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

----------x

Probate Proceeding, Will of

ANGELA LABITA
a/k/a ANGELICA J. LABITA,

Deceased.

----------X

File No. 340135

Decision No. 392

In this contested probate proceeding, petitioner, Nicolina D. Hayhurst, moves for an order granting summary judgment pursuant to CPLR 3212, dismissing the objections filed by objectant *pro se*, Katherine D'Alessandro. The motion is unopposed.

BACKGROUND

The decedent, Angela Labita, died on October 24, 2005 at the age of 96. Her husband, James Labita, died in 1976. The decedent did not have any children. The decedent's last will and testament dated May 11, 1974 provides for the appointment of her sister, Nicolina, as executrix and bequeaths to her the entire estate. The will was executed more than 31 years prior to the death of the decedent, when she was 65 years of age. Katherine is a daughter of one of the decedent's pre-deceased brothers, Alex J. D'Alessandro (also known as Aurelio D'Alessandro), who died several years prior to the decedent's death. All of the other distributees have executed waivers and consents.

The sole asset of the estate is a fifty percent interest, valued at approximately $250,000, in real property located at 23 Rockaway Turnpike, Lawrence, New York. The other fifty percent interest in the premises is owned by Nicolina. A deed annexed as an exhibit to Nicolina's moving papers shows that James conveyed the premises to the decedent on May 11, 1974, the

date the decedent executed the propounded instrument. Also annexed to Nicolina's moving papers is a document, which is also dated May 11, 1974, executed by James purporting to waive his right to elect against the decedent's estate in consideration of the receipt of $1.00 and other valuable consideration. Nicolina's one-half interest in the premises was conveyed to her by the decedent, as shown on the deed dated May 9, 1986, which bears the notation "no consideration." The decedent and Nicolina lived together at the premises since 1967 and, except for the several years she was married to James, the decedent lived with Nicolina for her entire life. Katherine testified that she had not seen the decedent since they had a confrontation in January 1974, although they spoke by telephone on several occasions and Katherine apparently sent the decedent and Nicolina several inflammatory letters in which she asks for money from them.

Katherine's objections to the probate of the propounded instrument read as follows:

> "1. My father Aurelio D'Alessandro was to receive the estate of 23 Rockaway Turnpike as it was agreed and written to him because he was the sole supporter of the house at 23 Rockaway Turnpike and prior money that was not given to him for former sale of 82 Cornelia Street[,] Brooklyn by his mother.
>
> 2. Due to the fact the [sic] Angela Labita took advantage of my Dad financially and abused his children also. Since the older sister Angela Labita wanted to use my father financially at the time she made a written agreement with him to have the estate of 23 Rockaway Turnpike or his daughter Katherine myself.
>
> 3. When my father passed away neither the older sister or Nicolina Hayhurst would attend the funeral at all. This is obvious disrespect for their own brother.
>
> 4. The [t]wo sisters have to control their brother to a degree of trying to force him to place his child me up for adoption after 11 years in [h]ousehold. After his objections

> and statements to them that they are mentally ill as I got older he severed his ties with them for awhile.
>
> 5. Both Angela Labita and Nicolina Hayhurst are mentally incapacitated and should not have the estate to begin with.
>
> 6. At the age of 15 I was ordered by his sisters that I have to work[.] [M]y father objected but needed them to care for me while he was at work. Actually they never did care for me as a family would. I contributed money also to Angela Labita and I was threatened by both sisters not to tell my father or they will be certain to remove me from [the] household. As the years progressed my Dad and I had a talk[.] [H]e then found out all and then inquired about money from the sale of former house that he supported and received nothing from. The sisters would state we took care of it[.] [Y]ou are in the will for the estate of 23 Rockaway Turnpike. However it is obvious once again they have deceived my Father."

Although Katherine's objections are not stated as such, the court will treat them as though they allege lack of testamentary capacity, lack of due execution, fraud, undue influence and a request for the imposition of a constructive trust.

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 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]).

DUE EXECUTION

In a probate contest, the proponent has the burden of proof on the issue of due execution (*Matter of Stegner*, 253 App Div 282, 284 [2d Dept 1938], citing *Delafield v Parish*, 25 NY 9, 29, 34 [1862]). The principal statutory requirements are: the testator must sign at the end of the instrument in the presence of at least two attesting witnesses, or his signature must be acknowledged by him to each of the witnesses; the testator must declare to the witnesses that the instrument to which his signature is affixed is his will and that he wishes them to act as witnesses to its execution; and the attesting witnesses must, within one thirty-day period, both attest the

testator's signature, as signed or acknowledged before them and at the request of the testator sign their names and affix their residence addresses at the end of the will (EPTL 3-2.1). The supervision of a will's execution by an attorney gives rise to an inference of due execution (*see e.g. Matter of Finocchio*, 270 AD2d 418, 419 [2d Dept 2000]; *Matter of Hedges*, 100 AD2d 586, 587 [2d Dept 1984]). Additionally, a validly executed attestation clause serves as prima facie evidence that the instrument was properly executed (*Matter of Collins*, 60 NY2d 466, 471 [1983]; 3 Warren's Heaton, Surrogate's Court Practice § 42.05 [4], at 42-77 [7th ed 2006]).

The one-page will was prepared an attorney, Angelo J. Santoro, who is deceased. Barbara La Rocca, the sole surviving witness to the will, testified that Mr. Santoro was present at the execution ceremony, giving rise to an inference of due execution (*see e.g. Matter of Finocchio*, 270 AD2d 418, 419 [2d Dept 2000]; *Matter of Hedges*, 100 AD2d 586, 587 [2d Dept 1984]). The instrument offered for probate contains a signature at the end, as well as an executed attestation clause dated May 11, 1974. The attestation clause is signed by two witnesses, which is prima facie evidence of due execution (3 Warren's Heaton, Surrogate's Court Practice § 42.05 [4] [7th ed 2006]).

