

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

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Christopher E. Brokopp,
as the Executor of the Estate of

File No. 2012-370800/A

ANNAMARIE BROKOPP,

Dec. No. 30165

Deceased,

against David Profeta
a/k/a David John Profeta, Respondent.
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Before the court is a petition and order to show cause brought by Christopher E. Brokopp, as the executor of the estate of Annamarie Brokopp, pursuant to RPAPL 711 (1) and SCPA 1901 (2) (h), EPTL 11-1.1 (b) (5), for an order and decree:

- (i) awarding to the executor possession of 1074 Park Boulevard in Massapequa Park, New York;
- (ii) issuing a warrant of eviction to the Sheriff of the County of Nassau to remove David Profeta and all other occupants from 1074 Park Boulevard in Massapequa Park, New York;
- (iii) directing the Sheriff to execute the warrant; and
- (iv) awarding a money judgment against David Profeta, and in favor of the executor, in an amount equivalent to the cumulative fair use and occupancy of 1074 Park Boulevard in Massapequa Park, New York, from July 6, 2012 through the date of delivery of the premises to the executor.

BACKGROUND

Annamarie Prokopp (the "decedent") died on July 5, 2012, leaving a will dated November 19, 2009. She was survived by her husband of seven years, David Profeta, respondent

herein ("David"), and by her children from a previous marriage, Casandra Marie Brokopp and Christopher E. Brokopp, petitioner herein ("Christopher"). Decedent's will was admitted to probate and letters testamentary issued to Christopher on January 16, 2014.

Article Fifth of decedent's will provides:

"I give to my husband, DAVID JOHN PROFETA, if he survives me, the smallest portion of my estate, if any, required to be given to my husband under applicable law, after taking into account the aggregate value of any property passing to him under this will or otherwise. Based upon a prenuptial agreement entered into between me and my husband, it is my desire and intent that my husband be disinherited by me to the fullest extent permitted by law. All provisions of this will, including without limitation any provisions which may refer to persons taking by intestacy, shall be considered to effectuate such disinheritance of my husband."

In addition to the terms of the will, a prenuptial agreement entered into between decedent and David, on May 19, 2005, provided that David's real property and other assets are designated as his sole and separate property, and that decedent's house, located at 1074 Park Boulevard, Massapequa Park (the "Massapequa property"), along with other property and investments, are designated as decedent's sole and separate property.

At the time of her death, decedent resided with David in the Massapequa property. After decedent's death, David continued living there.

PETITION FOR EJECTMENT

Christopher brought the present petition pursuant to SCPA 2107, 1901 and 1902. He seeks a decree ejecting David and ordering him to deliver the Massapequa property, which he values at \$300,000.00, to decedent's estate, and to pay \$115,000.00 in use and occupancy charges for the period of July 6, 2012 through May 6, 2014. He advises the court that when decedent died, David requested and was granted 60 days to vacate the Massapequa property. At

the end of 60 days, David refused to vacate, but claimed that he would vacate once the Massapequa property was sold. Christopher states that in July 2012 David agreed to allow real estate brokers to show the Massapequa property to prospective buyers, but that Christopher never agreed to allow David to remain there. Christopher states further that David was uncooperative and refused to vacate the Massapequa property, even after Christopher filed an eviction proceeding in May 2013 in the District Court of Nassau County. After David filed his Notice of Election in Surrogate's Court one month later, Christopher filed the present petition in this court for ejection.

Christopher argues that since the date of decedent's death, David has continually and exclusively used and occupied decedent's house and yet refuses to pay rent or any use and occupancy charges and refuses to vacate the house. According to Christopher, David has refused to allow Christopher or real estate brokers to show the house and has refused to cooperate with its inspection or sale. The prenuptial agreement provided that during decedent's life, David would "split utility bills: cable, water, electric, gas . . . house insurance . . . pool maintenance . . . and telephone." As part of the order directing David to pay for his use and occupancy of the house, Christopher asks the court to issue an order directing David to pay for all of these items since the death of the decedent.

VERIFIED ANSWER

David's answer raises twelve "affirmative defenses" to the petition, arguing that the petition fails based upon (1) failure to state a cause of action; (2) lack of jurisdiction over David and lack of subject matter jurisdiction; (3) laches and equitable estoppel; (4) a constructive trust

that David has in the house; (5) David's exercise of his spousal right of election¹; (6) the improper form of the Order to Show Cause proceeding, as a request for ejectment must be brought by a plenary action and not by a motion or miscellaneous proceeding, and the petition lacks the required specificity; (7) the grossly excessive and unjust claims for use and occupancy charges, which makes the proceeding frivolous conduct warranting sanctions against Christopher and the estate; (8) David's denial that the prenuptial agreement is valid or enforceable; (9) statute of frauds and failure to serve the required 6 month written notice on David; (10) statute of limitations; (11) Christopher's lack of standing to sue and proper title to the house; and (12) the improvements, maintenance and care of the house by David and its increase in value, which offsets the damages demanded by Christopher.

