Matter of McInerney
2009 NY Slip Op 33492(U)
July 17, 2009
Surrogate's Court, Bronx County
Docket Number: File No. XXXXX
Judge: Lee L. Holzman
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July 17, 2009

ESTATE OF MICHAEL MCINERNEY, Deceased

In this contested probate proceeding the proponent, the decedent's spouse, moves pursuant to CPLR 3212 for summary judgment dismissing the objections filed by one of the decedent's sons who is currently incarcerated in Nevada and is proceeding pro se. The objectant opposes the motion and requests summary judgment in his favor.

The decedent died on September 29, 2007 at the age of 71 at Calvary Hospital. He was survived by his spouse, the sole beneficiary under the will, and by five children, four of whom consent to probate and one of whom is the objectant. The three-page, typewritten instrument dated June 16, 2007 was witnessed by three witnesses, contains both an attestation clause and a self-proving affidavit and was prepared by an attorney who supervised its execution. Paragraph FOURTH of the instrument expressly disinherits all five children "to the fullest extent permitted by law, as I have provided for their needs throughout my lifetime and they are now adults." In her probate petition filed September 29, 2008, one year after the decedent's

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death, and in her application for preliminary letters testamentary, the spouse indicated that the sole asset of the estate is the Bronx marital home valued at $225,000 and mortgaged for $74,000.

The objections to probate allege fraud, lack of testamentary capacity and undue influence and, inter alia, assert: (1) the decedent's spouse of 18 years failed to immediately probate the will and allegedly "concealed" it for over a year while she liquidated other assets, moved to Westchester County and retired, and petitioned for probate only when she was unable to sell the realty without possessing letters testamentary; (2) the three witnesses to the will falsely stated that the decedent possessed testamentary capacity as the decedent was severely ill with "hemochromatosis" and was "delusional" at the time of execution; and, (3) he believes that the three witnesses to the will worked for the drafting attorney who was a friend of the spouse's family and that the spouse drove the decedent to the law office of the drafting attorney on the day of execution and controlled the contents of the will, even though the objectant has also averred that the decedent was too ill to go to the law office to execute the will and, at the time, may have been staying at Calvary Hospital where the spouse was a nurse and administrator.

The spouse's motion for summary judgment annexes the supporting affirmation of her attorney who alleges, inter alia, that: (1) she drafted and supervised the execution of the instrument so there is a presumption of regularity as to due execution; (2) she knew the decedent

"personally and professionally" for many years and, at the time of drafting and on the date of execution, the decedent was of sound mind and memory, understood the nature and consequences of making a will, knew the nature and extent of his property and was consistent in his intention and desire to leave his estate (essentially, the marital abode) to his wife of 18 years, rather than to his children; and, (3) the objectant never saw the decedent since the date of the objectant's incarceration more than eight years ago, and the claims that the decedent was "delusional" or that the will was the product of undue influence and fraud are speculative, and not supported by objective evidence.

In opposition to the motion, the objectant submits only his affidavit generally reiterating his objections, adding that he had weekly communications with the decedent and the alleged concealment of the will by the spouse rebuts any presumption of due execution. The attorney for the spouse replies that the three witnesses to the will were not employees of her law office. The objectant also contends that the motion is not timely; however, there is no merit to this contention (see CPLR 3212 [a]).

Summary judgment motions cannot be granted unless it clearly appears that no material issues of fact exist (see Phillips v Joseph Kantor & Co., 31 NY2d 307 [1972]). The movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals, Inc.

v Associated Fur Mfrs. Inc., 46 NY2d 1065 [1979]). When the movant has made out a prima facie case, the burden of going forward shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference and issues of credibility may not be determined on the motion but must await the trial (see Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439 [1968]). The papers submitted in the summary judgment application are scrutinized in a light most favorable to the party opposing the motion (see Robinson v Strong Mem. Hosp., 98 AD2d 976 [1983]).

The granting of a summary judgment motion in a contested probate proceeding is proper where the petitioner sufficiently establishes a prima facie case for probate and the objectant fails to raise any genuine issues of fact (see Matter of Castiglione, 40 AD3d 1227 [2007], lv denied, 9 NY3d 806 [2007]; see also Matter of Eastman, __AD3d__, 880 NYS2d 157 [2009]; Maisannes v Ryan, 34 AD3d 212 [2006], lv denied 8 NY3d 804 [2007]; Matter of Branovacki, 278 AD2d 791 [2000], lv denied 96 NY2d 708 [2001]). The proponent has the burden of proving due execution and that the decedent possessed the requisite testamentary capacity (see Matter of Kumstar, 66 NY2d 691 [1985]; Matter of Castiglione, 40 AD3d at 1228; Matter of Friedman, 26 AD3d 723 [2006], lv denied 7 NY3d 711 [2006];

