

Matter of Farinon

2011 NY Slip Op 33233(U)

June 17, 2011

Sur Ct, Nassau County

Docket Number: 355505

Judge: III., Edward W. McCarty

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

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Probate Proceeding, Will of

File No. 355505

MARION V. FARINON,

Dec. No. 27257

Deceased.
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In this probate proceeding, the petitioner moves for an order pursuant to CPLR 3212 and EPTL 3-2.1 granting summary judgment dismissing the objections to probate filed on behalf of William B. Farinon. The objectant opposes the motion. For the reasons set forth herein, the motion is granted in its entirety.

The decedent, Marion V. Farinon, died a resident of Nassau County on October 15, 2008. The decedent's last will and testament dated October 4, 2002 was offered for probate by the petitioner Robert E. Farinon, the decedent's surviving spouse, as well as the beneficiary of the decedent's entire estate and the executor named in the propounded will. William B. Farinon, one of the decedent's six surviving adult children, filed objections to the probate of the October 4, 2002 will, alleging: (1) that the will was not duly executed by the decedent; (2) that on October 4, 2002, the decedent was not of sound mind or memory and was not mentally capable of making a will; (3) that the will was procured by fraud and undue influence practiced upon the decedent by the petitioner; and (4) that the instrument offered for probate is not the last will of the decedent, but was executed by her by mistake in that she did not understand the contents of the instrument offered for probate herein.

The witnesses to the propounded instrument, Russell C. Burcheri and Robert Rosenthal were examined pursuant to SCPA 1404. Mr. Burcheri is also the attorney-draftsman of the instrument.

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]).

Summary judgment in a contested probate proceeding is appropriate where an objectant fails to raise any issues of fact regarding execution of the will, testamentary capacity, undue influence or fraud (see e.g. *Matter of DeMarinis*, 294 AD2d 436 [2d Dept 2002]; *Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]).

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]). Due execution requires that the proposed will be signed by the testator, that such signature be affixed to the will in the presence of the attesting witnesses or that the testator acknowledge her signature on the propounded will to each witness, that the testator publish to the attesting witnesses and that such attesting witnesses attest the testator's signature and sign their names at the end of the will (EPTL 3-2.1). If the will execution is supervised by an attorney, the proponent is entitled to a presumption of regularity that the will was properly executed in all respects (*Matter of Tuccio*, 38 AD3d 791 [2d Dept 2007]). Where an attorney states to the attesting witnesses, in the decedent's presence, that decedent is executing a will, such statement meets the publication requirement (see *Matter of Frank*, 249 AD2d 893 [4th Dept 1998]). If the 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 (*Matter of Buckten*, 178 AD2d 981 [4th Dept 1991], lv denied 80 NY2d 752 [1992]).

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 Section 42.05 [4] at 42-77 [7th ed]).

Here, the testimony of the two attesting witnesses, one of whom was also the attorney-draftsman, prima facie establishes due execution of the propounded instrument. Absent from the record is any proof that the propounded instrument was not executed in conformity with the formal requirements of EPTL 3-2.1 (*see Matter of Weinberg*, 1 AD3d 523 [2d Dept 2003]). Because all of the statutory requirements were met and no issues of fact requiring a trial exist, the objection of lack of due execution is dismissed and petitioner is granted summary judgment regarding due execution.

TESTAMENTARY CAPACITY

The proponent has the burden of proving testamentary capacity. It is essential that the testator understand in a general way the scope and meaning of the provisions of her will, the nature and condition of her property and her relation to the persons who ordinarily would be the natural objects of her bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]); *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although she need not have a precise knowledge of her assets, she must be able to understand the plan and effect of the will, and less mental faculty is required to execute a will than any other instrument (*see Matter of Coddington*, 281 App Div 143 [3d Dept 1952], *affd* 307 NY 181 [1954]). Mere proof that the decedent suffered from old age, physical infirmity and progressive dementia is not necessarily inconsistent with testamentary capacity and does not preclude a finding thereof as the relevant inquiry is whether the decedent was lucid and rational at the time the will was made (*see Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]).

