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

----------x

Probate Proceeding, Will of

ANITA G. CHAYKA,
a/k/a ANITA CHAYKA,

Deceased.

----------x

File No. 2010-360984

Dec. No. 27807

In this contested probate proceeding, the petitioner, Robert Bonich, moves for an order granting summary judgment pursuant to CPLR 3212 dismissing the objections to probate of the respondents, Frances Nieman and Lorraine Bonich, and admitting the propounded instrument to probate.

The decedent, Anita Chayka, died on May 14, 2010, survived by her three children: Robert Bonich, the petitioner, and Frances Nieman and Lorraine Bonich, the respondents. An instrument purported to be the last will and testament of the decedent, dated May 7, 2010, was submitted for probate by the petitioner. The propounded instrument leaves the decedent's entire residuary estate to the petitioner and names him as executor. Preliminary letters testamentary issued to the petitioner on June 9, 2010.

The respondents filed objections to probate alleging that: (1) on May 7, 2010, the decedent was not of sound mind and memory and was not mentally capable of making a will; (2) that the propounded instrument was not freely or voluntarily made or executed by the decedent, but was procured by undue influence, fraud and/or duress practiced upon the decedent by the petitioner, and by Rosemarie Billig (the petitioner's girlfriend and an attesting witness) and Lorraine Moloi (the decedent's private duty nurse and an attesting witness), acting in concert

or privity with the petitioner; and (3) that the propounded instrument was not duly executed as required by law.

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]). 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 or her 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 the objectants

fail 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 the 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 the 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 2006]).

Here, the deposition testimony of each of the three attesting witnesses, as well as the

deposition testimony of the attorney who drafted the will and supervised its execution, prima facie establish 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]). The respondents have failed to raise any triable issue of fact on the issue of due execution. 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 the petitioner is granted summary judgment regarding due execution.

TESTAMENTARY CAPACITY

The petitioner also 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 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 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 and physical infirmity 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]). Moreover, testamentary capacity is not negated by terminal illness (*Matter of Burack*, 201 AD2d 561 [2d Dept 1994]).

The three attesting witnesses to the propounded instrument and the attorney who drafted

it and supervised its execution each consistently testified at their 1404 examinations that the decedent possessed the capacity required by EPTL 3-1.1 to make a will. Accordingly, the petitioner has established prima facie that the decedent was of sound mind and memory when she executed the propounded instrument (EPTL 3-1.1).

In an attempt to raise an issue as to the decedent's testamentary capacity, the respondents rely upon the affirmation of a physician who practices in the field of geriatric medicine, but who neither treated nor examined the decedent at any time during her life, nor conferred with any of the decedent's treating physicians. After reviewing only the decedent's medical records, the physician opined that the decedent lacked testamentary capacity when the propounded instrument was executed on May 7, 2010. He bases this opinion largely upon the narcotic pain medications prescribed to the decedent for palliative care of her terminal cancer. However, this physician's affirmation completely fails to address the deposition testimony of Lorraine Moloi, an attesting witness, as well as the private duty nurse who cared for the decedent at home for the final three months of the decedent's life, who testified that the decedent had refused medication the day before the execution of the propounded instrument because she "wanted to be awake" (L. Moloi deposition pp. 38-39). Moreover, the opinion of the physician is at odds with the positive assessment of the decedent's mental capacity provided by each of the attesting witnesses and the attorney who supervised the execution of the propounded instrument. Given the limited basis for the physician's opinion and the proof provided as to the decedent's testamentary capacity, the physician's affirmation is insufficient to raise a triable issue of fact on the issue of testamentary capacity (*Matter of Van Patten*, 215 AD2d 947 [3d Dept 1995]; *Matter of Eshaghian*, 54 AD3d 869 [2d Dept 2008]).

