

Matter of Kanarek

2009 NY Slip Op 33496(U)

May 7, 2009

Surrogate's Court, New York County

Docket Number: File No. 1703/2007

Judge: Kristin Booth Glen

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SURROGATE'S COURT : NEW YORK COUNTY

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Probate Proceeding, Will of

DOROTHY S. KANAREK,

File No.1703/2007

Deceased.
-----X

G L E N, S.

In this contested proceeding for the probate of the will of Dorothy S. Kanarek, the decedent's daughter, Kathryn K. James, the proponent and sole beneficiary under a will dated January 27, 1997, moves for summary judgment seeking dismissal of the objections filed by decedent's son, David A. Kanarek. Objectant claims the propounded instrument was not duly executed, that the decedent lacked testamentary capacity, and that the will was the product of undue influence and fraud on the part of the proponent.

In a summary judgment motion, the proponent must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant has made out a prima facie case, the burden shifts to the opposing party to provide evidentiary proof of the existence of questions of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). While summary judgment is rarely granted in a probate proceeding, it is appropriate where the proponent has established a prima facie case and the opponent fails to raise any triable issue of fact (*Matter of Cioffi*, 117 AD2d 860 [3rd Dept 1986]).

We turn first to the issue of due execution. Proponent has the burden of proving that the propounded instrument was executed in compliance with EPTL 3-2.1 (*Matter of Watson*, 37 AD2d 897 [3rd Dept 1971]). Since the execution here was supervised by an attorney, there is a presumption of regularity (*Matter of Kindberg*, 207 NY 220 [1921]; *Matter of Spinello*, 291 AD2d 406 [2nd Dept 2002]). Objectant argues, however, that the proponent has not established a prima facie case of due execution because she has produced only one witness for his requested SCPA 1404 examinations, depriving objectant of the opportunity to depose the second witness.

SCPA 1405(1) provides that the court may dispense with the testimony of an attesting witness who "cannot with due diligence be found within the state." This section further provides that once testimony of the missing attesting witness had been dispensed with, the will may be admitted based on the testimony of the other attesting witness. On the evidence here, the court finds the proponent was sufficiently diligent in attempting to locate the missing attesting witness, some ten years after the fact, and therefore dispenses with the testimony of the second witness.

The testimony of Miriam Karp, the attorney drafter who also oversaw the will execution, as well as that of Adele Cohen, the other attesting witness, is evidence that the execution ceremony complied with all the requirements of EPTL 3-2.1. Moreover, the instrument contains an attestation clause, and is supported by a contemporaneous self-proving affidavit. In these circumstances, the Court finds the proponent has met her burden (*see Matter of Conti*, 5 Misc3d 1026A [Sur Ct Bronx County 2004]). Objectant having failed to rebut proponent's evidence, summary judgment is granted dismissing the objection as to due execution.

Objectant next claims the decedent lacked testamentary capacity. Proponent bears the

burden of establishing whether the testator (1) understood the nature and consequences of executing a will, (2) knew the nature and extent of the property she was disposing of, and (3) knew those who would be considered the natural objects of her bounty and her relations with them (*Matter of Kumstar*, 66 NY2d 691, 692 [1985]). The court finds that the proponent has met such burden.

It is conceded that the decedent approached DC37 Municipal Employees Legal Services (MELS) for the purpose of preparing her will. It is also conceded that decedent completed a form questionnaire provided by MELS. In this document, she correctly identified her children and grandchildren, while also providing information regarding her assets, as well as a proposed testamentary distribution of her estate. Additionally, the attorney drafter testified that she conversed with the decedent, both prior to drafting the instrument and later at the execution ceremony, and had no reason to believe the decedent was of unsound mind. The proponent has also submitted an affidavit from the decedent's accountant who avers that the decedent independently took care of her finances up until the year 2000, three years after she executed her will. There is nothing in the record to suggest incapacity.

Objectant has failed to raise a triable issue of fact. His only evidence consists of decedent's hospital records, covering the period two months *after* the will was executed. Some of these records contain doctors' comments that the decedent exhibited signs of mild dementia. These records, for the most part, portray an elderly woman suffering from physical infirmities who was uncooperative regarding her care; the evidence does not rise to the level of proving lack of testamentary capacity which must, of course, be ascertained as of the date of execution.

Objectant also argues that decedent's financial information in the MELS questionnaire is

incomplete, which, he claims, shows the decedent was unaware of the extent of her property and thus failed to understand the consequences of executing her will. This is pure conjecture.

