STATE OF NEW YORK
SURROGATE'S COURT : COUNTY OF NEW YORK

----------x

Probate Proceeding, Will of

ARON BERGMAN, also known as
Aron Bergmann,

File No. 2011-0735 /B

Deceased.

----------x

----------x

In the Matter of the Application of SAM HOROWITZ
and EDITH HOROWITZ, Temporary Administrators of
the Estate of

ARON BERGMAN, also known as
Aron Bergmann,

Deceased,

File No. 2011-0735

for a Turnover of Personal Property Withheld and
Belonging to Decedent.

----------x

G L E N, S.

At the call of the calendar, the court granted two summary judgment motions affecting the estate of decedent Aron Bergman. First, the court dismissed the objections to the probate of decedent's July 12, 2010 will. Second, the court granted the temporary administrators' motion for summary judgment for turnover from Jolanta Zebrowska, who was a home care aide and friend of the decedent.

Facts

The 89-year-old decedent died on January 5, 2011 and was survived by two sisters and a niece as his distributees. He had long lived in the Franconia, the building in which Zebrowska and her husband, Kazimier, the building's superintendent, also resided on Manhattan's Upper West Side. In the winter of 2009, decedent had been hospitalized with congestive heart failure

and other ailments. These substantially changed his physical condition, including his ability to walk. Although he remained ambulatory, his gait was unsteady and slow, and he frequently used a walker. He tired easily.

Around that time, Kazimier informed Zebrowska that decedent was looking for an individual to take care of him. Zebrowska, who had been on friendly terms with decedent in the past and who had received training as a care aide, thereafter began assisting decedent with many affairs, including personal care and appointments. Then, after decedent suffered a subsequent stroke, Zebrowska states that, at "his request and direction," she began to write out his checks and banking withdrawal slips because "his handwriting had become compromised."

The July 12, 2010 will gives to his "friend and caretaker," Zebrowska, a brokerage account worth approximately $287,000 at Charles Schwab, which was his largest asset, constituting perhaps more than one-third of his estate. The will names Zebrowska executor, and her husband as successor. Decedent executed it at his apartment under the supervision of the attorney drafter, who had never met or communicated with Zebrowska. Neither she nor any other beneficiary under the will was present at decedent's discussions with the attorney or at its execution. Apart from the bequest to Zebrowska, the will splits the residuary estate among three family members, a nephew, a grand-niece and a niece. The niece had been named as a co-executor, and all three were legatees, in a prior will executed on March 19, 2008. That will left the bulk of his estate to family, including his sisters. Zebrowska had never been a beneficiary or a nominated fiduciary in decedent's prior wills. Nothing indicates that decedent was estranged,

other than geographically, from the members of his extended family.[1]

Upon proof of the significant pre-death withdrawals from decedent's bank accounts, primarily through ATM withdrawals, alleged to have been made by Zebrowska, the court granted temporary letters to two family members to commence and prosecute a turnover proceeding against her. It is uncontroverted that Zebrowska was not decedent's attorney-in-fact and had neither joint account status nor signature authorization on the two bank accounts from which the withdrawals were made. She, however, had the use of decedent's personal identification number (PIN) to accomplish the ATM withdrawals. As Zebrowska explained, "Decedent would give [her] oral permission to access his Chase and Citibank accounts through an ATM in order to withdraw certain sums specified in advance by the decedent." She claims that she withdrew the funds for decedent at his request to pay various expenses, including substantial salaries for her and her husband.

Decedent during life had also designated Zebrowska beneficiary of the Charles Schwab account in a form submitted to Schwab. Petitioners challenged that designation in their turnover petition, in which Charles Schwab is also a respondent. The assets at Schwab are the subject of a court-ordered restraint, prohibiting their transfer or encumbrance.

Probate Proceeding

Proponent's summary judgment motion sought to dismiss the three objections interposed by the family – lack of testamentary capacity, fraud, and undue influence.

