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

----------x

In the Matter of the Last Will and Testament of

File No. 339318

ZELDA ASTOR, a/k/a
ZELDA A. ASTOR,

Dec. No. 26940

Deceased.

----------x

In this contested probate proceeding, the objectant Regina Astor Zyats moves for an order granting summary judgment pursuant to CPLR 3212 and denying admission of the purported will dated June 17, 2005 to probate on the ground of lack of due execution and revoking preliminary letters testamentary issued to Paula Sue Astor-Ferraro. The petitioner Paula Sue Astor-Ferraro opposes the motion. For the reasons that follow, the motion is denied.

BACKGROUND

The decedent, Zelda Astor a/k/a Zelda A. Astor, died on July 6, 2005, leaving a purported will dated June 17, 2005. The decedent was survived by her four children, Jeffrey Howard Astor, Stephen Brent Astor, Regina Astor Zyats and Paula Sue Astor-Ferraro. In her purported will, the decedent makes cash bequests of (i) $5,000.00 to Regina; (ii) $10,000.00 to Jeffrey; (iii) $25,000.00 to Stephen; (iv) $25,000.00 to her grandson, Baron Zyats; (v) $5,000.00 to her granddaughter, Rachel Zyats; and (vi) $5,000.00 to her former daughter-in-law, Pamela Astor. In Article EIGHTH of the purported will, the decedent bequeaths her entire residuary estate to Paula. The purported will nominates Paula as executor.

Regina filed verified objections to the purported will on May 11, 2006. The verified objections include three objections and a demand for a trial by jury. Regina objects to the purported will on the basis of (i) undue influence; (ii) lack of due execution; and (iii) unfitness of the fiduciary to serve by reason of dishonesty, improvidence, want of understanding or otherwise.

Paula applied for preliminary letters testamentary by application dated March 14, 2007. Regina objected to the issuance of preliminary letters to Paula. By decision dated May 22, 2007 (Dec. No. 334), this court granted Paula's application finding that Regina failed to demonstrate good cause or serious wrongdoing that would permit the court to nullify the decedent's choice of fiduciary. Accordingly, preliminary letters testamentary issued to Paula on May 24, 2007.

The three attesting witnesses to the purported will are Theodora Balaban, Irwin Balaban and Loriann Russell-Cody. Their SCPA 1404 examinations were conducted on January 18, 2006. The examination of the attorney-draftsman, Joseph M. Slater, Esq., was also conducted. In addition, the examinations of both Paula and Regina have been taken.

THE MOTION

Regina now moves for an order granting summary judgment denying admission of the purported will to probate on the ground of lack of due execution and revoking preliminary letters testamentary. Although Regina has objected to admission of the purported will to probate on the ground of undue influence, she has not moved for summary judgment on that basis. In support of the motion, Regina submits the transcripts from the 1404 examinations of the three attesting witnesses, Theodora Balaban, Irwin Balaban and Loriann Russell-Cody, and the affirmation of her attorney. Regina argues that the purported will was not executed in accordance with the requisite formalities of due execution as provided in EPTL 3-2.1. Specifically, Regina claims that (i) the will ceremony was not supervised by an attorney; (ii) Paula's husband, Dean, "was responsible for the documents;" (iii) the decedent did not declare the document to be her will; (iv) the decedent did not examine the document purported to be her will; (v) the witnesses signed the document prior to the decedent affixing her signature; and (vi) the document was not bound

as a whole.

Paula's counsel has submitted an affirmation in opposition to the motion. According to counsel, Regina has presented an inaccurate picture of the will execution ceremony by including only selective portions of the witnesses' testimony. Moreover, Paula's counsel argues that EPTL 3-2.1 does not require either that an attorney supervise the execution ceremony or that the purported will be stapled together. According to Paula's counsel, there are issues of fact which require a hearing, and thus, Regina has failed as a matter of law to show lack of due execution.

