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

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Probate Proceeding, Will of

File No. 346848

DOROTHY J. ANTONETZ,

Dec. No. 27270

Deceased.

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In this contested probate proceeding, petitioner Dorothy M. Valentini moves for an order granting summary judgment pursuant to CPLR 3212 dismissing the objections filed by objectant John Antonetz. Mr. Antonetz opposes the motion. For the reasons set forth below, the motion is granted.

The decedent, Dorothy J. Antonetz, died on December 31, 2006 at the age of 90. She was survived by two children, Dorothy M. Valentini, the petitioner, and John Antonetz, the objectant.

The petitioner has offered for probate a document dated December 14, 2006 as the decedent's last will and testament. The will provides, in pertinent part, the following: the appointment of Dorothy M. Valentini as executor; personal property to Dorothy Valentini and her husband John Valentini; and the residue to be divided ninety-nine and one-half percent (99 ½%) to Dorothy M. Valentini and one-half percent (½%) to John W. Antonetz. The will also contains an in terrorem clause. Mr. Antonetz filed objections to the propounded instrument and alleged that the will was not the decedent's; that the will was not duly executed; that the decedent was not of sound mind and memory; and that the will was obtained by the fraud and undue influence of Dorothy Valenti (sic) or persons acting in concert with her.

This proceeding has been pending in the court since 2009 with three separate pretrial conference orders entered into by the attorneys for the parties. The orders were extended

because the objectant was in an accident which delayed compliance with discovery requests. The last pretrial order dated October 27, 2010 was marked final and provided that discovery was to be completed by March 4, 2011 and pre-trial motions were to be made returnable by April 6, 2011. On or about January 31, 2011, a motion was made by the petitioner to enforce discovery demands or strike the objections. The decision of the court (Dec. No. 27121 dated March 23, 2011) granted the motion to strike the objections unless the objectant responded to the demands within twenty days after service of a copy of the decision. The attorney for the objectant now argues that because he was served with the motion for summary judgment on April 6, 2011, the matter should be rejected as untimely. The attorney for the objectant further argues that the motion is premature as discovery is incomplete. The court notes that the parties have had three years to complete discovery, which is more than enough time. The arguments are completely without merit.

The witnesses to the propounded instrument, Frederick J. Kramer and Joanne Albert were examined pursuant to SCPA 1404. Mr. Kramer is also the attorney-draftsman of the instrument.

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]).

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]). The principal statutory requirements 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]).

Mr. Kramer testified at his SCPA 1404 examination that the decedent was a long time client of his and that he had prepared approximately four wills for her from the period of 1991 through the last will. The first wills divided the residuary equally between the decedent's two children. Mr. Kramer testified that the testamentary disposition changed in 2005 when the decedent executed the third will and divided the residuary two-thirds to Dorothy and one-third to John. Mr. Kramer also testified that he prepared a deed for the decedent in which she transferred real property to her daughter, but retained a life estate. He further testified that he prepared a power of attorney and family trust for the decedent.

With regard to the execution of the propounded instrument, Mr. Kramer testified that the decedent was in the Glen Cove Center for Nursing and Rehabilitation and that he had received a letter from her at the end of November in which she indicated that she wanted to change her will. At some point between December 5, 2006 and December 14, 2006, Mr. Kramer visited the decedent at the care center. He testified that he discussed the proposed changes to her will with her. The decedent allegedly told Mr. Kramer that she was changing her will because her son did nothing for her and that her daughter basically did everything. Mr. Kramer testified that in his opinion, "[a]bsolutely, without any hesitancy" that the decedent had the mental faculties to

understand what she was doing. He further testified with regard to the execution of the decedent's will on December 14, 2006 that he met with her at the care center in her private room. He said he was impressed with her on that date as he thought she had made "somewhat of a rebound" and that she might possibly be able to return home. Mr. Kramer's recollection was that the decedent was in the care center for rehabilitation to strengthen her legs so that she could return home. Mr. Kramer testified that the will was stapled and that he read the will to her and explained what words meant so she understood the content clearly. Mr. Kramer further testified that although he cannot recall exactly what happened at this will signing, his custom is to ask the person if it is her last will and testament. He further testified "[a]nd then I would say, now, you understand that I am here to witness your Will, and, of course my legal assistant, Joanne Albert, is here to, as well...the law requires the signature of two witnesses on your Will. Would you like us to witness your Will? Yes. So then we proceed...and conclude the ceremony."

