Matter of Pearson
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October 23, 2007
Surrogate's Court, Nassau County
Docket Number: 0338367/2007
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Probate Proceeding, Will of

SAMUEL M. PEARSON,

Deceased.

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File No. 338367

Dec. No. 653

In this contested probate proceeding, the proponent, Matthew Pearson, moves for an order granting summary judgment pursuant to CPLR 3212, dismissing the objections filed by the objectant, Roger Pearson, and admitting the propounded instrument to probate. Roger opposes the motion on the ground that material issues of fact exist.

Roger cross-moves for an order: (1) pursuant to SCPA 205, dismissing the probate proceeding on the ground that the decedent was not a domiciliary of Nassau County at the time of his death; (2) pursuant to Article 45 of the CPLR, prohibiting Matthew from introducing into evidence certain DVDs that Matthew alleges to be recordings of the decedent; and (3) pursuant to CPLR 4519, prohibiting Matthew and Emily Pearson, who is the decedent's ex-wife and the mother of Matthew and Roger, from testifying at trial as to any statements allegedly made by the decedent. Matthew opposes the relief requested by Roger.

BACKGROUND

The decedent, Samuel Pearson, died on June 27, 2005, survived by his wife, Blanca Pearson, and two sons from a former marriage, Roger and Matthew.

Samuel and Blanca lived together in Florida from 1980 until July 16, 2003. There is evidence in the record that Samuel left Blanca, although there is no evidence of a legal separation or divorce decree.

On June 21, 2003, prior to his departure from Florida, Samuel executed a will prepared by his attorney in Florida. The will names Roger as the executor and primary beneficiary and specifically makes no provision for Matthew. After leaving Florida, Samuel was placed by Roger in The Mews, an assisted living facility in Greenwich, Connecticut. Roger went on a family vacation two days later, on August 19, 2003.

On August 21, 2003, Samuel executed a Power of Attorney granting power of attorney to Matthew. On August 29, 2003, when he was ninety-one years old, Samuel executed the propounded will,[1] prepared by an attorney Matthew obtained for Samuel. Matthew also moved Samuel out of The Mews and into the Nautilus Hotel which is in Nassau County, where he lived until his death in 2005. This later will names Matthew as the executor and primary beneficiary and specifically makes no provision for Roger. Roger objects to the probate of the August 29, 2003 will on the grounds that Samuel lacked testamentary capacity and that the will is the result of fraud and undue influence by Matthew and others acting in concert with him.

THE CROSS-MOTION

The Decedent's Domicile

Roger's contention that Samuel was not a domiciliary of Nassau County at the time of his death is advanced for the first time in Roger's cross-motion made more than a year after Roger filed objections to the probate of the propounded instrument. The court notes that Roger's own petition for the probate of the June 21, 2003 instrument that favors him identifies the decedent as

[1]The decedent and Blanca executed a prenuptial agreement and neither will contains any bequest for Blanca.

a domiciliary of Nassau County. That petition was verified by Roger on July 18, 2005; it has not been corrected or withdrawn.

Nevertheless, Roger advances a number of arguments in support of his contention that Samuel never effectuated a change of domicile from Florida, where he had lived for thirty-seven years with his second wife, Blanca, until he left her and went first to Connecticut and then to New York. Roger alleges the following: (1) Blanca continued to reside in Florida in the residence where she and Samuel has resided together; (2) Samuel's treating physician told Roger that, a few months after Samuel arrived at The Nautilus Hotel, he said he wanted to return to Blanca; (3) the propounded instrument, executed on August 29, 2003, states that Samuel is "of the County of Miami-Dade, State of Florida, temporarily residing at The Mews, ½ Bolling Place, Greenwich, Connecticut"; (4) the attorney-draftsman of that instrument testified at his deposition that he drafted it that way because he "was told that [Samuel] was domiciled in Florida"; (5) Samuel did not file tax returns in New York; and (6) Samuel lacked the mental capacity to effectuate a change in domicile.

