SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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Probate Proceeding, Will of

SYLVIA DUBIN,
Deceased.

File No. 335732

Dec. No. 817

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Before the court is a motion which seeks relief in both the pending probate proceeding and the pending SCPA 2103 discovery proceeding. This decision addresses the motion with regard to the probate proceeding. The relief sought with regard to the SCPA 2103 discovery proceeding will be addressed in a separate decision.

The proponents in the probate proceeding now move for summary judgment dismissing the objections to probate. The motion is granted as hereinafter set forth.

Sylvia Dubin died on November 3, 2004 at the age of 90. Her three distributees were a sister, Delcy Brooks; a brother, Melvin Dubin and a niece, Joan Levine, the daughter of Mollie Levine, a predeceased sister. The proponents of the will are Susan Brooks Ruskin and Richard Brooks, the children of decedent's surviving sister, Delcy; the objectant is Joan Levine, daughter of decedent's predeceased sister, Mollie. In the will, decedent's tangible personal property was left to proponents; specific cash bequests were made to a few family members; bank accounts and securities were left to Joan Levine and the residuary estate was left to proponents. Proponents were also left 90 percent of the shares of Slant/Fin stock, a corporation formed by Melvin Dubin and Delcy Brooks' spouse, and Joan Levine was left 10 percent of the stock.

INTRODUCTION

Sylvia Dubin died on November 3, 2004 without issue. Between 1986 and 1995, decedent executed eight (8) wills. On April 15, 1996, decedent executed a ninth will and on November 5, 1996 decedent executed a tenth will, the instrument at issue. The first eight (8) wills were drafted by James A. McMahon, Jr., Esq.; the ninth by Michael Feigenbaum, Esq. and the tenth was drafted by Henry Leibowitz, Esq. of the law firm Proskauer Rose. Proponent Susan Brooks' husband, Bradley Ruskin, is a partner at Proskauer Rose.

In October of 2001, decedent's brother Melvin Dubin saw the contents of decedent's November 1996 will. Melvin Dubin sought to have decedent change the terms of her will to, in his mind, achieve a fairer disposition of her estate. The effort culminated in the execution of an instrument, denominated a codicil, dated November 4, 2001 purporting to distribute decedent's assets in a manner more to Mel Dubin's liking. The document was signed by decedent and witnessed. Shortly thereafter, on December 9, 2001, decedent executed a second codicil, drafted by Henry Leibowitz, that, in effect, republished the November 5, 1996 will. The November 4, 2001 codicil has not been offered for probate.

THE OBJECTIONS TO THE NOVEMBER 5, 1996 WILL AND DECEMBER 9, 2001 CODICIL

The objectant offers the following objections to the probate of the November 5, 1996 will and the December 9, 2001 codicil:

1. That the execution of the above-stated paper writings was not the free and voluntary act of the testatrix, but that the above stated paper writings were obtained, and the signatures thereto and publication thereof, if those writings were in fact signed and published by her, were procured by fraud practiced upon the testatrix by Susan Brooks Ruskin and Richard Brooks and/or by some other person or persons acting in concert or privity with them, whose name or names are at present unknown to the objectant.

2. That the execution of the above-stated paper writings was not the free and voluntary act of the testatrix, but that the above-stated paper writings were

obtained, and the signatures thereto and publication thereof, if those writings were in fact signed and published by her, were procured by undue influence practiced upon the testatrix by Susan Brooks Ruskin and Richard Brooks and/or by some other person or persons acting in concert or privity with them, whose name or names are at present unknown to the objectant.

THE MOTION

In support of their motion for summary judgment, the proponents submit the deposition testimony of Henry Leibowitz, the attorney-draftsman of the November 5, 1996 will and December 9, 2001 codicil; Rona Warhaftig, a witness to the will; Bea Roth, decedent's friend and bookkeeper; Michael Feigenbaum, draftsman of the immediate prior will; Bradley Ruskin; decedent's siblings Melvin Dubin and Delcy Brooks, and other family members; as well as various documents, including decedent's prior wills. In opposition, the objectant submits her own affidavit, the deposition of petitioner Susan Brooks Ruskin, the affidavits of Melvin Dubin, his wife Eleanor Dubin and his son Adam Dubin and various documents.

