

**Matter of Castillo**

2010 NY Slip Op 34130(U)

January 5, 2010

Surrogate's Court, Bronx County

Docket Number: File No. XXXXX

Judge: Lee L. Holzman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

January 5, 2010

ESTATE OF LUCIA CASTILLO, Deceased

In this probate proceeding the objectant, one of the decedent's two daughters, moves, inter alia, pursuant to CPLR 3212, for summary judgment dismissing the probate petition. The proponent is the decedent's surviving spouse and the sole beneficiary under the propounded instrument. The decedent's only distributees are her two daughters and the proponent.

In addition to denying probate to the propounded instrument, the objectant initially sought the following relief: (1) that she, and not the proponent, be appointed the fiduciary of this estate; (2) that the proponent be compelled to furnish various items sought in discovery demands and be precluded from presenting proof with respect to certain issues should he fail to comply with the requests; (3) that the attorney who represented the proponent when he filed the probate petition be disqualified on the basis of a conflict of interest; and, (4) that the objectant be awarded counsel fees and costs. The branch of the motion requesting the disqualification of the proponent's prior attorney is now moot as that attorney was permitted to withdraw, and the proponent's present counsel was granted a period of time to file papers in opposition to this motion. The proponent opposes all of the

relief requested.

The decedent married the proponent, her fifth husband, in the Dominican Republic on June 5, 1992. Each of her daughters has a different father, one of the decedent's previous husbands. The propounded instrument was executed on April 26, 2006 while the decedent was hospitalized, and she died on June 2, 2006, at the age of 53.

Although the record before the court does not definitively establish whether an attorney drafted the propounded instrument, a self-proving affidavit was executed by the two attesting witnesses on the same date that the will was executed. Notwithstanding that the will makes several references to an executor and the powers of the executor, no one is named in the instrument as the executor. It appears that the only assets that are of more than de minimis value that would pass under the will are real property located in the Dominican Republic and the personal injury portion of any future recovery that might be obtained from a medical malpractice action that was commenced during the decedent's lifetime.

The objections allege, inter alia: (1) forgery of the decedent's name; (2) lack of due execution and irregularities in the execution of the instrument; (3) the self-proving affidavit was not made contemporaneously with the execution of the will; (4) lack of testamentary capacity; (5) the instrument fails to reflect the decedent's testamentary intent; (6) fraud, duress and undue influence practiced by the spouse upon the decedent; (7) unconscionability of the instrument; and, (8) disqualification of the proponent

as a fiduciary based on acts of dishonesty and self-dealing.

In support of her motion for summary judgment dismissing the probate petition, the objectant annexes copies of a portion of the decedent's medical records from Columbia University Medical Center, copies of a pharmacy bill, and information that the hospital allegedly gave to the spouse about the side effects of certain medications. The objectant alleges in an affidavit that: (1) the decedent was hospitalized from April 22, 2006 to April 27, 2006 for complications stemming from end stage gastric cancer, during which time she received many medications, including narcotics; (2) as a result, the decedent lacked testamentary capacity and knowledge of her estate and the natural objects of her bounty at the time of the will execution; (3) she, and not the proponent, was granted the authority to handle the decedent's affairs pursuant to powers of attorney executed by the decedent; (4) prior to marrying the proponent, the decedent purchased realty in the Dominican Republic solely with her own funds, and it is inconceivable that the decedent would have disinherited her daughters; and, (5) the decedent had a failed relationship with the proponent, her fifth husband, and they constantly argued because he failed to contribute to the household, "cheated" on the decedent, and was charged with tax evasion in connection with his filing of fraudulent income tax returns reflecting unwarranted deductions and a false number of dependent children.

In opposition to the motion, the spouse alleges that: (1) the movant was not present at the will execution and her allegations are

speculative; (2) the movant failed to produce any expert affidavit to support her contention that the decedent's medical condition or medications caused a lack of testamentary capacity; (3) while hospitalized, the decedent purportedly executed multiple powers of attorney in favor of the movant who then misused them to evict her grandmother from the Dominican Republic realty; (4) although the decedent attempted to purchase the realty in the Dominican Republic prior to their marriage, the purported grantor did not own the property and, consequently, the proponent made some of the payments for the property; (5) the decedent amply provided for her children by making them beneficiaries of her life insurance policy and pension benefits; (6) his income tax difficulties stemmed from his misplaced reliance on the advice of the decedent's sister, an income tax preparer; (7) the daughter's "hands are unclean," as she entered into a fraudulent marriage for immigration purposes and was compensated therefor; and, (8) he had a good relationship with the decedent and he contributed to the household from his earnings as a cab driver.

In further opposition to the motion, the spouse also submits two other affidavits. One affiant refers to himself as the decedent's son; however, he appears to be the proponent's son and the decedent's stepson. In any event, this affiant states that he was present when the will was executed, and at the time of the execution of the will, the decedent was able to sit up in bed and was conversant. The other affiant is one of the attesting witnesses, who describes himself as a lay pastor at the church the decedent attended. This

affiant also states that the decedent was fully conversant when she executed the will, that the objectant did not visit the decedent at the hospital and, prior to the execution of the will, the decedent requested that he assist her in ensuring that the spouse received the home in the Dominican Republic.