In order to effectuate a change in domicile, "there must be a union of residence in fact and an 'absolute and fixed intention' to abandon the former and make the new locality a fixed and permanent home" (*Hosley v Curry*, 85 NY2d 447, 451 [1995], quoting *Matter of Newcomb*, 192 NY 238, 250-251 [1908]). A change in residence is insufficient (*Matter of Newcomb*, 192 NY 238, 250 [1908]). The party alleging a change in domicile has the burden to prove the change by clear and convincing evidence (*Matter of Pingpank*, 134 AD2d 263, 265 [2d Dept 1987]). In order to meet this burden, Matthew must show the "decedent's intention to effect a change of domicile from [his] acts, statements and conduct" (*id.*).

The record does not contain the usual evidence of an intent to change domicile. Since Samuel was in his nineties and legally blind by the time he left Florida in 2003, it is not surprising that he did not attempt to obtain a New York driver's license. However, there is no evidence that Samuel changed his voter registration to New York or that he filed New York State tax returns. Samuel did establish a joint bank account with Matthew at a bank in Harrison, New York, and he commenced an action against Roger in New York State, Supreme Court, wherein Samuel alleges his residence to be Nassau County.

There is no evidence in the record to support Matthew's contention that Samuel was not mentally capable in September 2003 of changing his domicile to New York. However, Matthew has not met his burden of proving, by clear and convincing evidence, that Samuel intended to change his domicile to Nassau County, State of New York. A hearing will be held on the issue of Samuel's domicile on November 5, 2007, at 9:30 a.m., prior to the commencement of the probate trial.

CPLR 4519

Roger asks the court for a determination that Matthew and Emily are disqualified under CPLR 4519 from offering evidence in support of Matthew's motion for summary judgment and from testifying at trial with respect to transactions with Samuel. Roger asserts that Emily is barred because she does not consider herself to be divorced from Samuel because, although they were divorced in accordance with New York State law, they never obtained a divorce under Jewish law and because she and Matthew have assets in joint name.

CPLR 4519 provides, in pertinent part, that

> “upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person . . . except where the executor, administrator, [or] survivor . . . is examined in his own behalf, or the testimony of the . . . deceased person is given in evidence, concerning the same transaction or communication.”

The Court of Appeals has held, "[e]mphatically, evidence excludable under the Dead Man's Statute (CPLR 4519) should not be used to support summary judgment" (*Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 313 [1972]; 9 Warren's Heaton on Surrogate's Court, § 116.03[3], 7th ed.). While evidence excludable by CPLR 4519 may be used in opposition to a motion for summary judgment, it may not be used to support such a motion (*Matter of Vetri*, NYLJ, Feb. 26, 1999, at 32). Matthew is interested in the outcome of the probate proceeding. His sworn statements concerning transactions or communications with Samuel offered in support of the motion for summary judgment will not be considered. Any objections to Matthew’s testimony at trial will be considered upon proper objection made during the trial.

Emily is not "interested in the event" (CPLR 4519; see *Duncan v Clarke*, 308 NY 282 [1955]). “The test of the interest of a witness is whether the witness will gain or lose by the direct legal operation and effect of the judgment or that the record will be legal evidence for or against the witness in some other action” (*Smith v Kuhn*, 221 AD2d 620, 621 [2d Dept 1995], citing *Hobart v Hobart*, 62 NY 80, 83; *see also Duncan v Clarke*, 308 NY 282 [1955]; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4519:2, at

167-168). Despite her protestations, the only evidence supports the fact that Emily and Samuel were divorced for approximately thirty years prior to his death, and Emily does not appear to have a direct interest in the outcome of the proceeding. Emily's sworn statements submitted in support of the motion for summary judgment are not barred under CPLR 4519. Whether she is competent to testify at trial will be considered by the court at that time upon a proper objection.

