

Matter of Lombardi

2008 NY Slip Op 31824(U)

June 13, 2008

Surrogate's Court, Nassau County

Docket Number: 0329997/2008

Judge: John B. Riordan

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SURROGATE'S COURT: STATE OF NEW YORK
 COUNTY OF NASSAU

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 Probate Proceeding, Will of

File No. 339997

JOANNE C. LOMBARDI,
 aka JOANNE LOMBARDI,
 aka JOANNE CATHERINE LOMBARDI,

Dec. No. 128

Deceased.
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In this probate proceeding, the proponent, George Lombardi, moves for an order granting summary judgment pursuant to CPLR 3212, dismissing the objections filed by the objectant, Susan Giovinco, and admitting the propounded instrument to probate. Susan opposes George's motion and cross-moves for summary judgment.

BACKGROUND

The decedent, Joanne Lombardi, died testate on March 27, 2005, at the age of 87, after being diagnosed with pancreatic cancer approximately one week earlier. She was survived by her son, George and her daughter, Susan. The decedent's children are her sole distributees.

The instrument offered for probate is dated November 29, 2004. It pours over to The Joanne C. Lombardi 2004 Revocable Trust (2004 Trust), which is also dated November 29, 2004. Under the terms of the 2004 Trust, Susan receives \$25,000 and George receives the remainder of the estate. George is the nominated executor under the will and is the trustee of the 2004 Trust. In the probate petition, the total of the property constituting the decedent's gross testamentary estate is \$10,000. Several years prior to her death, the decedent placed the bulk of her assets into joints accounts with right of survivorship with George

Susan alleges that the will should not be probated because the decedent lacked testamentary capacity on the date it was executed and because its execution was procured by fraud and undue influence upon the decedent by George and others. Susan has withdrawn the objection alleging lack of due execution.

In 1996, the decedent made The Joanne C. Lombardi Grantor Trust (1996 Trust), naming George and Susan as the trustees. Under Article Two, the decedent irrevocably transferred the property set forth in Schedule “A”. Schedule “A” is blank on the copy of the 1996 Trust that is part of the court record. Pursuant to Article Three, the net income of 1996 Trust was to be paid to, or applied for, the benefit of the decedent, during her lifetime, in installments, at least on a quarterly basis. Both George and Susan assert that the decedent had transferred her house to the 1996 Trust, which apparently passed to George and Susan equally upon the decedent’s death.¹ The decedent continued to reside in the house until one week prior to her death when she entered the hospital.

SUMMARY JUDGMENT

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

¹Apparently, the decedent executed a revocable trust in 2001. The court was not provided with a copy of it.

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 this case, the testimony of the attorney-draftsman and the subscribing witnesses from the SCPA 1404 examinations and the witnesses’ self-proving affidavits annexed to the propounded instrument establish a *prima facie* case that the decedent possessed testamentary capacity when she executed the will (*Matter of James*, 17 AD3d 366 [2d Dept 2005]). The attorney-draftsman testified at his SCPA 1404 examination that, although George accompanied her to the attorney-draftsman’s office, he met alone with the decedent for one-and-one-half hours to discuss her testamentary plan. His testimony was based upon notes he made of the meeting, which the attorney-draftsman stated were his attempt to simultaneously “capture [the decedent’s] exact words during the interview.” He testified that the decedent had discussed her children, described her assets and told him how she wished to dispose of them upon her death. The attorney-draftsman also testified that the decedent told him that for several years her relationship with Susan was very bad, that they had not seen each other in a very long time and that Susan did not pay attention to her. The attorney-draftsman described the decedent’s appearance as “put together” and her face as being “particularly animated.”

The attorney-draftsman sent the decedent a draft of the will after their first meeting and prior to the date she executed the will, approximately one-month later. He testified that he spoke to the decedent after he sent the draft to her to confirm the provisions of the will and to resolve the open question of whether she wished to make a bequest to Susan, a topic they had discussed during their first meeting. During their conversation, the decedent indicated that she wanted to

bequeath \$25,000 to Susan.

On November 29, 2004, the decedent executed the propounded will and the 2004 Trust, which the attorney-draftsman had also prepared. The attorney-draftsman testified that he followed the formalities of his normal execution ceremony. He testified that George was not present when the decedent signed the documents and that he did not know where George had signed the 2004 Trust in his capacity as trustee. The attorney-draftsman took the acknowledgment of the decedent's signature on the 2004 Trust on November 29, 2004. A different notary was used for George's signature as trustee when he signed the 2004 Trust on December 14, 2004.