Summary judgment cannot be granted unless it clearly appears that no material issues of fact exist (see *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]; *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). The movant must make a prima facie showing of entitlement to judgment as 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 *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [2002]).

Although testimony that is inadmissible at trial under CPLR 4519 may be used to defeat a motion for summary judgment, such testimony may not be the basis for granting summary judgment (see *Phillips v Joseph Kantor & Co.*, 31 NY2d at 307). Consequently, the objectant's affidavit cannot be the

basis for granting her summary judgment motion. The only other submissions tendered by the objectant in support of her motion are the hospital records, a list of the possible side effects of the drugs that the decedent was taking when the will was executed, and the fact that the propounded instrument makes no provision for the two daughters and was executed only five weeks prior to the decedent's demise, at a time when she was suffering from a terminal illness. Notwithstanding that the admissible proof submitted in support of the motion together with additional proof might sustain either or both of the objections alleging lack of testamentary capacity and undue influence, such proof, by itself without any additional admissible medical or lay testimony as to the decedent's mental abilities when the will was executed, is insufficient to sustain any of the objections as a matter of law.

Although the proponent has the burden of proof on the issue of testamentary capacity, the objectant's submissions that may be considered in support of her motion do not establish as a matter of law that the decedent lacked testamentary capacity, i.e., that she did not have the capacity to understand the nature and extent of her property, the natural objects of her bounty, and the provisions of the instrument (see *Matter of Kumstar*, 66 NY2d 691 [1985]). Furthermore, the objectant's submissions that may be considered in support of her motion are insufficient to meet her burden of establishing undue influence, i.e., that the influence exerted by the proponent upon the decedent was tantamount to a moral coercion which restrained the decedent's independent action and destroyed her free agency (see *Matter of*

Walther, 6 NY2d 49 [1959]). No evidence in admissible form was submitted to support the objections alleging forgery, lack of due execution or fraud.

Assuming, arguendo, that the moving papers make out a prima facie case to deny probate to the propounded instrument, which they do not, the self-proving affidavit together with the other affidavits submitted in opposition to the motion by the proponent raise issues of fact and questions of credibility with respect to all of the objections to probate. These issues may only be resolved after a trial. The parties' respective divergent versions of the decedent's relationship with the proponent as well as the proponent's involvement with the purchase of the decedent's real property are examples of matters that may not be resolved in a summary judgment motion. Another example is the parties' positions with respect to the propounded instrument and one or more powers of attorney executed shortly prior to the decedent's death, at a time when she suffered from an end-stage terminal illness for which she was receiving medication. Not surprisingly, the proponent contends that the will is valid and the powers of attorney are not, while the objectant contends that the powers of attorney executed by the decedent naming her as the attorney-in-fact are valid and the will is not. Accordingly, the objectant's motion for summary judgment dismissing the probate petition is denied.

With respect to that branch of the motion seeking relief with regard to the objectant's discovery demands, the court concurs with the proponent that the objectant's demands for his income tax returns are

onerous, irrelevant and improper as they do not relate to the issues in the probate proceeding. Furthermore, a court cannot direct compliance with a discovery demand without some indication of "reasonable particularity," meaning a description of that which is sought to be produced sufficient "to enable the adverse party to identify it readily" (see *Mendelowitz v Xerox Corp.*, 169 AD2d 300, 304 [1991]). Accordingly, that branch of the motion is denied with leave to the movant either to serve amended discovery demands or move for compliance with the served demands identifying the specific deficiencies in the responses thereto.

In addition to the technical defect of seeking relief by motion instead of by a petition and service of process, the objectant's request for letters of temporary administration so that she may pursue the medical malpractice action must also be denied. Even if the objectant ultimately prevails in the will contest, in the absence of a statutory disqualification, the spouse is entitled to priority in the granting of letters of administration (SCPA 1001 [1] [a]). Although the objectant alleges that the spouse was dishonest when he filed a tax return in which he claimed more deductions and more dependents than allowed, she has not submitted any documentation to establish that he was either charged or convicted of any crime for such acts. For the spouse to be disqualified pursuant to SCPA 707 (1) (e) on the ground of dishonesty, the objectant must establish a dishonesty in money matters which makes it reasonable to be concerned that estate assets would not be safe in the fiduciary's hands (see *Matter of Flood*, 236 NY 408 [1923]; *Matter*

of Horton, 255 AD2d 642 [1998]). The objectant's mere allegation with regard to the proponent's tax returns do not rise to such a level. Accordingly, this branch of the motion is denied.

The court cannot conclude that the position of either party is frivolous. Accordingly, there is no basis to deviate from the American rule that each party pays its own attorney's fees absent a statutory provision or agreement to the contrary (see *A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1 [1986]), and the request of each party for attorney's fees and sanctions is denied.

Accordingly, this decision constitutes the order of the court denying the objectant's motion in its entirety. As there is no party over whom jurisdiction must be obtained pursuant to SCPA 1411, the respective parties are to appear for a conference before the court on February 8, 2010 at 9:30 a.m. to discuss, inter alia, any outstanding discovery demands and a time by which all discovery shall be completed. The Chief Clerk shall mail a copy of this decision and order to counsel for the proponent and the objectant.

*Lee L. Holzman*

---

SURROGATE