

SURROGATE'S COURT: KINGS COUNTY

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**In the Matter of the Petition of James L.
Dockery Pursuant to SCPA Section 2102(4)
Directing the Delivery of a Deed Transferring
Real Property of the Estate of**

DECISION AND ORDER

LUCILLE KOWALSKI,

File No. 3417/A/13

Deceased.
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JOHNSON , S.

The following papers were considered in deciding the executor's motion for permission to file late objections:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affirmation	1, 2
Affirmation in Opposition	3
Reply Affirmation	4

The decedent died on December 16, 2013. Her will, dated April 2, 2011, was admitted to probate on November 1, 2013 and letters of administration were issued to Evelyn Kelly (the "executor"). Under Article SECOND of her will, the testator left her real property located at 34 Gatling Place, Brooklyn, to petitioner. She left her personal property and residuary estate to two nieces, Evelyn Skelly and Mildred Wyer.

The real property is subject to a reverse mortgage. Under the terms of a reverse mortgage, the amount lent to the testator is secured by the real property and becomes due and owing upon the death of the mortgagor. On March 5, 2014, petitioner brought a proceeding pursuant to SCPA §2102(4) to compel the executor to transfer title of the real property to him.

Petitioner alleged that the mortgagee will not discuss the amount

owing or re-financing the mortgage as long as the deed is held by the estate. He alleges that the mortgagee has initiated proceedings to foreclose on its mortgage. He asks that the executor be directed to execute a deed transferring title to the real property to him.

The proceeding was originally on the process calendar for April 24, 2014. The matter was adjourned to May 22, 2014 with the expectation that the parties would be able to settle their differences. On the adjourned date, the executor failed to appear or file papers in opposition to the motion and the matter was submitted for decision. The executor now moves for permission to file late objections.

The executor's counsel submitted an affirmation in which she stated that the parties entered into negotiations after the April date but were unable to resolve their differences. The primary point of disagreement was the executor's claim that she was unable to convey title to the property to petitioner without satisfaction of the mortgage. The executor's counsel appeared at the courthouse on May 22, 2014, but was late for the calendar because her security pass had expired. She filed objections a week later but they were rejected.

On the merits, the executor claims that the residuary estate is insufficient to cover the administration expenses and, as a result, the specific devise will abate. However, the only expense claimed in the movant's affirmation in support of the motion is the unspecified amount due on the mortgage. She denies that the mortgagee is unwilling to negotiate the refinancing of the mortgage with petitioner and professes that

her only concern is saving the estate from liability on the mortgage.

Motions to Extend Time to Answer

CPLR §2004 allows a court to extend the time fixed by “any statute, rule or order upon such terms as may be just and upon good cause shown.” CPLR §3012(d) specifically provides that the court may extend the time to plead upon a showing of reasonable excuse for delay or default. In reaching its determination as to whether or not to grant the extension of time, the court may consider many factors, including the length of the delay, the prejudice to the other parties by the delay, the reason for the delay, whether the moving party was in default before seeking the extension and, if so, whether or not there is a affidavit of merit.

In the instant case, the attorney’s excuse for missing the calendar is the kind of law office failure that would normally be sufficient to grant the application. However, the other factors in the case, namely the failure to include the proposed objections, the lack of merit of the supporting papers and the prejudice to petitioner, precludes granting the relief sought.

Title to specifically devised real estate vests upon the death of the testator (*Barber v Terry*, 224 NY 334 [1918]; *Matter of Severoli*, 31 AD3d 452 [2d Dept 2006]). Vesting is complete except for the limited right of the executor to use specifically bequeathed property for the payment of administration and funeral expenses if necessary (*Matter of Payson*, 132 Misc 2d 949 [Sur Ct, Nassau County 1986]).

In the instant case, the executor has not attached a copy of the proposed objections to his motion, forcing the Court to rely on the

affirmations in support to glean the basis of her objections, which is the executor's claim that the balance of the estate is insufficient to pay the debts and administration expenses of the estate. However, the only debt alluded to is the mortgage debt on the specifically devised property. This debt passes with title to the property and is not chargeable to the estate (*see Crawford v McCarthy*, 159 NY 514 [1899]). The executor claims that this may not be so where a reverse mortgage is involved, but cites no authority supporting her position. In fact, since the amount lent under a reverse mortgage becomes due and owing upon the testator's death, the mortgage is transformed into a straight mortgage, and thus is not chargeable to the estate.

The probate petition asserts that probate assets are approximately \$30,000 in addition to the specifically devised real property. Article FIRST provides that all administration expenses and taxes are to be paid out of the residuary estate, without apportionment and without a right of reimbursement. Administration expenses should be minimal. There should be no estate taxes due. Commissions should be negligible.¹ The executor's bald statement that administration expenses exceed the residuary estate is unsupported by any factual evidence and is not credible.

Finally, petitioner has established that he will suffer prejudice by granting the motion. The property is apparently in foreclosure. The petitioner is at a disadvantage in protecting his interest in the property,

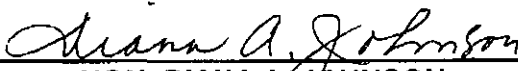
¹ There are no commissions on real property specifically devised (SCPA §2307[3]; *Matter of Lester*, 172 AD 509 [3d Dept 1916]).

since he has no standing in the foreclosure proceeding, although he is the party most affected.

Given the prejudice and the lack of merit to the proposed objections, the Court, in the exercise of its discretion, denies the executor's motion to file late objections. Based on the above, the underlying petition to compel the executor to transfer title to the real property is granted. The executor is directed to execute a deed and any other documents required to transfer title of the real property located at 34 Gatling Place, Brooklyn, within 15 days of receiving a copy of this decision and order as provided below.

The clerk of the court is directed to mail a copy of this decision to all parties who have appeared in this proceeding by ordinary mail.

This constitutes the decision and order of the Court.


HON. DIANA A. JOHNSON
Surrogate

Dated: August // , 2014