The DVDs

In support of his motion, Matthew has submitted Emily's affidavit, annexed to which as exhibits are three DVDs alleged to be audio-visual recordings of Samuel made at various times in and around 2003. Matthew claims that the statements allegedly made by Samuel in these recordings support the arguments Matthew advances in his motion for summary judgment. According to Emily, the recordings were copied by a third-party from videotape to DVD. Emily swears that the recordings are "exactly what occurred during the period[s] of time taped" and that the elderly man appearing on the tapes was Samuel. Emily also swears to the approximate dates the recordings was made.

Roger requests that the court not consider the material contained on the DVDs in connection with the motion for summary judgment and seeks an order prohibiting Matthew from introducing the DVDs at trial. Roger argues that there are gaps in the DVDs that raise questions about their accuracy and timing, that Matthew will not be able to authenticate them at trial since he was the person who was the videographer, and that the communications contained on the DVDs among Samuel, Matthew, and Emily should be barred under CPLR 4519.

The court has not viewed the DVDs. With respect to the motion for summary judgment, despite Emily's sworn statements, the court is not satisfied at this time as to the DVDs'

authenticity since Emily did not have custody of them and was not involved in the transfer from cassette tapes to DVDs. Matthew also swears that "[n]othing was been deleted from the videotapes," but does not offer any evidence from the company that converted the tapes to DVD format. The court will not consider the DVDs in connection with the motion for summary judgment. Whether the DVDs can be authenticated at trial and by whom is an issue to be determined at that time.

THE SUMMARY JUDGMENT MOTION

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge, Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

Testamentary Capacity

The proponent bears the burden of proving that the testator possessed testamentary capacity (*Matter of Kumstar,* 66 NY2d 691, 692 [1985]). The court looks at these factors: "(1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property she was disposing of; and (3) whether she knew those who would be considered the natural object of her bounty and her relations with them" (*id.*). Moreover, sanity and testamentary capacity are presumed unless there is evidence to the contrary, the presumption being that "a mind once sound continues" to be so (*Matter of McCarthy*, 269 App Div 145, 152 [1st Dept 1945], *affd* 296 NY 987 [1947]).

In support of the motion for summary judgment dismissing the objections, Matthew offers the deposition testimony of the attorney-draftsman, Thomas Amlicke, who was then the head of the estate department at Hall Dickler, and two of the three witnesses to the execution of the instrument. Mr. Amlicke testified as to the decedent's mental competence. He stated, "There was no question in my mind the guy was totally competent. He knew exactly what he wanted

and requested additional changes, then he was satisfied that this was the will he wanted, then we had him sign it." Another witness, Ted Cohen, who then was a partner at the firm, testified that, prior to the execution ceremony, he observed Mr. Amlicke read the entire will to Samuel because of his poor eyesight. When questioned about whether there was "any problem with [Samuel's] competence" at the time he executed the will, Mr. Cohen responded, "Absolutely not." Mr. Cohen states, in his affidavit, sworn to on July 9, 2007, that, "[i]t was clear to me that Samuel Pearson was "rational, competent and had the capacity to completely understand and execute his Last Will and Testament on August 29, 2003."

There is additional evidence in the record supporting Matthew's assertion that Samuel was competent in and around the time the will was executed. Messrs. Cohen and Amlicke testified that Samuel was aware of his family members, and Mr. Cohen has attested to his conversation with Samuel involving some of his assets, which he claimed were taken by Roger. Abraham Feder, who is Samuel's ex-brother-in-law, has submitted an affidavit in support of Matthew's motion in which he states that he spoke by telephone to Samuel during that time period and at no time did he sound irrational or incompetent. The court finds that Matthew has made a prima facie case that Samuel had testamentary capacity at the time he executed the propounded instrument.

