

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D22328
W/hu

_____AD3d_____

Argued - January 30, 2009

WILLIAM F. MASTRO, J.P.
RUTH C. BALKIN
THOMAS A. DICKERSON
ARIEL E. BELEN, JJ.

2007-09427

DECISION & ORDER

In the Matter of Susan E. Rudolph, deceased.
Charles M. Garcia, respondent; Edith Korn, appellant.

(File No. 1114/04)

McCarthy Fingar LLP, White Plains, N.Y. (Frank W. Streng, Dina M. Aversano, and Joseph J. Brophy of counsel), for appellant.

William Grace Crane, Poughkeepsie, N.Y., for respondent.

In a contested probate proceeding, the objectant, Edith Korn, appeals from an order and decree (one paper) of the Surrogate's Court, Westchester County (Scarpino, S.), dated September 6, 2007, which, upon a decision of the same court dated August 13, 2007, granted the petitioner's motion for summary judgment dismissing her objections to probate based on lack of testamentary capacity and undue influence, and admitted the will to probate.

ORDERED that the order and decree is affirmed, with costs to the petitioner payable by the appellant personally.

The Surrogate's Court properly granted that branch of the petitioner's motion which was for summary judgment dismissing the objection of Edith Korn (hereinafter the objectant) to the probate of the last will and testament of the decedent, Susan E. Rudolph, based on lack of testamentary capacity. In opposition to the petitioner's prima facie showing that the decedent was alert and of sound mind at the time of the execution of the will, and that she knew the nature of the act she was performing, the extent of her property, and the natural objects of her bounty, the objectant failed to raise a triable issue of fact as to the decedent's alleged lack of testamentary

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capacity (*see Matter of Kumstar*, 66 NY2d 691, 692; *Matter of Malan*, 56 AD3d 479, *lv denied* _____NY3d_____, 2009 NY Slip Op 63561 [2009]; *Matter of Tuccio*, 38 AD3d 791, 792; *cf. Matter of Ruparshek*, 36 AD3d 998, 999-1000).

The Surrogate's Court also properly granted that branch of the petitioner's motion which was for summary judgment dismissing the objection based on alleged undue influence. The record as a whole establishes that the decedent, although suffering from terminal cervical and ovarian cancer, "was alert, strong-minded, and financially, mentally, and emotionally independent" when she executed the will (*Matter of Zirinsky*, 43 AD3d 946, 948; *see Matter of Walther*, 6 NY2d 49, 53-54). In opposition to the petitioner's prima facie showing that the decedent's signature on the will was not procured by undue influence, the objectant failed to raise a triable issue of fact (*see Matter of Zirinsky*, 43 AD3d at 948; *cf. Matter of Neary*, 44 AD3d 949, 950-951; *Matter of Delyanis*, 252 AD2d 585, 585-586).

MASTRO, J.P., BALKIN, DICKERSON and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court