

Matter of Katz

2007 NY Slip Op 34244(U)

December 14, 2007

Surrogate's Court, Nassau County

Docket Number: 3413642/0077

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 of the Last Will and
Testament of

File No. 341364

ALLEN M. KATZ, a/k/a
ALLEN KATZ,

Dec. No. 732

Deceased.

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In this contested probate proceeding, objectant moves for an order granting objectant leave to renew petitioners’ motion for summary judgment wherein the court granted summary judgment in favor of the petitioners and, upon granting leave to renew, denying petitioners’ motion for summary judgment, vacating the decree of this court dated July 12, 2007 admitting decedent’s will dated October 24, 2005 to probate. Objectant also seeks to amend her objections to include an objection for lack of testamentary capacity. For the reasons that follow, the motion for leave to renew is denied.

The decedent, Allen M. Katz, died on December 30, 2005 survived by his son, Bradley Katz, one of the proponents, and his daughter, the objectant. The decedent’s oldest son, Elliot, predeceased him.

The will offered for probate provides that the entire residuary estate is payable to Bradley, or if Bradley is not living, to Bradley’s son, Brent, or his surviving issue. In addition, the will gives the decedent’s brother, Myron Katz, a life estate in the decedent’s one-half (1/2) interest in real property in Lynbrook. Objectant asserts that the decedent’s will was the result of undue influence and fraud on the decedent by Bradley and the decedent’s brother, Myron.

Pursuant to a pretrial conference order dated January 11, 2007, all discovery was to be concluded by all parties no later than March 1, 2007. Summary judgment motions were to be

made returnable on or before April 2, 2007. Trial of the matter was scheduled for June 19, 2007.

Petitioners moved for summary judgment dismissing the objections of fraud and undue influence. Pursuant to decision and order of this court dated June 12, 2007 [Dec. No. 263], this court granted summary judgment to petitioners dismissing the objections, finding that objectant opposed the motion for summary judgment solely on the basis of hearsay evidence. By decree dated July 12, 2007, decedent's last will and testament dated October 24, 2005 was admitted to probate.

By seeking renewal of the summary judgment motion, objectant asserts that she has now obtained medical records from the Garden Care Center, the facility in which decedent resided at the time of the execution of the will, containing references to decedent's suffering from depression and expressing concerns about suicidal ideation. The records contained the identity of decedent's treating physician at the facility, Dr. Bruce Greenberg. Objectant asserts that despite repeated requests for the records prior to the submission of the motion, she was unable to obtain the records from the facility due to a backlog of requested records in time to oppose the motion. Objectant further asserts that she did not know the identity of decedent's treating physician at the Garden Care Center until furnished with the records. In further support of the motion to renew, objectant submits the affidavit of Dr. Bruce Greenberg wherein he states that decedent was under his care from September 9, 2005 to November 3, 2005. Dr. Greenberg avers that in his opinion, it is "unlikely" that the decedent was capable of making financial and estate decisions during October 2005. Based upon the foregoing, objectant seeks renewal of the motion for summary judgment and, upon renewal, denial of the petitioners' motion, vacatur of the decree admitting decedent's will to probate and leave to amend her objections as to include an objection based on lack of testamentary capacity.

Petitioners oppose the instant motion asserting that no new facts have been presented for the court's consideration and that the alleged new evidence is insufficient on its face to alter the prior decision in the matter. Petitioners contend that objectant was aware of the fact that decedent was a patient at the Garden Care Center from September 29, 2005 to November 6, 2005 from the inception of these proceedings and had ample time to secure any required records. Petitioners urge that objectant was aware from the Franklin General Hospital records that Dr. Greenberg treated the decedent from the date of his hospitalization on September 5, 2005. Petitioners further assert that the new material fails to raise an issue as to objectant's assertion that undue influence was used on decedent and leave to amend the objections would be unduly prejudicial at this time.

CPLR 2221(e) governs motions for leave to renew:

A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination... .
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

The motion court may, in its discretion, grant renewal upon facts known to the movant at the time of the original motion if the movant offers a reasonable excuse for the failure to present those facts in the prior motion (*Surdo v Levittown Public School Dist*, 41 AD3d 486 [2d Dept 2007]; *Lawman v Gap, Inc.*, 38 AD3d 852 [2d Dept 2007]). As to reasonable excuse, although objectant may have known that Dr. Greenberg treated the decedent at Franklin General Hospital,

it appears that objectant did not know Dr. Greenberg was decedent's treating physician at Garden Care Center. Further, it appears that objectant made timely requests for the Garden Care records and did not receive a timely response from the facility. However, neither the medical records of the Garden City Care center, nor the affidavit of Dr. Greenberg, warrant a "different outcome on the underlying motion" or serve as a basis to amend the objections (*see Sample v Levada*, 8 AD3d 465, 467 [2d Dept 2005]). Objectant's motion is therefore denied.

The above constitutes the decision and order of this court.

Dated: December 14, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court