Roger asserts that Samuel lacked testamentary capacity on August 29, 2003. He states that, in July and August 2003, he observed Samuel sitting on Roger's porch talking to himself. On one of those occasions, Samuel is alleged to have asked Matthew if he could see the angels with whom Samuel was speaking and whom he had named. Roger also states that he once found his father sleeping on the bathroom floor and that he sometimes called Roger "Matthew." He

states that he observed Samuel hallucinating "most days", flicking the bridge of his nose until it bled and sleeping under a toilet when Samuel was at The Mews. Roger has not submitted any medical records from that time period.

Thereafter, when Samuel resided at The Nautilus Hotel after the will was executed, Roger found Samuel to be confused and agitated. Roger has annexed to his opposition papers a note from the assistant director of The Nautilus Hotel to Samuel's doctor advising him that Samuel "is hallucinating & much more confused. He thinks the devil is telling him things. . . . He was found also in the garage 2 nights ago." This note is dated January 15, 2004, more than four months after Samuel executed the will. Roger also asserts that Samuel's incompetence is demonstrated by his misapprehension that Roger took his assets.

Roger also relies on certain of Samuel's medical records. While Samuel was a resident at The Nautilus Hotel, his treating physician was Baruch Kassover, M.D. Dr. Kassover's notes from an examination of decedent on September 4 or 9, 2003 [the date is not clear], state, in part, that "Dad depressed . . . . thinks has a chemical imbalance. . . . Depression poor vision[,] glaucoma[,] legally blind." These notes appear to be from the first time Dr. Kassover examined Samuel, several days to more than a week after the will was executed. Roger also offers Dr. Kassover's records from July 6, 2004, which state that Samuel was "very agitated in dining room" and from October 20, of presumably 2004 since they are in sequence for that year, that note "dementia" for what appears to be the first time. There are notations in the records offered that Samuel was alert and oriented "x 3."

Notably, there are no records for August 29, 2003. Notably, too, Roger was away on vacation from August 19, 2003 and did not see Samuel for at least ten days prior to the date Samuel signed the propounded instrument.

"A testator needs only a lucid interval of capacity to execute a valid will. This can occur even contemporaneously with an ongoing diagnosis of dementia, *Matter of Friedman,* 26 AD3d 723 (2006), or even incompetency, *In re Walther,* 6 N.Y.2d 49 (1959)" (*Matter of Petix*, 15 Misc.3d 1140(A), *4 [Sur Ct, Monroe County 2007]). There is no medical evidence that Samuel was suffering from dementia or was incompetent on the date he executed the will. Even assuming that Roger witnessed Samuel hallucinating at times prior to and after the date he signed the will, there is no evidence in the record that Samuel lacked testamentary capacity on August 29, 2003, the date of the will's execution. Accordingly, Matthew's motion for summary judgment is granted on the issue of capacity, and Roger's objection alleging that Samuel lacked testamentary capacity is dismissed.

Undue Influence

The objectant has the burden of proof on the issue of undue influence (*Matter of Bustanoby,* 262 AD2d 407, 408 [2d Dept 1999]). The three elements of undue influence have been described as motive, opportunity, and the actual exercise of undue influence (*see Matter of Fiumara,* 47 NY2d 845, 846 [1979]). This classic formulation about what constitutes undue influence still resonates in the case law: "[i]t must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency . . . . It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly

offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear" (*Children's Aid Socy. v Loveridge,* 70 NY 387, 394 [1877]; *see also Matter of Kumstar,* 66 NY2d 691, 693 [1985]).

