

**Matter of Cohen**

2011 NY Slip Op 30415(U)

February 23, 2011

Sur Ct, Nassau County

Docket Number: 352208/A

Judge: Edward W. McCarty III

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

-----XC  
In the Matter of the Last Will and Testament of

ROBERT COHEN,

File No. 352208/A

Dec. No. 26974

Deceased.

-----X

In this contested probate proceeding, the petitioner Beatrice Cohen moves for an order (1) dismissing the objections to probate filed by Meryl Kovit; (2) granting summary judgment pursuant to CPLR 3212; and (3) admitting to probate the propounded last will and testament of Robert Cohen. Meryl opposes the motion. The motion is granted in part and denied in part.

BACKGROUND

The decedent Robert Cohen died on December 26, 2007 leaving a purported will dated October 28, 2002. The decedent was survived by his wife, who is the petitioner, and a daughter from his prior marriage, the objectant. By the terms of the instrument, the decedent left his residuary estate to the petitioner, if she survived him “to be hers absolutely to the exclusion of any children of mine” (Article SECOND). If, however, the petitioner had not survived the decedent or it could not be determined which of them survived the other, the decedent bequeathed his residuary estate “unto my beloved children, MERYL KOVIT, JONATHAN HORN, and JACQUELINE HORN, me surviving, equally, share and share alike, per stirpes and not per capita” (Article THIRD). Jonathan and Jacqueline are the petitioner’s children. In the purported will, the decedent defined children to include Beatrice’s children (Article SECOND). In the event that any of Meryl, Jonathan or Jacqueline predeceased the decedent, then his or her share is bequeathed to his or her issue, equally, per stirpes, and if that person died without issue,

to the remaining “children” equally (Article THIRD). The purported will nominates the petitioner as executor and the decedent’s attorney John C. Sullivan as the alternate executor (Article FOURTH).

Meryl filed a verified answer and objections to probate, alleging that the will was not duly executed, that the first two pages of the instrument were not part of the document if and when it was subscribed, and that the will is the result of undue influence and fraud having been practiced on the decedent. There is no allegation that the decedent lacked testamentary capacity.

#### THE FACTS

The decedent and Beatrice were married on November 29, 1982. The purported will was drafted by John Sullivan in 1993. At the time, a mirror will was drafted by Mr. Sullivan for Beatrice. On the propounded instrument, “Nineteen Hundred and Ninety-three” is typewritten twice, once in the sentence above the decedent’s signature and again in the attestation clause above the witnesses’ signatures and addresses. The purported will was executed on October 28, 2002. “Nineteen Hundred and Ninety-three” is crossed off in both places and “Two Thousand and Two” is handwritten in both places, alongside with the initials “RC.” The self-proving affidavit was not executed and, at some point, the staples were removed from the document, if, in fact, it had been stapled.

On October 28, 2002, the decedent and Beatrice went to Washington Mutual Bank in Massapequa, New York, where the execution ceremonies for the decedent’s and Beatrice’s wills allegedly took place. On the same date, each of them executed an IRA Beneficiary Change Form. The decedent made Beatrice the primary beneficiary and made Meryl, Jacqueline and

Jonathan the contingent beneficiaries equally of his IRA. Beatrice made Robert the primary beneficiary and made Meryl, Jacqueline and Jonathan the contingent beneficiaries equally of her IRA.

### THE MOTION

Beatrice now moves for an order granting summary judgment admitting the purported will to probate and striking Meryl's objections. In support of the motion, Beatrice submits the transcripts from the SCPA 1404 examinations of the attesting witnesses and the attorney-draftsman, an affidavit of the attorney-draftsman, Beatrice's attorney's affirmation and various other exhibits. Beatrice argues that, as a matter of law, the purported will should be admitted to probate.

Meryl opposes the motion only to the extent of arguing that the instrument was not duly executed. Specifically, Meryl claims that (1) there was no will execution ceremony; (2) the execution was not supervised by an attorney; (3) the decedent did not declare the document to be his will; (4) the self-proving affidavit was not signed by the witnesses; and (5) the document was not bound as a whole. In opposition to the motion, Meryl has submitted her attorney's affirmation and relies on the SCPA 1404 deposition transcripts and various exhibits. According to Meryl's counsel, Beatrice has presented an inaccurate picture of the will execution ceremony by citing only selective portions of the witnesses' testimony.

In reply, Beatrice has submitted her attorney's affirmation and Beatrice's affidavit of staples in which Beatrice avers that before she made copies of the propounded will after the decedent died, she removed the staples from the instrument to make it easier to make the copies.

