29 (col. 4) (Sur. Ct. Westchester County), *aff'd*, 264 A.D.2d 850 (2d Dep't 1999). *See also Phillips v. Kantor & Co.*, 31 N.Y.2d 307 (1972); *Matter of Rudolph*, 60 A.D.3d 685 (2d Dep't 2009).

If the moving party meets her burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In doing so, the party opposing the motion for summary judgment must lay bare all her proof. *Towner v. Towner*, 225 A.D.2d 614, 615 (2d Dep't 1996).

Pursuant to SCPA 2104 (4), “[i]f it appears that the petitioner is entitled to the possession of any property the decree shall direct delivery thereof to him . . .” In this proceeding, there is no dispute that the property was owned by the decedent at the time of his death. The respondent has shown no evidence that she has an exclusive right to reside in the property, or that she has any individual ownership, or residential right to the property. There is also no dispute between the parties that the property must be sold and the proceeds distributed equally amongst the executor, the respondent, and Julian Nedd. As such, the respondent has utterly failed to demonstrate that there are any triable issues of fact requiring a hearing.²

Based on the foregoing, the executor has met her burden that the property is an asset of the estate. The respondent concedes that fact and therefore the property must be delivered to the estate’s representative so that she may dispose of it and distribution made pursuant to the terms of the Will. Any award of legal fees may be addressed in an accounting proceeding.

Accordingly, the petitioner’s motion is granted to the following extent: i) the respondent, Gail Nedd-Soogrim, is directed to vacate 1339 East 99th Street in Brooklyn, New York within thirty days from service of the decree with Notice of Entry; ii) a warrant of eviction pursuant to RPAPL 749 shall issue directing a New York City marshal to remove Gail Nedd-Soogrim from possession of 1339 East 99th Street in Brooklyn, New York, execution of which is stayed for thirty days from service of the decree with notice of entry.

Settle decree.

Dated: February 1, 2017
Brooklyn, New York



HON. MARGARITA LÓPEZ TORRES
S u r r o g a t e

² The respondent has certainly not presented the “clear and convincing proof” required of her to prevail as a respondent in a turnover proceeding. *See Matter of Voyiatgis*, 110 A.D.3d 911 (2d Dep’t 2013).