---

[1]Jack Meisel, a nephew, who is also a one-third residuary beneficiary under the propounded will, lived locally and assisted decedent with his medical appointments. He also took decedent to Florida for a holiday with the family in March of 2010. Several other family members spent only part of the year in New York.

Proponent met her burden of establishing a prima facie case for judgment as a matter of law (*Matter of Korn*, 25 AD3d 379, 379 [1st Dept 2006]) on testamentary capacity upon proof that decedent was able to (1) appreciate the nature and extent of his property, (2) identify the natural objects of his bounty, and (3) understand the nature and consequences of executing a will (*Matter of Kumstar*, 66 NY2d 691, 692 [1985]; *cf. Matter of Hedges*, 100 AD2d 586, 588 [2d Dept 1984]). Not only did the attesting witnesses' affidavit regarding the will execution state that the decedent was of "sound mind, memory and understanding" (*see Matter of Schlaeger*, 74 AD3d 405, 406 [1st Dept 2010], but also, Kenneth Joelson, the attorney drafter who supervised and witnessed the execution, testified at his deposition that decedent had been lucid and conversational during his interactions with decedent. According to Joelson, at their first meeting in June of 2010, decedent described what he wanted in his will, supplied without hesitation his social security number and date of birth, and discussed his family genealogy and his long-time employment as a banquet waiter at the Waldorf Astoria. During the execution ceremony at decedent's apartment on July 12, 2010, Joelson "reviewed each clause with the testator who confirmed his full understanding and acquiescence."[2]

Decedent's physician, Dr. Arthur Kennish, affirmed further that he had treated decedent 10 to 15 times in 2009-2010, and that was in addition to hospital consultations. Aside from cardiac issues and Bradykinesia (slowness in the execution of movements), Kennish stated that decedent's "mental state appeared to be sound" and he "was able to engage in relevant conversation and communicate logically, appeared to be lucid and did not seem at all confused or

[2]A partner in the attorney drafter's law practice and a legal assistant in his office were the other two attesting witnesses.

disoriented." In other words, decedent's treating physician never saw him in a confused or disoriented state at any appointment or consultation during the period in which decedent's will was drafted and executed.

In the face of this proof, objectants have failed to come forward with evidence that raises a material, triable issue of fact as to decedent's capacity *(Matter of Bustanoby*, 262 AD2d 407, 408 [2d Dept 1999]). Although several affidavits in opposition to the motion indicate that decedent may have experienced non-lucid intervals, none indicates that these occurred around the time that the will was executed, which is the necessary inquiry (*Matter of Paigo*, 53 AD3d 836, 838-839 [3d Dept 2008][citations omitted]; *Gala v Magarinos*, 245 AD2d 336 [2d Dept 1997]; *Matter of O'Donnell*, NYLJ, Oct. 28, 2008, at 35, col 2 [Sur Ct, New York County]). Nor is it fatal to a finding of capacity that decedent may not have described to the attorney drafter all of his assets (*Matter of Khazaneh*, 15 Misc 3d 515, 520-521 [Sur Ct, New York County 2006]). The lack of capacity objection was consequently dismissed.

To resist summary judgment on the undue influence ground, objectants would have to provide evidence not only of motive and opportunity, but also, of the actual exercise of such influence (*Matter of Walther*, 6 NY2d 49, 55 [1959]). As to this, however, objectants have failed to provide anything other than speculation upon which to find that Zebrowska actually exercised undue influence upon decedent. Even if the court assumes for the purposes of this motion that Zebrowska was in a confidential relationship with the decedent, proponent dispelled any inference of wrong-doing in her receiving the bequest of the Schwab account. The proof was clear that she never met or spoke to the attorney drafter prior to decedent's death, and there was

no evidence to indicate that she was involved in procuring the attorney drafter for preparation of decedent's will (*Matter of Bartel*, 214 AD2d 476, 477 [1st Dept 1995]). No evidence connects Zebrowska to the will, its drafting or its execution.