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]). Nevertheless, the party moving for summary judgment bears the burden of establishing their entitlement thereto as a matter of law (CPLR 3212). Thus, the party moving for summary judgment on the basis of lack of due execution must establish that the propounded instrument was not executed in accordance with the statutory formalities.

The principal statutory requirements of due execution as set forth in EPTL 3-2.1 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]). Substantial compliance with the requirements of EPTL 3-2.1 (a) (3) and (4) is sufficient to establish that a will was duly executed (*Lane v Lane*, 95 NY 494 [1884]; *Matter of Frank*, 249 AD2d 893 [4th Dept 1998]).

EPTL 3-2.1 provides that during the execution ceremony the testator declare to the witnesses that the instrument to which he has affixed his signature is his will (EPTL 3-2.1[a][3]). The publication requirement dictates that the testator make his intention known to the witnesses that the document is intended to serve as his will (*Matter of Falk*, 47 AD3d 21, 26 [1st Dept 2007], *appeal denied*, 10 NY3d 702 [2008]). "Generally, where an attorney announces to the subscribing witnesses, in the presence of the decedent, that decedent is executing a will, such announcement is sufficient to satisfy the requirements of an express declaration. Furthermore, this requirement need not be followed literally as long as sufficient information is conveyed to the subscribing witnesses during the execution ceremony that the testatrix is aware that the instrument she is signing is her will" (*Matter of Ferraro*, 2007 N.Y. Misc Lexis 1169 [Sur Ct, Suffolk County 2007] [internal citations omitted]). Substantial compliance is sufficient and no particular form of words is required to effectuate publication (*Matter of Falk*, 47 AD3d 21, 26 [1st Dept 2007]). "Publication can be through words or actions, but something must occur to show that there had been a meeting of the minds between the testator and the attesting witnesses

that the instrument they were being asked to sign as witnesses was testamentary in character" (*Matter of Pirozzi*, 238 AD2d 833, 834 [3d Dept 1997]*; see also Matter of Roberts*, 215 AD2d 666 [2d Dept 1995]).

EPTL 3-2.1(a)(4) provides that the witnesses attest to the fixing of the testator's signature and sign their names at the end of the will at the request of the testator. "Although a decedent does not expressly request that a particular witness sign the will, such a request may be inferred from a testator's conduct and from circumstances surrounding execution of the will, which may include tacit approval of counsel's request that a person sign the will" (*Matter of Ferraro*, 2007 N. Y. Misc. Lexis 1169 [Sur Ct, Suffolk County 2007]).

Here, Theodora Balaban, one of the three witnesses to the purported will, testified that she knew the decedent since 1957 and they were very good friends. According to Theodora, the decedent contacted her by telephone and asked if she would participate in the will signing at the rehabilitation center where the decedent was staying. When Theodora and her husband, Irwin, arrived at the rehabilitation center on June 17, 2005, the decedent was in her room with her son-in-law, Dean. Then, the other witness, Loriann Russell-Cody, arrived and the notary came about fifteen minutes later. Theodora testified that the notary brought the papers with her. On examination by Regina's counsel, Theodora testified as follows:

> Q. The notary had the papers?
>
> A. Yes. She had the papers and asked me to sign this paper with my address, and I precisely asked her, I said, "What am I signing?" And she said, "You are signing a Will and health paper that she is in sound mind."
>
> Q. Who signed after you?