Barbara was examined pursuant to SCPA 1404. She testified that she had known the decedent for two to three years prior to the execution ceremony since the decedent lived across the street from and was a customer of the dry cleaners that Barbara managed. With respect to the will's execution, Barbara testified that (1) she witnessed the will on May 11, 1974 in the kitchen at the decedent's residence at 23 Rockaway Turnpike, Lawrence, New York; (2) Mr. Santoro asked the decedent whether the instrument was her will, to which the decedent replied, "Yes, it is my will"; (3) Mr. Santoro asked Barbara and Alex, the other witnesses, to witness the will for the

decedent; and (4) Barbara witnessed the decedent sign the will in the presence of both witnesses.

The court is satisfied that the other witness to the will, Alex J. D'Alessandro, is dead. He was a brother of the decedent, as well as Katherine's father. The court may dispense with the testimony of attesting witness who is dead upon the testimony of the other attesting witness even "without further or additional proof" (SCPA 1405 [1]). Based upon the record, the court is satisfied that the will was executed in conformance with the statutory requirements of EPTL 3-2.1.

The court finds that Nicolina has made a prima facie showing of entitlement to summary judgment on the issue of due execution of the propounded instrument. The court has searched the record, and finds that it is devoid of any evidence that the instrument was not properly executed. Because all of the statutory requirements were met and there are no issues of fact requiring a trial exist, Nicolina's motion for summary judgment is granted regarding due execution.

TESTAMENTARY CAPACITY

The proponent also 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]). As a general rule and until the

contrary is established a testator is presumed to be sane and to have sufficient mental capacity to make a valid will (*Matter of Beneway*, 272 App Div 463, 467 [3d Dept 1947] [citations omitted]).

At her SCPA 1404 examination, Barbara testified unequivocally that the decedent possessed testamentary capacity on the date she executed the will. Barbara also signed an SCPA 1406 affidavit of attesting witness after the decedent's death in which she swore that the decedent appeared to be of sound mind and memory on the date she executed the will.

Based upon the record, the court finds that Nicolina has met her burden of proving that the testator possessed testamentary capacity on the date she executed her will. Although Katherine alleges that the decedent was mentally incapacitated, she has not introduced any admissible evidence that creates a triable issue of fact. Accordingly, Nicolina's motion for summary judgment on the issue of testamentary capacity is granted.

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, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. 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]).

Barbara testified that Nicolina was present during the will execution ceremony. This alone is insufficient to create a triable question of fact with respect to undue influence. Indeed, there is absolutely no evidence in the record that anyone unduly influenced the decedent to make or execute the propounded will. Accordingly, Nicolina's motion for summary judgment on the issue of undue influence is granted.

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]). Indeed, 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 (PJI 7:60). 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]).

Again, Katherine has failed to demonstrate that a question of triable fact exists with respect to fraud; the record is devoid of any evidence that fraud was perpetrated upon the decedent in the making or execution of the propounded instrument. Accordingly, Nicolina's motion for summary judgment is granted regarding fraud.

CONSTRUCTIVE TRUST

Katherine's objections appear to allege that the decedent and Nicolina had promised Katherine's father that he would receive the real property located at 23 Rockaway Turnpike, Lawrence, New York. The decedent's one-half interest in the property is the sole asset of her estate. If Katherine's objections are construed as a request for the imposition of a constructive trust, they fail as a matter of law.

"It is well established in New York that a person who has not obtained letters as personal representative lacks standing or the legal capacity to commence an action on behalf of an estate " (*Schoeps v Andrew Lloyd Webber Art Found.*, 17 Misc 3d 1128[A], *2 [Sup Ct, New York County2007], citing EPTL § 11-3.2; *Matter of Peters v Sotheyby's Inc.*, 34 AD3d 29, 34 [1st Dept 2006]). There is no evidence in the record that Katherine was appointed as personal representative of her father's estate. Thus, Katherine lacks standing to advance a request for the imposition of a constructive trust on behalf of her deceased father.

Although the following criteria are not rigidly applied (*Simonds v Simonds*, 45 NY2d 233, 241 [1978]) and "a constructive trust may be erected whenever necessary to satisfy the demands of justice" (*Latham v Father Divine*, 299 NY 22, 27 [1949]), there is no evidence in the record of the usual elements required for the imposition of a constructive trust, which are: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance thereon; and (4)

unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Losner v Cashline, L.P.*, 41 AD3d 789, 790 [2d Dept 2007]). There is no evidence that the decedent was in a fiduciary or confidential relationship with Katherine's father. There is also no evidence, other than Katherine's bald assertion, that the decedent promised Katherine's father her interest in the house. Katherine refers to a written agreement that the decedent supposedly executed giving the real property to Katherine or her father, but Katherine has failed to provide the court with it, assuming that such an agreement ever existed. There is no evidence that Katherine's father made a transfer in reliance upon the decedent's alleged promise to give the real property to him. And, finally, there is no evidence that the decedent was unjustly enriched. Thus, even if Katherine had standing, the evidence before the court fails to establish the existence of a triable issue of fact that would require a trial on the issue of whether a constructive trust should be imposed on the real property (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Katherine's objections are dismissed to the extent they attempt to allege that issue.

CONCLUSION

For the above-stated reasons, the motion for summary judgment is granted, and Katherine's objections to the probate of the propounded instrument are dismissed.

Settle decree.

Dated: September 15, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court