Beatrice states that she was unaware that it was improper to unstaple the original, that she did not in any way alter the document and that she reassembled it in the same order as it had been prior to when she removed the staples.

#### 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]).

#### UNDUE INFLUENCE

Although undue influence was pled by Meryl as an objection to probate, she has not opposed Beatrice’s motion to dismiss that objection. Further, the court has searched the record and has not found any evidence of undue influence in the making and execution of the purported will. Accordingly, Beatrice’s motion for summary judgment on the issue of undue influence is granted.

#### FRAUD

Again, Meryl has not opposed the motion to dismiss the fraud objection and the record is devoid of any evidence that fraud was perpetrated upon the decedent in the making or execution of the propounded instrument. Accordingly, Beatrice’s motion for summary judgment is granted regarding fraud.

#### 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]). Also, 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 due execution must establish that the propounded instrument was 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 to 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 must 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]).

John Sullivan, the attorney-draftsman of the will, testified that in 1993, while the decedent was employed as administrative director of the Sunrise Psychiatric Clinic, he asked Mr.

Sullivan, who was a member of the clinic's board of directors, to draft a will for him and a mirror will for Beatrice. Mr. Sullivan agreed and met at his office with the decedent. Mr. Sullivan could not recall whether Beatrice was present at the meeting. Mr. Sullivan kept the notes he took at the meeting and read them at his SCPA 1404 examination. He read, "All to spouse, and in the event of predeceased, equity amongst the three children . . . or to their issue." Although he drafted the wills and sent the drafts with a cover letter to the Cohens on September 29, 1993, they never scheduled an appointment with Mr. Sullivan to execute them. Mr. Sullivan further testified that the first time he saw the executed will was after the decedent died. Mr. Sullivan reviewed a certified copy of the propounded will and testified that it was the will that he drafted for the decedent.

Beatrice and Meryl disagree about whether the execution ceremony of the propounded will was supervised by an attorney, thus entitling it 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]). The decedent was an attorney. Although Meryl asserts that the decedent was not a practicing attorney on October 28, 2002, it appears that he remained a New York State registered attorney to the time of his death.

At her SCPA 1404 examination, attesting witness Barbara Romano testified that she witnessed the decedent sign the propounded instrument when the decedent and Beatrice came to the bank on October 28, 2002. Mr. Cohen asked her to witness the purported will. She recognized her signature on the document but did not recall whether Peter Scelfo, the other

attesting witness, was present at the time. However, later in her examination, she testified as follows:

- Q. Could you describe the execution ceremony? What happened at the time this document was signed?
- A. No.
- Q. So, you have no recollection?
- A. No. Of a specific document, no. I notarize things every day. I witness things for customers. So, one particular item it's really hard to recall.
- Q. So, do you have any independent recollection as to what Mr. Cohen told you at that time on October 28, 2002?
- A. No. I mean, the only that, you know, I say is that he asked me to witness something. I said yes. He is my customer and that's what we do.

Barbara also testified that she did not recall whether the document was stapled or whether one or more copies of the document was signed that day.

Peter Scelfo testified at his SCPA 1404 examination that he met the decedent in the summer of 2002 in the course of Peter's employment at the bank. He stated that he witnessed a document signed by the decedent on more than one occasion. When shown the propounded instrument, Peter did not recall how his signature came to be on it, but recalled that the decedent and Beatrice were "in that day and I was asked to witness the Will." Peter testified that Barbara

Romano was present at the time. He recalled that the signing took “[m]inutes or seconds, you know. A couple of minutes.” He could not recall how many copies of the document were signed or whether it was stapled. Peter also testified, at page 17:

Q. Before the document was signed, do you recall if Mr. Cohen had asked you if he wanted you to witness his Will or just a generic document?

A. I don’t believe so. I believe he asked me anytime (sic) before that day.

Q. But in that day - -

A. Yes.

Q. - - do you recall if he asked you, I need you to witness a document, or did he say, I need you to witness my Will or do you recall if he said something else?

A. I really don’t remember specific words.

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 comported as a matter of law with the requirements of EPTL 3-2.1 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 EPTL 3-2.1 (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 NY Misc Lexis 1169 [Sur Ct, Suffolk County 2007]). Since there are triable issues of fact, Beatrice's motion for summary judgment is denied with respect to due execution.

The matter is scheduled for a conference with a member of the law department on March 3, 2011, at 11:00 a.m. A trial date will be selected at the conference.

This constitutes the decision and order of the court.

Dated: February 23, 2011

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