

Ranaldo v Zucker

2010 NY Slip Op 33071(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 348679

Judge: John B. Riordan

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

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Diane Ranaldo, as Distributee of the Estate of

VERA RANALDO,

File No. 348679

Deceased,

Dec. No. 26490

Petitioner,

-against-

Virginia Zucker, a/k/a Virginia Ranaldo Zucker,
Individually and as Trustee of the Ranaldo Family
Revocable Trust,

Respondent.

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In the Matter of the Probate in the Estate of

File No. 343358/B

VERA RANALDO,

Dec. No. 26489

Deceased,

-----X

In a contested probate proceeding tried simultaneously with a proceeding to invalidate an amendment to a lifetime trust, the jury returned a verdict finding that the instrument propounded as the decedent’s last will and testament and the First Amendment to the Ranaldo Family Revocable Trust, both dated July 13, 2005, were the product of fraud having been exercised upon the decedent by her daughter, Virginia Zucker. Virginia now moves the court pursuant to CPLR 4404 for an order to set aside the verdict as against the weight of the evidence. She also renews her motions made during trial to dismiss the objection of fraud for failure to prove a prima facie case, and for a directed verdict because Diane failed to establish all the elements of fraud by clear and convincing evidence. For the reasons that follow, all three motions are denied.

Decedent had two daughters, Diane and Virginia. She was the owner of two parcels of real property which she transferred to the original Ranaldo Family Revocable Trust, dated July 17, 2003. The trust provided that upon decedent's death, one of the parcels was to be held for the decedent's grandson (Virginia's son), Jeremy Jorgenson (herein referred to as "Jeremy"), the second property to be divided equally between Virginia and Diane, the residuary estate to be given to Virginia and Diane in equal shares. The decedent's prior will, executed on the same date as the original trust agreement, contained identical dispositive terms. The will appointed Virginia and Diane to act as co-executors.

On July 15, 2004, an incident occurred which the jury determined was the catalyst for a change in the decedent's testamentary plan. Jeremy was helping decedent set up her new computer at the decedent's home when Diane arrived. Afterwards, Virginia contacted the decedent and alleged to her that subsequent to Diane's visit at the decedent's house, Diane had gone to Virginia's home and had told Virginia that Jeremy was influencing decedent to leave him something in the decedent's will, and that Diane "would see him dead" before that happened. Diane denied that she had ever threatened Jeremy. On July 13, 2005, approximately a year later, the decedent executed a new last will and testament as well as the First Amendment to the Ranaldo Family Revocable Trust which removed Diane entirely as a beneficiary of the decedent's estate. Diane claims that the change in the estate plan was the result of Virginia's fraudulent statement to the decedent that Diane had threatened Jeremy.

Following the decedent's death on August 5, 2006, Virginia offered the July 13, 2005 will for probate. Diane filed objections to probate and commenced a separate proceeding to invalidate the First Amendment to the Ranaldo Family Trust, claiming that the change to decedent's estate plan was a direct result of Virginia's fraudulent statement.

For the purpose of this instant motion, Virginia is willing to assume and not challenge whether a fraudulent statement was made to the decedent, or whether the decedent believed it. The material issue, Virginia contends, is whether that statement was the inducing cause of the changes to the decedent's testamentary plan.

Among the witnesses to testify was decedent's attorney, Steven A. Kass. At his deposition and then during his direct examination at trial, Mr. Kass testified that decedent expressed her intent to change her will at a meeting with him on July 29, 2004 (approximately two weeks after the alleged threat occurred). However, on cross examination, Mr. Kass inconsistently testified that decedent did not express changes to her will at the July 29, 2004, meeting but rather during a March 10, 2005 meeting (Tr.¹ 188-189), approximately 9 months after the incident with Jeremy. On cross, Mr. Kass explained that his initial testimony at his deposition and on direct examination was based on a two-page document that was mistakenly marked as Exhibit 18 (pertaining to the July 29, 2004 meeting) but in actuality should have been marked as part of Exhibit 25 (pertaining to the March 10, 2005 meeting) (Tr. 190). Thus, it appeared that decedent first relayed her intention to disinherit Diane at the March 10, 2005 meeting, rather than at the July 29, 2004 meeting. Virginia essentially argues that the change in the testamentary plan is too remote in time from the alleged fraudulent statement for it to have been the inducing factor in Diane's disinheritance.