Mr. Kramer's employee, Joanne Albert, was also deposed and she testified that she did not remember the specific details of the will signing ceremony, but that Mr. Kramer would have gone over the terms of the will with the client and made sure that it was done in accordance with the testator's desires before he would have asked his employee to act as a witness. She further testified that her recollection would be of Mr. Kramer "explaining to her [the decedent] that in order to have the Will signed you need to state in my presence and in Joanne's presence that this is your Last Will and Testament and we have gone over it, you understand its contents, it meets with your desires and if it does, could you please sign your name in the presence of both of us so we can witness it and then have it dated."

Mr. Kramer's presence at the execution ceremony 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]). The attestation clause is signed by two witnesses, which is prima facie evidence of due execution (3 Warren's Heaton, Surrogate's Court Practice § 42.05 [4] [7th ed 2006]).

Based upon the record, the court is satisfied that the will was executed in conformance with the statutory requirements of EPTL 3-2.1. The court finds that Dorothy M. Valentini has made a prima facie showing of entitlement to summary judgment on the issue of due execution of the propounded instrument. The court has searched the record, and finds that it is devoid of any evidence that the instrument was not properly executed. Because all of the statutory requirements were met and no issues of fact requiring a trial exist, the petitioner's motion for summary judgment is granted regarding due execution.

The proponent also bears the burden of proving that the testator possessed testamentary capacity (*Matter of Kumstar,* 66 NY2d 691, 692 [1985]). The court looks at these factors: "(1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property she was disposing of; and (3) whether she knew those who would be considered the natural objects of her bounty and her relations with them" (*id.*). Moreover, sanity and testamentary capacity are presumed unless there is evidence to the contrary, the presumption being that "a mind once sound continues" to be so (*Matter of McCarthy*, 269 App Div 145, 152 [1st Dept 1945], *affd* 296 NY 987 [1947]). As a general rule and until the contrary is established, a testator is presumed to be sane and to have sufficient

mental capacity to make a valid will (*Matter of Beneway*, 272 App Div 463, 467 [3d Dept 1947] [citations omitted]).

As stated previously, Mr. Kramer testified that the decedent was a long time client of his. He testified that she was a "very independent-minded woman" who had enjoyed some kind of career and that on the day the will was executed she was fully competent. He described the decedent as getting frail and becoming more dependent upon her daughter for help, but with full mental capacity. According to Mr. Kramer, he had conversations with the decedent and she understood what he was talking about and that he really enjoyed the conversations.

Based upon the record, the court finds that Dorothy M. Valentini has met her burden of proving that the decedent possessed testamentary capacity on the date she executed her will. There has been absolutely no evidence offered by the objectant to the contrary. Thus, although the objectant alleges that the decedent was mentally incapacitated, he has not introduced any evidence that creates a triable issue of fact. Accordingly, the petitioner's motion for summary judgment on the issue of testamentary capacity is granted.

The objectant has the burden of proof on the issue of undue influence (*Matter of Bustanoby,* 262 AD2d 407, 408 [2d Dept 1999]). The three elements of undue influence have been described as motive, opportunity, and the actual exercise of undue influence (*see Matter of Fiumara,* 47 NY2d 845, 846 [1979]). This classic formulation about what constitutes undue influence still resonates in the case law:

> "[i]t must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be

> the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear" (*Children's Aid Socy. v Loveridge,* 70 NY 387, 394 [1877]; *see also Matter of Kumstar,* 66 NY2d 691, 693 [1985]).