A. After me, I guess my husband did.

Q. And who signed after your husband?

A. I guess Lori.

Q. And then who signed?

A. That is it.

Q. Did anyone sign before you?

A. You know, I can't remember who signed first, to tell you the truth, Lori or me. I can't remember who signed first.

Q. Do you know if Zelda ever signed the document?

A. Oh, yes.

Q. When did she sign?

A. She signed after we signed.

Theodora was then questioned by Paula's attorney. Theodora testified that the decedent's initials appear on pages 1 through 3 of the purported will and that the decedent's signature appears on page 4. Theodora stated that she saw the decedent sign the purported will. She also recognized her signature and her husband's signature after the attestation clause. Theodora testified that she signed after her husband, thereby contradicting her prior testimony regarding the order of signing. According to Theodora, Loriann signed in her presence. Theodora answered in the affirmative when asked if the decedent signed and the three witnesses signed the purported will in successive order. She also confirmed that they were all present at the same time that the purported will was signed and no one left the room. Theodora also testified that her husband's signature, her signature, Lori's signature, the decedent's initials and the notary's signature appear

on Page 5 and that she saw everyone affix their respective signature. According to Theodora, the purported will was stapled when she signed it.

On re-examination by Regina's attorney, Theodora reiterated that the decedent signed after the witnesses. Accordingly, Theodora's testimony was inconsistent as to the order in which the witnesses signed and as to whether the decedent signed before or after the witnesses.

Irwin Balaban, Theodora's husband and a witness to the purported will, testified that he knew the decedent as a family friend for approximately forty-eight years. Irwin believed that the papers offered as the purported will were clipped together on June 17, 2005 at the rehabilitation center, but not stapled. Irwin further testified as follows:

Q. I would like to bring you now to the signing process itself.

Could you please tell us in your own words exactly step-by-step how the process came about, who signed, when they signed?

A. I do know I asked what we are signing for each time we had to sign. I don't remember the exact order who signed first. I think I signed it first, if I recall.

Q. Then who signed?

A. I think my wife and then Lori.

Q. And who signed after Lori? When did Zelda sign?

A. I don't recall. I guess she must have signed it before we did.

Q. You don't know?

A. I am not sure.

Q. Did you observe anyone else while they were signing the document?

A. I don't understand the question.

Q. Well, did you watch anyone else sign the document? When you signed, did you walk away; did you turn around?

A. I walked away.

Q. Do you know whether anyone was watching when you signed the document?

A. I do not.

Q. Did you observe Lori sign the document?

A. No, I did not.

Q. Did you observe Zelda signing any of the documents?

A. No, I did not.

Q. How long did the process take?

A. Probably about 15 minutes.

Q. And do you recall during the process whether Zelda said anything, this is during the signing?

A. I don't recall.

Q. And do you recall if anyone said anything else during the signing process other than where to sign?

A. Yes. I asked for an explanation of what we are signing.

Q. Who gave you that explanation?

A. The notary.

Q. What did the notary say?

A. She said, "You are signing that Zelda was – had her faculties when we executed this instrument," or whatever it is.

Irwin, when questioned by Paula's attorney, testified that he believed he saw the decedent put her initials on Pages 1 to 3 though he admitted that he "didn't stand over her and watch her do every page." According to Irwin, the decedent signed the document in his presence. He recognized his signature, his wife's signature and Loriann's signature and testified that all signatures were affixed to the purported will in his presence. Irwin also recalled that the notary placed her signature and stamp on the document and that no one left the room throughout the entire process.

Loriann testified that she is a friend of Paula's and that she had known the decedent since Loriann was seventeen years old. The decedent asked her to participate in the will signing process. The decedent called her in June to be a witness to her will and Loriann agreed. The purported will was signed at a rehabilitation center in Glen Cove. Loriann testified that she believed the decedent looked the will over and that the papers "may have been clipped but they were not stapled." The will was not read out loud, but they were given an opportunity to look over the pages that they had to sign. During the process, the decedent did not say anything "specifically" to Loriann. When asked whether she said anything to anybody, Loriann responded that it was possible, but she was not listening. Loriann further testified as follows:

Q. After they organized the papers on this stand what, if anything, happened?

A. Dean had asked for the first witness to come forward and go over, and they signed. We didn't sign – first Mr. Balaban signed, then Mrs. Balaban, and I was the last person.