RELEVANT TESTIMONY

By all accounts, the decedent was independent and financially astute. Decedent enjoyed a close family relationship with the proponents. Between 1986 and 1995, decedent executed eight (8) wills frequently changing her proposed bequests. For example, a will dated June 19, 1995 left 1400 shares of Slant/Fin stock to objectant and the balance to the Brooks family; the April 15, 1996 will left 6000 shares of Slant/Fin to the Brooks family and 2000 shares of stock to Joan and the November 1996 will left 90 percent of the Slant/Fin stock to the proponents while objectant received 10 percent of the stock.

Decedent purportedly requested that the will at issue be drafted at the law firm of Proskauer Rose. Brad Ruskin, husband of proponent Susan Brook Ruskin, is a litigation partner

at Proskauer Rose. Brad Ruskin testified that he arranged for decedent to meet with Henry Leibowitz, an associate in the firm's trusts and estates department. Leibowitz testified that he met with decedent on October 10, 1996 and went over with her the provisions of her previous will as well as a detailed list of her assets. Leibowitz stated that at no time did he discuss the contents of decedent's will with Brad or Susan Ruskin. On November 5, 1996, Leibowitz supervised the execution of the will and stated that decedent had testamentary capacity and had signed the will free of any undue influence. Rona Warhaftig, a paralegal at the Proskauer firm, testified to the statutory formalities of the will execution.

Decedent's brother Melvin Dubin testified at his deposition that in October 2001 he saw the contents of decedent's November 5, 1996 will and that it represented to him an unfair distribution of decedent's assets. He stated that the cash bequest of $108 to his son Adam was an insult. Although he stated that he could not point out a specific instance of fraud or undue influence, he testified that the will itself is an indication of undue influence. The evidence shows that Melvin Dubin then set out to create what he thought was a fairer division of decedent's assets, enlisting the cooperation of other family members including the objectant who herself called decedent four to seven times during the weeks leading up to November 4, 2001. Melvin Dubin's efforts culminated in the execution of the November 4, 2001 document which called for a different distribution of decedent's assets, i.e., a more balanced division of Slant/Fin stock among decedent's nieces and nephews. Shortly thereafter, decedent asked Susan Brooks Ruskin to have a document drawn up to have the November 5, 1996 will remain in effect. Susan Brooks Ruskin instructed Henry Leibowitz to draft a document reconfirming the November 1996 will. Leibowitz testified that he did not speak to decedent when he prepared the December 9, 2001 codicil or when he drafted other instruments, a trust and stock power in November 2001.

Leibowitz prepared a memorandum of instruction for the supervision of the execution of the codicil which he gave to Brad Ruskin. The second codicil was executed by the decedent at a holiday party at the home of Delcy Brooks on December 9, 2001 and Susan Brooks Ruskin, a lawyer, supervised its execution.

Objectant, who the evidence showed had a deep-seated rivalry with Susan Brooks Ruskin, testified that she frequently visited decedent and maintained regular contact with decedent, although eschewing visits to the Brooks' residence. There is no allegation that objectant was prevented from seeing the decedent. Further, decedent regularly socialized with Melvin Dubin and his son as well. Objectant stated that decedent apparently sought out Susan Brooks Ruskin's advice concerning the April 1996 will, sending Susan a note on the subject leading to the possibility that proponent may have been involved in the November 1996 will. While objectant testified that she did not know of any undue influence by either proponent and was not able to identify a specific false representation by either, in an affidavit objectant stated that false representations were made to decedent concerning the amount of money objectant inherited from her mother (Mollie Levine) and what she would do with any bequest that she did receive from the decedent. Tellingly, objectant testified that the June 1995 will and the April 1996 will, wherein objectant also received a lesser amount of Slant/Fin stock than members of the Brooks family, were fair. Objectant asserts that the November 1996 will was a product of fraud and undue influence, without, however, taking into account the other bequests that were made to her in the November 1996 will.

ANALYSIS

SUMMARY JUDGMENT

The proponent of a summary judgment motion must make a prima facie showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment in contested probate proceedings is appropriate where an objectant fails to raise any issues of fact regarding execution of the will, testamentary capacity, undue influence or fraud (*see e.g. Matter of DeMarinis*, 294 AD2d 436 [2d Dept 2002]; *Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). The remedy, however, is inappropriate where there are material issues of fact (*Matter of Pollock*, 64 NY2d 1156 [1985]).