None of the arguments raised by the respondents are sufficient to raise a triable issue of fact that the decedent lacked the requisite testamentary capacity at the time that she executed the propounded instrument. Accordingly, on the issue of testamentary capacity, the petitioner's motion for summary judgment is granted, and the objection of lack of testamentary capacity is dismissed.

UNDUE INFLUENCE AND FRAUD

In order to prove undue influence, the respondents 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]).

The totality of the circumstances surrounding the decedent's execution of the propounded instrument raises issues of fact which preclude the granting of summary judgment on the undue influence objection. Prior to the execution of the will at issue herein, which leaves everything to

the petitioner, decedent's son, and nothing to the respondents, decedent's daughters, the decedent's former testamentary plan, embodied in a will dated October 16, 2008, was to leave her residuary estate equally to all three of her children, with the share of the respondent Lorraine Bonich to be held in a Supplemental Needs Trust, due to Lorraine's disability. According to an affirmation submitted in support of the motion by the attorney who had prepared the 2008 will, the decedent reiterated this testamentary plan when she held a meeting in her home with that attorney and her three children on April 12, 2010. While the decedent spoke to that attorney by telephone on May 5, 2010 and told her she wanted to draft a new will because the respondent Frances Nieman had purportedly "stolen money" from their joint account, the attorney who had prepared the 2008 will for the decedent was not retained to draft such a will for reasons unknown to the attorney. Instead, the propounded instrument was drafted two days later by an attorney referred to the decedent by the petitioner's girlfriend. While the apparent reason for the change in the decedent's testamentary plan was the decedent's belief that Frances Nieman had improperly taken money from their joint account, the propounded instrument fails to make any provision for either Frances Nieman or Lorraine Bonich. This drastic and sudden change in the decedent's testamentary plan, particularly, the decedent's failure to make any provision whatsoever for Lorraine, when she had previously sought to establish a supplemental needs trust for her, raises an issue of fact as to whether undue influence may have been exerted upon the decedent by the petitioner.

Conflicting deposition testimony was provided by each of the parties, as well as the decedent's banker, concerning the shifting of funds by respondent Frances Nieman out of the decedent's joint bank account and then back into that account, and the subsequent transfer of

such funds to a joint account with the decedent and the petitioner. Such testimony also conflicted with regard to how the decedent was informed of the transfers made by Frances. Since the transfer of such funds by Frances was the alleged precipitating event for the decedent's decision to alter her testamentary plan, these conflicting accounts also raise issues of fact concerning possible undue influence by the petitioner.

While the fact that the petitioner and his girlfriend lived with the terminally ill decedent for the last several months of her life is not determinative of the existence of undue influence in and of itself, this fact coupled with the fact that the petitioner sought numerous loans from the decedent, none of which were repaid, when viewed together with the other circumstances surrounding the execution of the propounded instrument, also raise issues of fact with regard to the possibility of undue influence. Accordingly, so much of the petitioner's motion as seeks summary judgment dismissing the respondents' objection of undue influence is denied.

To prevail upon a claim of fraud, the respondents must prove by clear and convincing evidence (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) that the proponent knowingly made false statements to the 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]).

To the extent that the respondents claim that the fraud perpetrated upon the decedent by the petitioner was his advising the decedent that respondent Frances Nieman had removed funds from the decedent's joint account, such a statement cannot form the basis for a claim of fraud, since Frances admits in her deposition testimony that she did in fact remove the funds from the joint account. Therefore, summary judgment is granted to the petitioner dismissing the

respondents' fraud objection.

CONCLUSION

The petitioner's motion for summary judgment is granted to the extent that the respondents' objections of lack of due execution, lack of testamentary capacity and fraud are hereby dismissed. However, this matter must proceed to trial on the issue of undue influence.

A pre-trial conference is scheduled in this matter before a member of this court's Law Department for Tuesday, February 28, 2012 at 11:00 a.m.

Dated: February 27, 2012

EDWARD W. Mc`CARTY III
Judge of the
Surrogate's Court