

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK**

AEtna National Bank v. Kramer

142 A.D. 444 (N.Y. Ct. App. 1911) · Decided January 20, 1911

OPINION

MILLER, J.

Miller, J.: This action was brought against the defendant's testatrix, and a warrant of attachment was granted on the 7th day of April, 1910, on the ground that she was a non-resident of the State of New York. The affidavit of non-residence was to' the effect that the affiant knew the said testatrix and her husband, who died on the 10th of March, 1910, and had visited her home in Oradell, N. J., on the 12th and 21st of March, 1910, and that on the 5th day of April, 1910, he had a telephone conversation with the defendant, and was informed that the said testatrix still resided at her home in Oradell, N. J. On the motion to vacate the attachment it was established beyond doubt that the said testatrix and her husband had for some time prior to the death of the latter on the 10th of March, 1910, resided at Oradell, N.- J., and that she continued to reside there after that date until the' 3d of April, 1910, when, in company with this defendant, who had for many years been her housekeeper, she left her home in Oradell, N. J., with the intention of taking up her residence with the defendant' at the latter's home in Brooklyn, and of abandoning her residence in New Jersey; that with that intention, on said date, she went to the home of the said defendant's sister, at No. 396 Waverly avenue, Brooklyn, for the purpose of staying there until the defendant's home, at No. 1236 Bed-ford avenue, Brooklyn, should be ready for occupancy; that, on the 6th of April, 1910, at least part of her furniture was moved from her New Jersey home to the said home of the defendant in Brooklyn; that on the tenth of April, the said home being ready for occupancy, the testatrix went there 'to live with the defendant, and died there on the following day.

In opposition to the motion affidavits of two witnesses were filed to the effect that they' saw the testatrix at the railway station at Oradell on the third of April, and that she said to' them: " I have a little business to attend to. *446I expect to be back." The respondent construes that statement to mean that she was going away on business, expecting to return.

In the light of the established facts I construe it to mean that she expected to return to attend to some business. At any rate, the statement is too equivocal to overcome the established facts. ' There was also filed in opposition to the motion the affidavit of the testatrix's landlord in Oradell to the effect that the premises occupied by her were rented, and the rent paid until April 15, 1910, and that the keys were not surrendered until April 16,1910.

It appears by the moving papers that the testatrix gave the keys on the third of April to a neighbor with the request that she deliver them to the landlord; moreover, the retention of the leased premises until the termination of the lease did not preclude a change of domicile.

The circumstance is of course entitled to consideration, but it has no cogency in the face of an established change of domicile. The learned justice at Special Term held that there was no change of domicile until the tenth of April, when the testatrix moved into her permanent home in Brooklyn. No doubt, to effect a change of domicile, there must be an actual change of residence^a coupled with, an intention to abandon the former domicile and to acquire another.

The controlling principles are well settled. For a statement of them see *Dupuy v. Wurtz* (33 N. Y. 556). • On the third of April the testatrix left her former domicile with the intention of abandoning it, and went to reside in Brooklyn with the intention of acquiring a domicile there.

Thus, there was both a change of residence and an intention to acquire another domicile. While the house in which she expected to live was being furnished she remained temporarily in another house in the locality. But we do not consider that fact of any importance. When she abandoned her domicile in New Jersey, and went to reside in Brooklyn, with the intention of making that her permanent domicile, she acquired a domicile there, and the mere fact that her first residence was a temporary one is of no consequence in view of the fact that there was an actual change of residence with the necessary intention of effecting a change of domicile.

The conclusion that the testatrix was in fact a resident of the State of New York on the seventh of April renders it unnecessary to consider the other point argued. *447 The order should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs. Ingraham, P. J., Clarke and Soott, JJ., concurred; Laughlin, J., dissented.