FRAUD

To prevail upon a claim of fraud, the objectant must prove by clear and convincing evidence (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) that the proponent knowingly made false statements to decedent to induce her to execute a will that disposed of her property in a manner contrary to that in which she would have otherwise disposed of it (*see Matter of Gross*, 242 AD2d 333 [2d Dept 1993]; *Matter of Evanchuk*, 145 AD2d 559 [2nd Dept 1988]). There is no such evidence in this case (*Matter of Philip*, 173 AD2d 543 [2d Dept 1991]). Objectant's assertions that decedent may have been influenced by family stories concerning what objectant might do if she inherited money and by statements concerning what objectant may have inherited from her mother do not satisfy the elements of fraud.

UNDUE INFLUENCE

In order to prove undue influence, the objectant must show (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testator at the time of the execution of the will; and (3) the execution of a will, that, but for undue influence, would not have been executed (*cf. Matter of Walther,* 6 NY 2d 49 [1959]). Undue influence can be shown by all the facts and circumstances surrounding the testator, the nature of her will, her family relations, the condition of her health and mind and a variety of other factors such as the opportunity to exercise such influence (*see generally* 2 Pattern Jury Instructions, Civil, 7:55). Undue influence is seldom practiced openly but it is the product of persistent and subtle suggestion imposed upon a maker furthered by the exploitation of a relationship of trust and confidence (*Matter of Burke,* 82 AD2d 260 [2d Dept 1981]). Without a showing that undue influence was actually exerted upon the decedent, the existence of opportunity and motive to exert such influence is insufficient (*see Matter of Chiurazzi,* 296 AD2d 406 [2d Dept. 2002]; *Matter of Herman,* 289 AD2d 239 [2d Dept 2001]).

It is clear that the proponents had the motive and opportunity to exercise undue influence upon the decedent. However, there is simply no evidence that such influence was exerted upon the decedent with regard to the November 1996 will. The evidence shows that the decedent was independent and cognizant of her assets. The evidence further shows that decedent frequently changed her bequests, evidenced by her many wills, and objectant herself conceded that the bequests contained in the instruments dated June 1995 and April 1996 were fair. The fact that decedent in November 1996 increased the amount of shares to proponent is consistent with her conduct of frequently changing her bequests.

While the events surrounding the execution of the December 2001 codicil, particularly the supervision of the codicil's execution by a beneficiary, might, in other circumstances, raise a question of fact regarding possible undue influence as to the execution of that instrument (*see Matter of Putnam*, 257 NY 140 [1931]), the court is satisfied on these facts that the execution of the December 2001 codicil was not the product of undue influence. Nor was there a confidential relationship between decedent and proponents that would shift the burden of proof on the issue of undue influence. As stated in *Connelly v Conneely* (4 Misc 3d 1019A [Sup Ct Kings County 2004]), "where a familial relationship exists, it may only be viewed as a confidential or fiduciary relationship sufficient to shift the burden of establishing that the transaction was not the product of undue influence if coupled with other factors, such as where the donor is in a physical or mental condition such that he or she is completely dependent upon the defendant-donee for the management of his of her affairs and/or is unaware of the legal consequences of the transaction." Here, at the time of the execution of the November 1996 will, the evidence shows that the decedent was not dependent upon proponents for the management of her affairs and was fully capable of appreciating the consequences of legal transactions. For that reason, cases relied upon by objectant (*see Loiacono v Loiacono*, 187 AD2d 414 [2d Dept 1992]; *Matter of Bumbaca*, 182 AD2d 756 [2d Dept. 1992]; *Hennessey v Elker*, 170 AD2d 650 [2d Dept 1991]) are distinguishable. The fact that from time to time proponents acted as attorney-in-fact for decedent does not require a contrary result.

Proponent's motion therefore is granted; the objections to the November 1996 will and December 2001 codicil are dismissed. A decree may be entered admitting both instruments to probate.

Settle order on five days' notice with five additional days if service is made by mail.

Dated: March 8, 2007

JOHN B. RIORDAN
Judge of the
Surrogate'sCourt