Undue influence is rarely proven by direct evidence; rather, it is usually proven by circumstantial evidence (*Matter of Walther,* 6 NY2d 49, 54 [1959]; *Children's Aid Socy. v Loveridge,* 70 NY 387, 395 [1877]*; Matter of Burke,* 82 AD2d 260, 269 [2d Dept 1981]). Among the factors that are considered are: (1) the testator's physical and mental condition (*Matter of Woodward,* 167 NY 28, 31 [1901]; *Children's Aid Socy. v Loveridge,* 70 NY 387, 395 [1877]; *Matter of Callahan,* 155 AD2d 454, 454 [2d Dept 1989]; (2) whether the attorney who drafted the will was the testator's attorney (*Matter of Lamerdin*, 250 App Div 133, 135 [2d Dept 1937]; Matter *of Elmore,* 42 AD2d 240, 241 [3d Dept 1973]); (3) whether the propounded instrument deviates from the testator's prior testamentary pattern (*Children's Aid Socy. v Loveridge,* 70 NY 387, 402 [1877]; *Matter of Kruszelnicki,* 23 AD2d 622, 622 [4th Dept 1965]); (4) whether the person who allegedly wielded undue influence was in a position of trust (*Matter of Burke,* 82 AD2d 260, 270 [2d Dept 1981]) and (5) whether the testator was isolated from the natural objects of his affection (*Matter of Burke,* 82 AD2d 260, 273 [1981]; *see Matter of Kaufman,* 20 AD2d 464, 474 [1st Dept 1964], *affd* 15 NY2d 825 [1965]). With this in mind, it is also important to remember that in order to defeat a motion for summary judgment, the objectant must demonstrate that there is a genuine triable issue by allegations that are specific and detailed

and substantiated by admissible evidence in the record. Mere conclusory assertions will not suffice (*Matter of O'Hara,* 85 AD2d 669, 671 [2d Dept 1981]).

The objectant has not offered any proof with regard to undue influence and there is absolutely no evidence in the record that anyone unduly influenced the decedent to make or execute the propounded will. Accordingly, the petitioner's motion for summary judgment on the issue of undue influence is granted.

The objectant also bears the burden of proving fraud (*Matter of Schillinger*, 258 NY 186, 190 [1932]; *Matter of Beneway*, 272 AD 463, 468 [3d Dept 1947]). It must be shown that "the proponent knowingly made a false statement that caused decedent to execute a will that disposed of [her] property in a manner different from the disposition [she] would have made in the absence of that statement" (*Matter of Clapper,* 279 AD2d 730, 732 [3d Dept 2001]). Moreover, a finding of fraud must be supported by clear and convincing evidence (*Simcusky v Saeli*, 44 NY2d 442, 452 [1978]). In order to defeat the motion for summary judgment on the issue of fraud, the objectant must come forward with more than "mere conclusory allegations and speculation" (*Matter of Seelig*, 13 AD3d 776, 777 [3d Dept 2004]). To defeat a motion for summary judgment, the objectant must produce sufficient evidence to show that there is an issue of fact to the effect that the proponent made a false statement or statements to the decedent to induce her to make this will, that the decedent believed the statement, and that without such statement or statements, the propounded will would not have been executed (PJI 7:60). A showing of motive and opportunity to mislead is insufficient; evidence of actual misrepresentation is necessary (*Matter of Gross*, 242 AD2d 333, 334 [2d Dept 1997]).

The objectant has failed to demonstrate that a question of triable fact exists with respect to fraud; the record is devoid of any evidence that fraud was perpetrated upon the decedent in the making or execution of the propounded instrument. Accordingly, the petitioner's motion for summary judgment is granted regarding fraud.

For the above-stated reasons, the motion for summary judgment is granted, and the objections to the probate of the propounded instrument are dismissed.

Settle decree.

Dated: June 7, 2011

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