Objectants' attempt to show otherwise relies almost exclusively on the affidavit of the building manager where decedent resided. However, that individual's speculation that Zebrowska may have gone to decedent's apartment during the attorney drafter's initial meeting with decedent regarding the will's preparation is insufficient to raise a question of fact, especially given the attorney drafter's sworn statements that he did not meet or speak with her prior to decedent's death (*Bustanoby*, 262 AD2d at 408; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).[3] Undue influence was thus dismissed as an objection to probate.

As to fraud, there was no evidence that a misrepresentation had been made to the decedent, and consequently, the fraud objection was also dismissed (*see Matter of Eastman*, 63 AD3d 738, 740 [2d Dept 2009]; *Matter of Zirinsky*, 43 AD3d 946, 948 [2d Dept 2007]). Objectants' speculation or conjecture is not sufficient (*Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270, 270-271 [1st Dept 2009]).

Turnover Proceeding

The temporary administrators moved for summary judgment on their turnover claims against Zebrowska for $281,080 in unauthorized withdrawals from decedent's Citibank and JP

[3]Although affidavits from the family indicate that decedent loved his sisters, and his failure to provide for them was suspicious to them, such statements remain merely speculation or conjecture about what decedent wanted. The attorney drafter's testimony was clear that decedent wanted to give other family members his residuary estate, which is reflected in the July, 2010 will.

Morgan Chase accounts during his lifetime. They met their burden of demonstrating that the assets in question, here the funds taken from specific bank accounts in decedent's name alone, belonged to the decedent and that respondent had no authority regarding the funds in these accounts (*see Matter of Rabinowitz*, 5 Misc 2d 803 [Sur Ct, Nassau County 1957]). In her responsive pleading, Zebrowska had not denied that she withdrew significant amounts from his bank accounts.[4] Instead, she claimed there that the transfers had implemented decedent's intent to make gifts.[5] However, in her affidavit in opposition to the summary judgment motion, Zebrowska claims that $234,000 was withdrawn to make various payments as follows: $131,000 for "salaries" for her ($75,000) and her husband ($56,000); another $56,000 for salaries of "other employees;" $7,500 for a "Florida Trip (2010)"; $25,000 for "Casinos"; $5,000 for "Restaurants;" $4,000 for "Food;" $3,000 for "Taxis;" and $2,500 for "Gifts."[6] Although unpled, such *defenses* can still be used to resist summary judgment (*see Rizzi v Sussman*, 9 AD2d 961 [2d Dept 1959] [fraud], *citing Curry v Mackenzie*, 239 NY 267, 272 [1925]), so long as the defense is supported by admissible proof creating a material question of fact (*see Alvord & Swift*

---

[4]Zebrowska's answer denied, however, that she did so "improperly."

[5]To be clear, Zebrowska's answer does admit that she was "one of a number of caretakers." Her answer, however, nowhere states that the bank account withdrawals were to pay salaries or expenses. The answer makes no claims under contract, express or implied, or for services rendered (*cf. Matter of Riccio*, 24 AD2d 483 [2d Dept 1965]). Instead, it states as an affirmative defense that "[a]ny property, gifts, or pledges made or transferred by decedent to respondent was done knowingly, in the absence of fraud, and with donative intent on the part of decedent."

[6]Other than pictures of Zebrowska and decedent on a Florida trip, Zebrowska provides primarily copies of ATM withdrawal receipts, often for $800 or $1,000, on the back (and sometimes the front) of which decedent apparently put his signature. These, however, do not indicate whether decedent assented in any way to a particular use of or gift of these funds.

v Muller Constr. Co., 46 NY2d 276, 281 [1978]).[7]

In this, Zebrowska falls short. Her burden is to show by evidentiary facts, and not merely conclusory allegations, a genuine issue requiring trial (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]), or an acceptable excuse for the failure to provide proof in admissible form (*Friends of Animals, Inc. v Assoc. Fur Manufacturers, Inc.*, 46 NY2d 1065, 1068 [1979]), neither of which she has provided. Nothing other than her own self-serving statements, which would be inadmissible at trial, supports her claims.