Q. When did Zelda sign?

A. She also signed. I am not aware of the exact process.

Q. Did you see her sign?

A. I know she had a pen. I saw her initial it. Did I see her sign specifically, no . But I was not looking until my turn came.

Loriann testified that she signed three times and that there were three documents executed. The three documents were the will, a document attesting that the decedent was in her sound mind and the other document gave Paula power of attorney or the right to make medical decisions for the decedent.

The examination of the attorney-draftsman, Joseph M. Slater, Esq., reveals that he knew the decedent for approximately nineteen or twenty years. They met through the decedent's son, Jeffrey. After the decedent's husband Harry died, the decedent scheduled an appointment to meet with Mr. Slater. The initial meeting took place sometime in February 2004. Mr. Slater testified that Paula drove the decedent to his office for that initial meeting, but that he met only with the decedent. When the decedent entered his office, she burst into tears and began "basically a monologue" "venting and complaining about each kid" other than Paula. The decedent told him Paula was her friend and took care of her. After that initial meeting, the decedent told Mr. Slater she would get back to him. She then contacted him by telephone a few times. Their next meeting was in March 2005 and at that point the decedent was using an oxygen tank for her emphysema. The March 2005 meeting lasted a "solid hour and a half." The decedent kept changing her mind about the amounts of the cash bequests she wanted to make in her will. According to Mr. Slater, he warned the decedent "she would be planting or serving the

seeds of a war" by virtue of her proposed testamentary scheme. After that March 2005 meeting, the decedent called Mr. Slater and provided him with different numbers for the cash bequests. Mr. Slater also had the decedent meet with another attorney in his office, Robert Clinard, to discuss issues regarding the proposed gifts to the grandchildren, including utilizing a supplemental needs trust for her grandson, Ian.

Thereafter, the decedent and Mr. Slater had a telephone conversation during which Mr. Slater reiterated his concerns regarding the amounts of the cash bequests. The decedent made it clear to him that it was her money and this is what she wanted to do. After this last telephone call, Mr. Slater drafted a will for the decedent to execute. Mr. Slater did not send a draft of the will to the decedent to review. Prior to the date of execution of the purported will, they had "one, possibly two" telephone calls discussing Mr. Slater coming over to the rehabilitation center for the will to be executed. Mr. Slater, however, would not be available to supervise the execution. As a result, the decedent advised him that her son-in-law Dean would pick up the original for execution. Mr. Slater gave Dean both the original will and a photocopy. Mr. Slater testified that he dictated execution instructions to Dean. Mr. Slater had a further telephone conversation with the decedent the day after he gave the documents to Dean. She inquired how the original should be executed and he told her that witnesses were required. Thereafter, a copy of the executed will was delivered to his office.

Here, the testimony of the attesting witnesses is somewhat unclear on what exactly transpired at the will execution ceremony. It cannot be gleaned from the record that the procedures utilized at the execution ceremony were defective as a matter of law to warrant granting summary judgment on the issue. Under such circumstances, there are issues of fact as to

due execution and whether the requirements of EPTL3-2.1(a) (3) and (4) were satisfied. "While probate should not be allowed unless the court is satisfied as to the genuineness of the will and the validity of its execution (SCPA 1408), likewise, the court has the obligation to honor the wishes of a testator who memorializes in writing, with the assistance of an attorney, a testamentary scheme designed to carry out the testator's intention. To that end, the soundness of the execution ceremony should be afforded a full and complete examination at trial" (*Matter of Ferraro*, 2007 N.Y. Misc. Lexis 1169 [Sur Ct, Suffolk County 2007]). Moreover, the contentions that the purported will was not stapled, that Paula's husband Dean was responsible for the purported will, that the decedent did not examine the purported will at the execution ceremony and that the execution ceremony was not supervised by an attorney are unavailing to warrant summary judgment as to due execution.

Accordingly, the motion for summary judgment is denied. This matter will proceed to trial on January 18, 2011 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: January 10, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court