Objectant bases his argument on the drafter's notes indicating the decedent said she had \$30,000 in a bank account, while in fact her estate is worth 1.5 million. There is no evidence, however, that the decedent claimed her entire estate was worth \$30,000. Further, she may have been unwilling to divulge her entire net worth while in the process of preparing her will. In any event, case law rejects an independent requirement of precise knowledge of the value of one's estate (*Matter of Khazeneh*, NYLJ Dec 4, 2006, at 33, col 2 [Sur Ct, New York County]).

Objectant's reliance on *Matter of Slade*, (106 AD2d 914 [4th Dept 1984]), is misplaced. In that case, the testator was found lacking testamentary capacity based upon compelling evidence of impairment that preceded the will execution (stockbroker's testimony that the testator had been unable to transact any business for several years; the appointment of a conservator; house strewn with \$30,000 cash; testator not having paid her utility bills or taxes for years; medical diagnosis of degenerative dementia; and the testator's delusion that she had only \$30,000, when her estate was valued at \$650,000). Here, no evidence has been presented to establish that the decedent suffered from any functional incapacity at any time prior to executing her will. Objectant has not rebutted petitioner's evidence of decedent's testamentary capacity, and the court therefore grants summary judgment dismissing this objection.

The objectant next alleges the propounded instrument is the result of fraud perpetrated by the proponent. It is the objectant's burden to prove that the proponent made a false statement or promise to the testator which caused the testator to execute a will disposing of her property differently than she would have in the absence of such misrepresentation (*Matter of Young*, 289

AD2d 725 [3rd Dept 2001]). The objectant has provided no evidence of a false statement or promise. He speculates that the proponent misrepresented to the decedent the true value of her estate. However, unsubstantiated allegations and speculation are insufficient to raise an issue of fact (*Matter of Coniglio*, 242 AD2d 901 [4th Dept 1997]). Moreover, objectant presents no proof that the decedent ever considered making a will with provisions other than those contained in the propounded instrument. In fact, the proponent has provided a copy of a prior will executed by the decedent which is virtually identical to the propounded instrument, except for decedent's choice of executor and a cash bequest of \$10,000 to the objectant in the earlier will. Moreover, in both wills, the decedent explains her failure to provide, or to provide more, for the objectant. Accordingly, objectant's claim of fraud is dismissed.

Finally, we turn to the claim of undue influence, for which the objectant has the burden of proof (*Matter of Kindberg, supra*). The objectant must show proponent's influence rose to the level of "moral coercion" which restrained decedent's independent action and destroyed her free will. Objectant must also show proponent had the motive, opportunity, and actually exercised such undue influence (*Matter of Walther*, 6 NY2d 49 [1959]). While direct evidence of undue influence is seldom available, it may be shown by "affirmative evidence of facts and circumstances from which the exercise of such undue influence can fairly and necessarily be inferred" (*Matter of Malone*, 46 AD3d 975, 977 [3rd Dept 2007], quoting *Matter of Bundy*, 217 App Div 607 [1926]). The objectant has not provided any evidence, either direct or circumstantial, that would remotely suggest the proponent restrained the decedent's free will. Objectant's bald assertion, that proponent had motive and opportunity to influence decedent, in of itself does not raise any questions of fact.

Objectant further alleges the proponent was acting as the decedent's attorney-in-fact¹ creating an inference that she exercised undue influence over the decedent. However, the Court of Appeals in *Matter of Henderson* (80 NY2d 388 [1992]) expressly rejected application of such a per se rule. For the inference of undue influence to arise, there must be evidence that the confidential relationship was used to influence the testator or the will drafting process (*Matter of Bartel*, 161 Misc2d 455 [Sur Ct New York County 1994], *affd sub nom, Cordovi v Karnbad*, 214 AD2d 476 [1st Dept 1995]). There is no evidence in the present record that proponent had any direct or indirect involvement either in the preparation or execution of the decedent's will. The attorney drafter testified she was not acquainted with the proponent, and it is uncontroverted that the proponent was not present in the room when the will was executed. In the absence of any evidence that the proponent used her alleged fiduciary relationship to influence the testator's wishes or the will drafting process, no inference of undue influence attaches. Objectant having failed to sustain his burden of proof, the motion for summary judgment to dismiss the objection of undue influence is granted.

Accordingly, the objections to the probate of the instrument dated January 27, 1997 are dismissed.

The court in its discretion denies proponent's request for legal fees and costs in this proceeding.

¹ Objectant has provided no direct evidence of the existence of any power of attorney given by the decedent.

Submit probate decree.



SURROGATE

Dated: May 7, 2009