Despite submitting evidence that she received certification as a "personal care aide," Zebrowska offers no invoices, receipts, or tax records evidencing the alleged salaries or expenses, much less any other documentation or proof indicating that decedent agreed to provide her or her husband with these significant salaries.[8] The temporary administrators have established that Zebrowska was not authorized to make the withdrawals from decedent's bank accounts in that she was not decedent's attorney-in-fact and had neither joint account status nor signature authorization on the accounts. They further demonstrated that the pattern of withdrawals was a significant departure from decedent's prior, relatively frugal lifestyle, a description which was uncontradicted and supported by bank records. In response, Zebrowska has failed to come forward with any evidence that would not be barred by CPLR § 4519, the

---

[7]The exception to this holding are those defenses that are waived unless they appear in a responsive pleading or a motion to dismiss (CPLR 3211[e]).

[8]Zebrowska claims that she and her husband "adopted" decedent informally as one of their family: "while we were ... paid for performing [care] duties, I can state with certainty that as for myself, I would have worked for free if necessary." Her husband, it is alleged, "slept [at decedent's apartment] most evenings."

Dead Person's Statute, to substantiate her claims that the transfers were for salaries and expenses. Where the sole proof offered to oppose summary judgment would be barred at trial by CPLR § 4519,[9] it is insufficient to create a question of fact (*Miller v Lu-Whitney*, 61 AD3d 1043, 1045 [3d Dept 2009] and cases cited therein; *Matter of Recupero*, 28 Misc 3d 1027[A], 2010 NY Slip Op 51200[U] [Sur Ct, Bronx County 2010]; *see also Largotta v Recife Realty Co., N.V.*, 254 AD2d 225, 225 [1st Dept 1998]).

As for donative transfers, Zebrowska does not argue on the present motion that the vast majority of the transfers were gifts, but she does state that decedent did make a gift to her and her daughter of a trip to Florida in 2010, for which she claims $7,500 was paid from decedent's funds.[10] Her affidavit in opposition also claims that a further $2,500 withdrawn from the accounts was for "gifts" – the nature and recipients of which are undisclosed by her on this motion.[11] The law requires that the proponent of a gift, here Zebrowska, provide clear and

---

[9]The temporary administrators state that they will in no manner waive the protections of the statute (*see Matter of Steger*, 2008 NY Slip Op 33374[U][Sur Ct, Nassau County 2008]). Moreover, their case does not depend on proof which would be barred under the statute or that may have had the effect of opening the door to admission of respondent's statements otherwise precludable under § 4519 about the use of the withdrawn funds (*see Matter of Wood*, 52 NY2d 139 [1981]).

[10]In her answers to petitioners' interrogatories, Zebrowska states that $4,200 was given to her and her daughter "for airfare and accommodations" for the 2010 Florida trip. Given the $7,500 claimed in respondent's affidavit in opposition, without any suggestion that a portion of such funds was used for the decedent, the court considers the $7,500 figure to be amount of the claimed gift related to the 2010 Florida trip. She states that her husband made the trip too, but paid his own way.

[11]As with the Florida trip (*supra* n 10), respondent's interrogatory answer regarding other gifts to her by decedent provides some specifics. It indicates that she received in 2009 two gifts of jewelry from decedent, totaling approximately $1,550 in value, at Thanksgiving and Christmas, respectively, and an additional holiday cash bonus of $700. This is $250 less than the

convincing proof of all elements of the gift, namely, donative intent, delivery and acceptance (*see Mirvish v Mott*, 18 NY3d 510, 518 [2012], *citing Gruen v Gruen*, 68 NY2d 48 [1986]). Here again, however, where the proof of decedent's donative intent comes solely from her own self-serving statements as an interested witness that would be barred under CPLR § 4519 at trial, respondent has failed to raise a question of fact regarding the *bona fides* of these claimed gifts (*Matter of Lockwood*, 234 AD2d 782, 782 [3d Dept 1996]).