Matter of Williams, 13 AD3d 954 [2004], lv denied 5 NY3d 705 [2005]). "Where, as here, the attorney-draftsman supervised the will's execution, there is a presumption of regularity that the will was properly executed in all respects" (Matter of Weinberg, 1 AD3d 523 [2003], quoting Matter of Finocchio, 270 AD2d 418 [2000]; see also Matter of Cottrell, 95 NY 329, 339 [1884]; Matter of Coniglio, 242 AD2d 901, 902 [1997]). The affidavit accompanying the will signed by three witnesses also creates a presumption of regularity as to due execution (see Matter of Paigo, 53 AD3d 836 [2008]; Matter of Korn, 25 AD3d 379 [2006] Matter of James 17 AD3d 366 [2005]). The failure to offer the instrument for probate in a more timely fashion is not, by itself, fatal to the admission of the will to probate (see Matter of Adamo, 16 Misc 3d 800 [2007]).

Here, the proponent established her prima facie entitlement to judgment as a matter of law based on the instrument, the attestation clause, the affirmations of the attorney who drafted the instrument and supervised its execution and the self-proving affidavit of the three witnesses, thereby demonstrating due execution and testamentary capacity (see Matter of Paigo, 53 AD3d at 836; Maisannes v Ryan, 34 AD3d at 212; Matter of Korn, 25 AD3d 379 [2006]). In response, the objectant submitted his affidavit containing self-serving, conclusory and speculative assertions, thereby failing to rebut the presumption of testamentary capacity and due execution (see Matter of Korn, 25 AD3d at 379). As a result, the proponent is entitled to summary judgment dismissing the objections alleging lack of testamentary

capacity and that the instrument was not executed with the statutory formalities required by EPTL 3-2.1.

The objectant has the burden of proof with respect to his contentions of undue influence and fraud (see Matter of Walther, 6 NY2d 49, 54 [1959]; Matter of Schillinger, 258 NY 186, 191-192 [1932]; Matter of Colverd, 52 AD3d 971, 973 [2008]; Matter of Seelig, 13 AD3d 776, 777 [2004], lv denied 4 NY3d 707 [2005]). "In order to avoid a will [based on the ground of undue influence], it 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" (Children's Aid Socy. v Loveridge, 70 NY 387, 394 [1877]; see also Matter of Eastman, 880 NYS2d at 157; Matter of Colverd, 52 AD3d at 973; Maisannes v Ryan, 34 AD3d at 213). "To establish fraud, it must be shown that the 'proponent knowingly made a false statement that caused the decedent to execute a will that disposed of his property in a manner different from the disposition he would have made in the absence of that statement" (Matter of Eastman, 880 NYS2d at 159 quoting Matter of Evanchuk, 145 AD2d 559, 560 [1988]; see also Matter of Colverd, 52 AD3d at 973-974, quoting Matter of Clapper, 279 AD2d 730, 732 [2001]; Maisannes v Ryan, 34 AD3d at 212). Absent specificity as to times, dates and places, "conclusory allegations and speculation" are insufficient to raise an issue of fact as to acts of undue

influence or fraud (Matter of Colverd, 52 AD3d at 973, quoting Matter of Young, 289 AD2d 725, 726-727 [2001]).

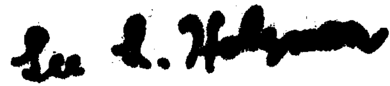
Here, the objectant failed to allege sufficient facts which, even if credited, might prove that any undue influence was exerted (see Matter of Colverd, 52 AD3d at 973), and failed to allege any false statements made by the spouse that would have caused the decedent to execute a will that disposed of his property in a manner different from the disposition he would have made in the absence of that statement (see id.). The fact that the probate proceeding was commenced one year after the decedent's death is not, by itself, evidence of fraudulent intent (see Matter of Adamo, 16 Misc 3d at 800; Matter of Cohen, 5 Misc 3d 869, 877 [2004]). While the spouse may have had the opportunity to exert undue influence on the decedent, there is no evidence of the spouse's involvement in the drafting of the testamentary instrument, and the mere opportunity for undue influence does not mean that it was exercised (see Matter of Walther, 6 NY2d at 49; Matter of Colby, 240 AD2d 338, 339 [1997], lv denied 91 NY2d 801 [1997]; Matter of Bobst, 234 AD2d 7, 8 [1996], appeal dismissed 90 NY2d 844 [1997]). As a result, the objectant failed to meet his burden of proof with respect to the issues of undue influence and fraud, and the proponent is entitled to summary judgment dismissing those objections.

For the foregoing reasons, the court is satisfied that the will dated June 16, 2007 was duly executed and, at the time of execution, the testator was in all respects competent to make a will and not under restraint

(SCPA 1408 [2]). Accordingly, a decree may be settled granting the proponent's motion for summary judgment, dismissing the objections, admitting the propounded instrument to probate, directing the issuance of letters testamentary to the proponent and denying the objectant's motion for summary judgment.

The Chief Clerk shall mail a copy of this decision to the pro se objectant.

Settle decree.



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