It was clear that decedent's love and affection for her grandson Jeremy was undisputed. From decedent's very first meeting with Mr. Kass in December, 2002 until the very last one in 2005, decedent never wavered in her desire to provide for Jeremy because she felt that she, along with her deceased husband, had raised him like a son and that Jeremy had a hard life (Tr. 161-164). Diane argues that the false threat to Jeremy's life that Virginia alleged Diane had made upset decedent to the point of wanting to remove Diane from her will as a result thereof.

¹Tr. references trial transcript dated March 23, 2010.

The part of Mr. Kass's testimony which relates to when decedent expressed her intent to change her testamentary plan, has become the crux of the matter for the jury to determine: whether the fraudulent statement induced decedent to make changes to her will.

The court notes that Virginia testified that although she was fearful of Diane's alleged threat against her son, she never reported it to anyone. Her trial testimony was as follows:

Q. After your sister made this alleged threat toward your son, did you call the police to tell them of it?

A. No, I did not.

Q. You knew your sister worked for the federal government. Did you call her job to alert them to that?

A. No, I did not.

Q. Did you think it was a figure of speech, that she was saying that?

A. No, I did not.

Q. So you told your mother and you believed the threat was real?

A. Yes, I did.

Q. So you were concerned for your son?

A. Yes, I was.

Q. You were concerned that his life was in danger?

A. Yes, I was.

Q. But you didn't do anything about it, did you?²

On the issue of witness credibility, of Kass as well as Virginia, the court gives appropriate deference to the jury's opportunity to assess the witness' credibility (*People v Marshall*, 65 AD3d 710

²Tr. 305-305.

[3d Dept 2009]). Also, the jury was charged as follows regarding witness credibility:

If you find that any witness has wilfully testified falsely as to any material fact, that is, as to an important matter, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unbelievable. You may accept as much of his or her testimony as you deem true and disregard what you feel is false. By the processes that I have just described to you, you, as the sole judges of the facts, decide which of the witnesses you will believe, what portion of their testimony you accept and what weight you will give to it. (PJI Civil 7:27).

There is no doubt that Virginia's statement to decedent that Diane had threatened Jeremy was the catalyst that moved the decedent to call Kass nearly immediately after the incident to discuss it with him. From the testimony adduced, the jury evidently believed that Diane had never, in fact, threatened Jeremy, but that Virginia's claim to the decedent that she had induced the decedent to change her testamentary plan disinheriting Diane, regardless of whether the change in plan was relayed to Kass immediately after the incident, or nine months thereafter. The court cannot say that the jury's conclusion was unreasonable or clearly against the weight of the credible evidence.

Also, if the jury believed Diane's testimony and not Virginia's, as it evidently did, Diane made out not only a prima facie case of fraud, but established it by clear and convincing evidence. Quite simply, the jury believed that Diane never made a threat against Jeremy, but that Virginia falsely claimed to the decedent that she had and that Virginia's false statement induced the decedent to disinherit Diane, something she would not have done had the fraudulent statement not been made, which is sufficient for a finding of fraud in the inducement (*Matter of Evanchuck*, 145 AD2d 559 [2d Dept 1988]).

Accordingly, Virginia's motion to set aside the jury verdict as against the weight of the evidence, as well as her two motions made in limine, are denied and the jury's verdict is affirmed.

This decision constitutes the order of the court and no additional order need be submitted.

Settle separate decrees.

Date: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court