Undue influence is rarely proven by direct evidence; rather, it is usually proven by circumstantial evidence (*Matter of Walther,* 6 NY2d 49, 54 [1959]; *Children's Aid Socy. v. Loveridge,* 70 NY 387, 395 [1877]*; Matter of Burke,* 82 AD2d 260, 269 [2d Dept 1981]). Among the factors that are considered are: (1) the testator's physical and mental condition (*Matter of Woodward,* 167 NY 28, 31 [1901]; *Children's Aid Socy. v. Loveridge,* 70 NY 387, 395 [1877]; *Matter of Callahan,* 155 AD2d 454, 454 [2d Dept 1989]; (2) whether the attorney who drafted the will was the testator's attorney (*Matter of Lamerdin*, 250 App Div 133, 135 [2d Dept 1937]; Matter *of Elmore,* 42 AD2d 240, 241 [3d Dept 1973]); (3) whether the propounded instrument deviates from the testator's prior testamentary pattern (*Children's Aid Socy. v. Loveridge,* 70 NY 387, 402 [1877]; *Matter of Kruszelnicki,* 23 AD2d 622, 622 [4th Dept 1965]); (4) whether the person who allegedly wielded undue influence was in a position of trust (*Matter of Burke,* 82 AD2d 260, 270 [2d Dept 1981]) and (5) whether the testator was isolated from the natural objects of his affection (*Matter of Burke,* 82 AD2d 260, 273 [1981]; *see Matter of Kaufman,* 20 AD2d 464, 474 [1st Dept 1964], *affd* 15 NY2d 825 [1965]). With this in mind, it is also important to remember that in order to defeat a motion for summary judgment, the objectant must demonstrate that there is a genuine triable issue by allegations that are specific and detailed and substantiated by admissible evidence in the record. Mere conclusory assertions will not suffice (*Matter of O'Hara,* 85 AD2d 669, 671 [2d Dept 1981]).

A confidential relationship may be inferred if one party has disparate power over the other (*see Ten Eyck v. Whitbeck*, 156 NY 341, 353 [1898]), such as an attorney-in-fact, guardian, clergyman or doctor, where a confidential relationship is said to exist as a matter of law (N.Y. PJI 7:56 [in the context of probate contests]). However, the law recognizes that a close family relationship "counterbalances any contrary legal presumption" (*id.*, citing *Matter of Walther*, 6 N.Y.2d 49 [committee and ward were sisters]; *Matter of Moskowitz*, 279 App.Div. 660 [2d Dept 1951], affd 303 N.Y. 992 [1952] [attorney and client were son and father]) and "explanation by the [agent] is not required" (N.Y. PJI 7:56). Matthew was the attorney-in-fact for Samuel at the time he executed the propounded instrument. However, the record does not support a finding that, as a matter of law, a confidential relationship existed between Matthew and Samuel.

Turning to the propounded will, Mr. Cohen knew Matthew for some time prior to meeting with Samuel. Mr. Cohen testified that Matthew had consulted with him on several legal matters. In mid-August 2003, Matthew contacted Mr. Cohen and asked him to meet with Samuel. Mr. Cohen agreed and went to The Mews in Connecticut, where Samuel was living at the time. According to Mr. Cohen, Matthew was present for parts of the meeting, which last for approximately one hour. Samuel asked Mr. Cohen to assist him with a number of legal matters, including terminating a joint bank account he had with Roger at a bank in Connecticut, revoking a power-of-attorney he had given to Roger and preparing a power-of-attorney with Matthew as attorney-in-fact. During the meeting, Samuel told Mr. Cohen that Roger had taken some securities that belong to Samuel. He also told Mr. Cohen that he might want to change his will.

Mr. Cohen prepared a letter for Samuel's signature removing Roger from the bank account, prepared a revocation of the power-of-attorney and prepared a new power-of-attorney

naming Matthew as attorney-in-fact. Mr. Cohen met with Samuel on August 21, 2003 to have Samuel sign the documents. Matthew was present for part of the meeting, as well as during the car trip with Samuel and Mr. Cohen from Connecticut to Port Chester, New York, where Mr. Cohen, who has a New York State notary license, notarized Samuel's signature on these documents.

After receiving a call from Samuel, Mr. Cohen met alone with him on or about August 24, 2003. Samuel told Mr. Cohen that he was unhappy at The Mews where Roger had moved him and was thinking of cutting Roger out of his will. On August 27, 2003, Samuel called Mr. Cohen and requested that he prepare a new will for him leaving his entire estate to Matthew and nothing to Roger.