George has also submitted the affidavit of Michael C. Cantor, M.D., who was the decedent's doctor from the early 1990s. Dr. Cantor, who practices gastroenterology and internal medicine, was introduced to the decedent by George, who is also a doctor. Other than noting that the decedent had become diverticular and had slightly raised cholesterol, Dr. Cantor describes her as in "fine fettle given her age." He avers that he prescribed Aricept for the decedent after he read that it comprised a prophylactic medication to prevent loss of memory. Dr. Cantor states that it upset the decedent's stomach and she discontinued taking it within one week. Dr. Cantor acknowledges that George would see to the renewal of the decedent's prescriptions. He also attests that he attended the decedent's 87th birthday party in November 2004, where he noted that the decedent was "entirely aware of the occasion, appeared animated at the attention shown her, [and] was entirely rational" Dr. Cantor states that to his knowledge the decedent continued to live by herself and manage her own affairs and that George would stop by on the weekends to see that she was doing well and would see to the refill of the medications Dr. Cantor prescribed.

Based upon his medical records and his independent recollection of the decedent's mental capacity, Dr. Cantor opines that she was fully competent to make a will on November 29, 2004.

In opposition, Susan asserts that the decedent exhibited irrational behavior starting in or about 2002. Susan alleges that the decedent had no knowledge of her assets and did not recall that she had transferred her house to the 1996 Trust. Susan testified that she spoke to the decedent in October, although she did not specify of which year, and the decedent told her she was giving the house and all of her assets to George. The attorney-draftsman also testified at his SCPA 1404 examination that his notes reflected that the decedent told him that she owned the house and did not mention the 1996 Trust. Assuming, *arguendo*, that the decedent did not recall the prior transfer, that standing alone, is insufficient to overcome the proponent's summary judgment motion, particularly where, as here, the decedent resided alone in the house until one-week before her death when she was hospitalized and paid the expenses of the house, including the real estate taxes (*see Matter of Santamorina*, 213 NYS2d 555 [Sur Ct, Westchester County] 1961) (testator's mistaken belief as to nature of her interest in real property did not preclude finding of testamentary capacity).

Susan also asserts that, when they spoke by telephone, the decedent was extremely forgetful. Susan testified that she spoke to the decedent about two times in 2003 and at least three times in 2004. Susan also testified that the decedent had lost 23 pounds prior to the time she executed the propounded instrument. The decedent's medical records are not part of the court's record, and Susan had not seen the decedent since February 2003 until she visited her at the hospital during the decedent's week-long hospitalization which ended when she succumbed to cancer. Susan attributes the state of their relationship to the decedent's failing mental

capacity. To support her position, Susan relies on a CVS Pharmacy print-out that shows that George prescribed Aricept,² a drug used to treat mild to moderate Alzheimer's Disease, for the decedent. The CVS print-out shows a one-time disbursement of thirty pills in February 2004.

Susan also offers an article about dementia written by physicians and an affidavit by a psychiatrist, D. Peter Birkett, in support of her contention that the decedent lacked testamentary capacity on the date she executed the propounded will. Dr. Birkett never met or examined the decedent, nor did he examine any of her medical records. Dr. Birkett opines, based solely upon the CVS Pharmacy print-out, that:

“[a] reasonable competent physician would only prescribe [Aricept] after establishing the diagnosis of dementia. In order to establish such a diagnosis, the patient must have impairment of memory and of the ability to understand number problems. In my professional opinion and to a degree of reasonable medical certainty, such a patient would be unable to understand the nature and extent of her property.”

Opinion evidence by a physician who never examined the testator and whose opinion is based on medical records and prescribed drug therapy has been described as “the weakest and most unreliable kind of evidence and insufficient to warrant submission of the issue of testamentary capacity to the jury” (Matter of Van Patten, 215 AD2d 947, 949 [3d Dept 1995] (internal quotation marks and citations omitted).

The “appropriate inquiry [regarding testamentary capacity] is whether the decedent was

²George testified that, although the CVS print-out states that he prescribed the drug, it was actually Dr. Cantor who prescribed it. George, a doctor, also testified that he sometimes picked up the decedent's prescriptions and that is perhaps why the print-out shows that he prescribed it. In his affidavit, Dr. Cantor states that he prescribed Aricept for the decedent on one occasion.

lucid and rational at the time the will was made” (*Matter of Buchanan*, 245 AD2d 642, 644 [3d Dept 1997]). Even proof that a decedent suffered at the time she executed her will from physical or mental infirmities is not

“necessarily inconsistent with testamentary capacity as long as the testatrix was acting rationally and intelligently at the time the [will] was prepared and executed. Furthermore, evidence relating to the condition of the testatrix before or after the execution is only significant insofar as it bears upon the strength or weakness of mind at the exact hour of the day of execution” (*Matter of Hedges*, 100 AD2d 586, 588 [2d Dept 1984]).