In respondent's affidavit in opposition, David claims that as decedent's surviving spouse, he has a right to occupy the marital residence and further claims that he is afraid that if he vacates the residence, Christopher will sell it and fail to pay a spousal elective share to David. The attorney's supporting affirmation focuses largely on the prenuptial agreement, and its impact on the spousal right of election, which is not the subject of the present motion. Counsel also argues that common law requires that a six-month notice to terminate have been served on David prior to the commencement of an action for ejectment, and that Christopher's failure to do so requires dismissal of the present petition and denial of any requests for use and occupancy charges as a

¹On June 10, 2013, David filed a notice of election of surviving spouse in this court; a determination concerning David's right of election, which was the subject of a cross-motion that the parties agree was invalid, is not part of this decision. A petition filed by David on July 29, 2014 to compel Christopher to account as executor (File No. 2012-370800/B) and requesting that the court determine the validity of the prenuptial agreement between the decedent and David is returnable before this court on November 19, 2014.

matter of law. In support, counsel cites *Kosa v Legg*, 12 Misc 3d 369 [Sup Ct, Kings County 2006]). However, *Kosa v Legg* concerns the denial of a summary judgment motion where a landlord failed to give requisite notice to a month-to-month tenant.

AFFIDAVIT IN REPLY IN SUPPORT OF PETITION

Christopher argues that David's occupation of the Massapequa property is an attempt to extort money from decedent's estate, which money David is not entitled to, based upon the prenuptial agreement between decedent and David.

ANALYSIS

Eviction proceedings which involve a decedent's estate fall under the jurisdiction of this court (*Matter of Rice*, 8 Misc 3d 1001A [Sur Ct, Nassau County 2005]). Pursuant to SCPA 1902 and EPTL 11-1.1, a fiduciary has the "right to possess and manage the decedent's realty so that he may sell the property in accordance with the statutory authority with which estate fiduciaries are imbued as well as to collect the rentals thereof, and otherwise preserve the asset and make it productive to all those with a beneficial interest therein" (*Estate of Pastorelli*, NYLJ, Nov. 21, 2002, at 25, col 5 [Sur Ct, Suffolk County]; see also *Matter of Rice*, 8 Misc 3d 1001A, [Sur Ct, Nassau County 2005]).

Although counsel for David opposed the petition by asserting the twelve "affirmative defenses," listed above, he cites no statutes or case law in support of his opposition to the relief requested, aside from challenges to the prenuptial agreement, with the exception of *Kosa v Legg*, 12 Misc 3d 369 [Sup Ct, Kings County 2006]) which, as noted above, is not pertinent to the facts before the court. The court has reviewed and considered the "affirmative defenses" presented and notes that (1) David has clearly stated a cause of action; (2) this court has jurisdiction over

David based upon personal service upon him, and the court has subject matter jurisdiction under SCPA 201; (3) counsel has offered no substantive support for his assertion of laches and equitable estoppel; (4) no evidence whatsoever has been presented regarding a constructive trust that David claims to have in the Massapequa property; (5) David's exercise of his spousal right of election will be addressed in a separate proceeding before this court; (6) the petition before the court was not lacking in specificity and the form of the petition was acceptable; (7) the claims for use and occupancy charges will be addressed at a hearing; (8) David's denial that the prenuptial agreement is valid or enforceable will be addressed in a separate proceeding; (9) the statute of frauds has no applicability to the present case, and David is not entitled to receive service of a six-month notice to terminate prior to the commencement of an action for his ejection from decedent's property; (10) the statute of limitations does not bar this proceeding or the relief requested; (11) as executor of decedent's estate, Christopher has standing to sue and proper title to the Massapequa property; and (12) the improvements, maintenance and care of the house by David and its increase in value, if any, and whether these amounts offset any amounts that may be charged to David, will be considered at the hearing to be scheduled.

Accordingly, the petition is granted in part, in connection with the relief requested which seeks an order: (i) awarding possession of the Massapequa property to the executor; (ii) issuing a warrant of eviction to the Sheriff of the County of Nassau to remove David Profeta and all other occupants from the Massapequa property; and (iii) directing the Sheriff to execute the warrant.

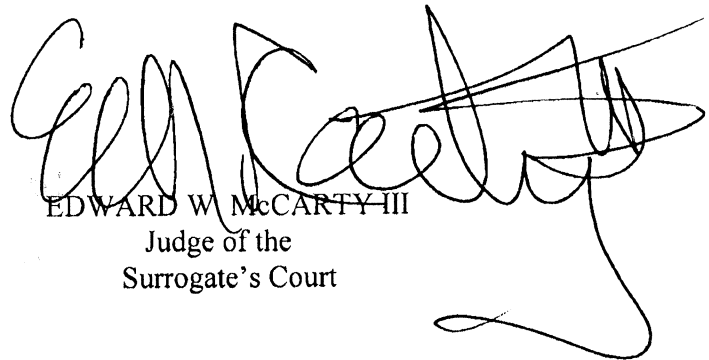
The matter will be scheduled for a hearing on the issue of charges for use and occupancy (*Matter of Sevioli*, 31 AD3d 452 [2d Dept 2006]). The parties shall appear for a conference on

December 10, 2014 at 9:30 a.m.² to schedule the hearing and to address any issues of discovery with respect to such hearing.

Submit order of possession and warrant of eviction.

This constitutes the decision and order of the court.

Dated: November 21, 2014



EDWARD W. McCARTY III
Judge of the
Surrogate's Court

²As noted above, David's petition to compel Christopher to account and for a determination of the validity of the prenuptial agreement is already on the court's calendar on that date.