Mr. Cohen states in his affidavit that he consulted with Mr. Amlicke on August 28, 2003. That same day, Mr. Amlicke drafted a new will, along with a summary, and faxed it to Samuel for his review.

On August 29, 2003, Matthew brought Samuel to Hall Dickler's office in White Plains, New York. Messrs. Cohen and Amlicke reviewed the will's provisions with Samuel. According to Mr. Cohen, Samuel requested that several changes be made to the will, and insisted on including additional language to the provision that disinherited Roger, specifically, that Roger "took other substantial assets of mine without my consent and has refused to return same," an accusation that Roger denies. Matthew was in the room for part of the time that Samuel discussed the will's provisions with the attorneys, although Mr. Cohen states that they received all directions from Samuel. After the will was revised, Samuel executed it. Matthew was present during the execution ceremony.

The earlier June 21, 2003 instrument, which favors Roger, was prepared by Murray Weil, Esq., a Florida attorney. Roger has submitted Mr. Weil's affidavit, sworn to on August 1, 2007. In it, Mr. Weil states that he first met Samuel sixty-one years ago and that he was a client of Mr. Weil's late partner, Harold Shapiro, Esq. Mr. Weil represented Samuel on various legal matters from 1999 and also that they were in touch every few months by telephone.

Mr. Weil states that Samuel contacted him in the late spring of 2003 about changing his will. An earlier will executed by Samuel on May 7, 1999 left Matthew $29,000 and left the residuary of the estate to Matthew and Roger, equally. Samuel advised Mr. Weil that he had provided Matthew with money during his adult years that was not repaid. Samuel also told Mr. Weil that Roger called and visited him in Florida, but Matthew called only when he needed money. According to Mr. Weil, Samuel asked him to prepare a will that left everything to Roger and nothing to Matthew. Mr. Weil prepared the instrument, which Samuel executed on June 21, 2003.

Because the testamentary scheme set forth in the August 29, 2003 will is so dramatically different than that in the June 21, 2003 will, coupled with Matthew's involvement in engaging Mr. Cohen to assist Samuel and Matthew's presence at certain meetings and during the will execution, the court finds that a question of fact exists as to whether the August 29, 2003 instrument is a product of undue influence. Accordingly, Matthew's motion for summary judgment on that issue is denied.

<u>Fraud</u>

The objectant also bears the burden of proving fraud (*Matter of Schillinger*, 258 NY 186, 190 [1932]; *Matter of Beneway*, 272 AD 463, 468 [3d Dept 1947]). It must be shown that "the

proponent knowingly made a false statement that caused decedent to execute a will that disposed of [her] property in a manner different from the disposition [she] would have made in the absence of that statement" (*Matter of Clapper,* 279 AD2d 730, 732 [3d Dept 2001]). Moreover, a finding of fraud must be supported by clear and convincing evidence (*Simcusky v Saeli*, 44 NY2d 442, 452 [1978]). In order to defeat the motion for summary judgment on the issue of fraud, the objectant must come forward with more than "mere conclusory allegations and speculation" (*Matter of Seelig*, 13 AD3d 776, 777 [3d Dept 2004]). To defeat a motion for summary judgment, the objectant must produce sufficient evidence to show that there is an issue of fact to the effect that the proponent made a false statement or statements to the decedent to induce him to make this will, that the decedent believed the statement, and that without such statement or statements, the propounded will would not have been executed (NY PJI 7:60 [2006]). A showing of motive and opportunity to mislead is insufficient; evidence of actual misrepresentation is necessary (*Matter of Gross*, 242 AD2d 333, 334 [2d Dept 1997]). There is no evidence in the record that Matthew or anyone at his behest actually made a fraudulent statement to Samuel that caused Samuel to execute the propounded will. Accordingly, Matthew's motion for summary judgment on the issue of fraud is granted, and Roger's objection alleging fraud in the making and execution of the propounded instrument is dismissed.

Settle order.

Dated: October 23, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court