Here, the evidence presented by Susan does not create a triable issue of fact about the decedent’s testamentary capacity on November 29, 2004. Accordingly, George’s motion for summary judgment on the issue of testamentary capacity is granted, that branch of Susan’s cross-motion is denied, and the objection alleging lack of 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]).

In support of his motion for summary judgment on the issue of undue influence, George

asserts that the propounded instrument was a product of the decedent's free will. Susan, the other hand, alleges that the propounded will was the result of undue influence on the decedent by George and by others.

Susan also argues that George was in a fiduciary relationship with the decedent at the time the propounded will was executed. In support of her position, Susan asserts that, from 2001 to the date of the decedent's death, George: (1) selected the decedent's doctors, lawyers and financial advisors and handled all of the decedent's financial transactions; (2) exclusively cared for the decedent; (3) arranged for the decedent's transportation to the attorney-draftsman's office; (4) caused the decedent to discontinue using Susan's husband to prepare the decedent's tax returns; and (5) prescribed Aricept for her.

A confidential relationship may be inferred if one party has disparate power over the other (*Ten Eyck v Whitbeck*, 156 NY 341 [1898]), such as the power of an attorney, guardian, clergyman or doctor, where a confidential relationship is said to exist as a matter of law (NY PJI 7:56 [citations omitted]). However, the law recognizes that a close family relationship “counterbalances any contrary legal presumption (*id.*, citing *Matter of Walther*, 6 NY2d 49 [1959] [committee and ward were sisters]; *Matter of Moskowitz*, 279 App Div 660 [2d Dept 1951], *affd*, 303 NY 992 [1952] [attorney and client were son and father] [additional citations omitted]) and explanation by the [agent] is not required” (NY PJI 7:56).

Susan asserts that the confidential relationship that allegedly existed between George and his mother, together with George's involvement in the decedent's affairs, is sufficient to deny George's motion for summary judgment. The court disagrees. It is clear that the decedent lived an independent life and that George's involvement with her affairs was no more than incidental,

given their particular circumstances.

At his depositions in this proceeding and in the pending proceeding Susan commenced to discover property allegedly withheld from the decedent's estate, George testified that he assisted the decedent with her financial affairs, introduced her more than a decade before to Dr. Cantor and later to the attorney-draftsman of the 2004 instruments. But, the record also shows that the decedent lived alone and was able to manage her own affairs until a week before she died. There is no evidence that George wielded disparate power over his mother, the decedent. Despite Susan's allegations, there also is no evidence in the record that the decedent was in a weakened physical state on the date she executed the will.

Turning to the issue of undue influence, at best, Susan has shown that George perhaps had motive and opportunity. There is absolutely no evidence in the record demonstrating that a triable issue of fact exists about the "actual exercise" of undue influence practiced by George or anyone else on the decedent in the making of the propounded will. Although George accompanied the decedent to the attorney-draftsman's offices, the decedent met alone for one-and-a-half hours with the attorney-draftsman to discuss her estate plan. The decedent explained to the attorney-draftsman that she was favoring George because of her long-time estrangement from Susan. Later, the decedent informed the attorney-draftsman that she wished to leave Susan \$25,000. Susan does not deny that she and the decedent were estranged, and she has provided no evidence that their estrangement was the result of George's efforts. More than a month elapsed between the time that the decedent first met with the attorney-draftsman and the execution ceremony. The attorney-draftsman testified that he met again with the decedent on November 29, 2004, both before and after the decedent executed the will. George was not at the attorney-

draftsman's office on that day.

Susan has failed to meet her burden of showing that a triable issue of fact exists on the issue of undue influence. Accordingly, George's motion for summary judgment on the issue of undue influence is granted, Susan's cross-motion on that issue is denied, and the objection alleging undue influence is dismissed.

FRAUD

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 her 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]).

When questioned at her deposition about the basis for her allegation of fraud, Susan

testified that, in August 2002, the decedent told Susan that George had promised that the decedent “was going to a wonderful nursing home and all her needs would be taken care of,” a statement Susan alleges to be false. The conversation between Susan and the decedent took place more than two years before the decedent executed the propounded will and is hardly the clear and convincing evidence of fraud needed to overcome a motion for summary judgment. Indeed, Susan has failed to present any evidence of fraud upon the decedent by George or by anyone else in the making or execution of the propounded instrument. Accordingly, George’s motion for summary judgment on the issue of fraud is granted, Susan’s cross-motion regarding fraud is denied, and the objection alleging fraud is dismissed.

In conclusion, George’s motion for summary judgment is granted, and Susan’s is denied.

This constitutes the decision of the court.

Settle decree.

Dated: June 13, 2008

JOHN B. RIORDAN
Judge of the
Surrogate’s Court