As to the amount sought to be turned over, there is a $47,080 discrepancy between Zebrowska's $234,000 figure and the $281,080 sought by petitioners. Zebrowska's affidavit states that "all of the funds withdrawn were disbursed for salaries and the aforementioned activities except for the two transfers in excess of $20,000 each which can easily be traced in October 2010 from Citibank into the Chase account, within a day or two." Although Zebrowska provides no bank records upon which to substantiate such claims, petitioners themselves provide copies of the monthly statements, which confirm the deposits. These statements reveal that two $20,000 deposits (one in October 2010 and the other in November 2010) were made to decedent's Chase account by checks written from his Citibank account, but these were nonetheless included in petitioners' reckoning of improper withdrawals from the Citibank account. They also reveal that a November 1, 2009 Citibank ATM withdrawal was improperly stated to be for $1,000, when it was for $500.[12] As a result, $40,500 of petitioners' claimed

---

amount claimed in her opposition affidavit, and the court again considers the affidavit amount, the $2,500 figure, to be the amount of the claimed gifts.

[12]Two other deposits were made to the Chase account, one a $2,000 cash deposit and the other, a $1,300 check deposit. Nothing in the record, however, establishes that these deposits comprised funds from decedent's other account, the Citibank account, and thus they are properly not considered in the calculation.

$281,080 is not properly sought since these withdrawals have been explained as not having been diverted from decedent's accounts.

The remaining $6,580 of this discrepancy, however, is unexplained. Given that petitioners have demonstrated that respondent had no authorization to make the withdrawals and that respondent herself concedes that she assisted with or conducted his banking affairs because he could not, respondent's failure to put in any disinterested testimony or documentary evidence explaining them compels the conclusion that this sum must be included in the amount to be turned over by Zebrowska. Consequently, summary judgment is granted in favor of the temporary administrators for turnover of the sum of $240,580 by respondent Zebrowska (*see Matter of Stein*, 150 AD2d 700, 701 [2d Dept 1989]). In the exercise of discretion (CPLR § 5001[a]), the court awards interest at 3% per annum on this amount from February 1, 2010 (CPLR § 5001[b] [permitting the court, where damages were incurred, as here, "at various times," to pick a "single reasonable intermediate date" from which interest shall run]).

The temporary administrators' motion also sought summary judgment for turnover of the Schwab account given to Zebrowska pursuant to a beneficiary designation form that the fiduciaries assert was invalid. The basis of their motion was that, after decedent's death, Zebrowska made a misrepresentation on the transfer authorization form by certifying that there were no known disputes as to the account. As noted above, however, in addition to such designation by decedent during his lifetime, the decedent bequeathed the account to Zebrowska under his will. Given the dismissal of the probate objections, this portion of the temporary administrators' motion is moot. The court-ordered restraint on the Charles Schwab assets is removed, with the proviso that $240,580 of the amounts held in that account plus interest

awarded herein be turned over to the temporary administrators, to the extent of the whole thereof, if assets therein are insufficient to pay the entire amount.[13]

Although the court notes that no interested party has requested that letters testamentary not issue to Zebrowska, given the facts established in the turnover proceeding, the court will require Zebrowska to post a bond in an amount equal to the value of the assets passing under the will to beneficiaries other than herself.

The transcript of the June 15, 2012 proceedings, together with and as modified by this decision, constitutes the order of the court.

Settle on notice the probate decree and the turnover decree.

Dated: October 18, 2012

SURROGATE

[13]To ensure a clear directive as to the restrained Schwab account, the court inquired as to whether Zebrowska would pay the turnover amount over from some other source, and she answered in the negative. Although the parties sought to interject arguments not raised in their pleadings or in their motions upon this inquiry from the court, issues not raised in the papers are not addressed herein.