In this case, the record establishes that at all relevant times, including the time when the will was executed, the decedent possessed the capacity required by EPTL 3-1.1 to make a will. In their deposition testimony, the attesting witnesses both unequivocally stated that the decedent was of sound mind at the time of the execution of the propounded will.

Based upon the foregoing, the proponent has established prima facie that the decedent was of sound mind and memory when she executed the will (EPTL 3-1.1). The record is absent any admissible proof that at the date of the execution of the propounded will, the decedent was incapable of handling her own affairs or lacked the requisite capacity to make a will.

In his “sur reply,” in an attempt to raise an issue as to the decedent’s testamentary capacity, the objectant relies upon the report of a physician who saw the decedent for an office visit on May 11, 2001. Initially, it should be noted that new matters raised for the first time in reply papers are not properly considered (*Hoyte v Epstein*, 12 AD3d 487 [2d Dept 2004]). However, even if this court were to consider this document offered for the first time in a “sur reply,” the physician’s report is not sworn to or affirmed or certified, thus rendering it inadmissible in form and insufficient to defeat a motion for summary judgment (*Matter of Delgatto*, 82 AD3d 1230 [2d Dept 2011]). Moreover, even if such report had been in admissible form, it refers to the decedent’s apparent “forgetfulness” in May 2001, nearly a year and a half before she executed the will at issue herein, and fails to raise a triable issue of fact as to decedent’s testamentary capacity at the time she executed the will in October 2002.

Accordingly, on the issue of testamentary capacity, the proponent’s motion for summary judgment is granted, and the objection of lack of testamentary capacity is dismissed

FRAUD

To prevail upon a claim of fraud, the objectant must prove by clear and convincing evidence (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) that the proponent knowingly made false statements to decedent to induce her to execute a will that disposed of her property in a manner contrary to that in which she would have otherwise disposed of it (*see Matter of Gross*, 242 AD2d 333 [2d Dept 1997]; *Matter of Evanchuk*, 145 AD2d 559 [2d Dept 1988]). There is no such evidence in this case (*Matter of Philip*, 173 AD2d 543 [2d Dept 1991]). Accordingly, the objection of fraud is dismissed, and summary judgment granted on this issue.

UNDUE INFLUENCE

In order to prove undue influence, the objectant must show (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testator at the time of the execution of the will; and (3) the execution of a will, that, but for undue influence, would not have been executed (*Matter of Walther*, 6 NY2d 49 [1959]). Undue influence can be shown by all the facts and circumstances surrounding the testator, the nature of her will, her family relations, the condition of her health and mind and a variety of other factors such as the opportunity to exercise such influence (*see generally* 2 Pattern Jury Instructions, Civil, 7:55). It is seldom practiced openly, but it is the product of persistent and subtle suggestion imposed upon a weaker mind and furthered by the exploitation of a relationship of trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). Without the showing that undue influence was actually exerted upon the decedent, mere speculation that opportunity and motive to exert such influence existed is insufficient (*see Matter of Chiurazzi*, 296 AD2d 406 [2d Dept 2002]; *Matter of Herman*, 289 AD2d 239 [2d Dept 2001]).

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]).

In attempting to establish that the decedent was unduly influenced and that she executed the propounded will by mistake, the objectant relies upon unsworn statements attributed to various family members. Even if these statements had been in proper form, while they express animosity toward the petitioner, they do not establish that the petitioner exerted undue influence over the decedent. The objectant also attributes statements to the decedent's caregiver, which are not only unsigned and unsworn, but also directly and vehemently refuted by the caregiver in her affidavits offered in support of the petitioner's motion for summary judgment.

The record is devoid of any admissible evidence supporting the objections of undue influence or mistake and, accordingly, those objections are dismissed and summary judgment granted thereon.

CONCLUSION

The proponent's motion for summary judgment is granted and all objections to the probate of the propounded instrument are dismissed.

Settle decree.

Dated: June 17, 2011

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