Matter of Bogen
2014 NY Slip Op 32844(U)
November 7, 2014
Sup Ct, New York County
Docket Number: 2011-761
Judge: Nora S. Anderson

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

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In the Matter of a Proceeding for Probate in the Estate of

JOSEPH BOGEN, File No. 2011-761

Deceased.

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A N D E R S O N , S .:

In a contested proceeding for probate in the estate of Joseph Bogen, proponent moves for summary dismissal (CPLR 3212) of objections that allege lack of testamentary capacity and lack of due execution and undue influence, fraud, and mistake. In their opposition papers, objectants ask the court not only to deny a summary ruling on the merits, but also, to allow them – in light of the submissions now before the court – further discovery from which they have been barred to date under the "3-2 Rule" (22 NYCRR § 207.27).

As a threshold matter, objectants contend that proponent's motion should be denied for failure to satisfy the statutory mandate that it be supported by, among other things, "a copy of the pleadings...." (CPLR 3212[b]). Their contention rests on movant's failure to have included her own pleading among the motion papers. In response, movant has appended her pleading to her reply papers. Although such supplemental filing does not automatically eliminate the issue, the court has the authority under CPLR 2001 to "disregard" the technical shortcoming. Since objectants do not identify any "prejudice" to a "substantial right" of objectants caused by the initial omission, the court concludes that denial of the motion on the technical ground raised is not warranted.

The Undisputed Facts

There are only a few undisputed facts, and they are as follows. Decedent died on February 17, 2011, at the age of 91, survived by six issue of deceased nephews. The date of death value of his estate was approximately $13.5 million, including a residential and commercial building on Park Avenue and two parcels of realty of relatively modest values in the Bronx and upstate New York. Decedent was a widower, his wife having died more than 20 years earlier. Although there had been no interaction to speak of between decedent and his six blood relatives who ultimately became his distributees, he had remained in contact with his wife's family, including, among others, Michael Gill, one of her nephews, and Maeve Sheridan, the daughter of another of his wife's nephews. Gill, Sheridan, and all of decedent's distributees are objectants in this proceeding.

Decedent executed a total of four wills, the latest of which is the propounded instrument. The first will, executed shortly after his wife's death, related solely to property in Ireland which she had devised to him and which he in turn left to members of her family. The second will, executed 20 years later (January 8, 2008), concerned decedent's New York properties. Decedent left his Bronx and upstate realty to Sheridan and Gill, respectively, and his Park Avenue building to Elzbieta Sztuka (a woman whom he had met a few years earlier) and her daughter, proponent Karin Michonski, as tenants in common. The rest of decedent's property was bequeathed to Sztuka. Four months later (May 8, 2008), decedent executed a third will, which altered his testamentary scheme by adding Michael Wallerstein, proponent's boyfriend, as a beneficiary, giving him a tenancy-in-common with Gill in the upstate parcel. All other dispositions were unchanged. Under decedent's fourth and final will, executed nine months later (April 24, 2009), decedent gave Sheridan a bequest of $10,000, instead of the Bronx property, which he left to Gill

and Wallerstein as tenants-in-common. He also eliminated Gill's devise of the upstate property in favor of Wallerstein alone. The devise of the Park Avenue property to Sztuka and proponent as tenants-in-common and the bequest of the residuary estate to Sztuka under the immediately preceding instrument remained unchanged.

As to the fiduciary designations in the three testamentary instruments executed between 2008 and 2009, the first named decedent's accountant, Peter Moran, Jr. (the son of a deceased close friend of decedent), as executor. The later two named proponent as executor and Wallerstein as successor executor.

The last three wills were executed under the supervision of the attorney-drafter, who also served as one of the two attesting witnesses. The lawyer predeceased decedent by a year.

Summary Judgment Principles

On a motion for summary judgment, the movant must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If movant succeeds in doing so, the burden shifts to the opposing party to submit proof that a material issue of fact remains and that a trial is therefore necessary (*id.*).

Since a summary ruling against a party on the merits deprives that party of the opportunity to have a trial, such relief is to be recognized as a "drastic measure" that should be considered with caution (*F. Garofalo Elec. C. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]). As the First Department has observed, "in determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility" (*Dauman Displays, Inc. v Masturzo*, 168

AD2d 204 [1st Dept 1990]). Moreover, although hearsay evidence cannot be a basis for a summary ruling, hearsay can be used to oppose a motion for such a ruling so long as there is other evidence to corroborate the hearsay (*see Matter of Maurer*, 106 AD3d 622 (1st Dept. 2013). Finally, mere speculation cannot serve as a substitute for evidence (*see Matter of Hatzistefanou*, 77 Misc 2d 594 [Sur Ct, NY County 1974]; *Matter of Molnar*, 76 Misc 2d 126 [Sur Ct., NY County 1973]; *Matter of Lerner*, 72 Misc 2d 592 [Sur Ct, Queens County 1973]).

Objection Alleging Testamentary Capacity

An instrument cannot be admitted to probate unless the court is satisfied that the testator executed it knowingly, *i.e.*, that he (1) understood the nature and consequences of executing a will; (2) knew the nature and extent of the property affected by the will; and (3) was aware of those persons who would normally be considered the natural objects of his bounty and of his relations with them (*Matter of Kumstar*, 66 NY2d 691, 692). Thus, the mental clarity required of a testator is relatively minimal, in the sense that it is less than the law requires to execute other legally binding instruments (*Matter of Coddington*, 281 AD 143 [3d Dept 1952], *aff'd* 307 NY 181). The point at which capacity is required is the time of the propounded instrument's execution (*Matter of Hedges*, 100 AD2d 586[2d Dept 1984]).

When a proponent moves for summary dismissal of an objection alleging lack of capacity, the law allows her the benefit of a presumption that the testator, so long as he was once mentally sound, continued "to be sane and to have sufficient mental capacity to make a valid will" (*Matter of Beneway*, 272 AD 463, 467 (3d Dept 1947]). The presumption thus serves here as a basis for proponent's prima facie case for capacity (*see* 2B Warren's Heaton on Surrogate's Courts, sec 187, par 2[f], and cases cited therein). Moreover, although the lawyer who drafted

the will and witnessed its execution died before his testimony could be obtained, the surviving witness was available. At his deposition, he testified that he had worked in an office near the lawyer's and from time to time served as a witness to wills for the lawyer. He further testified that he did not recall anything inappropriate in decedent's comportment at the execution ceremony.[1]

In view of the foregoing, movant has made a prima facie showing that decedent had testamentary capacity. Objectants must therefore lay bare their proofs to establish that there is a genuine question of fact as to decedent's capacity. In their effort to do so, objectants have submitted affidavits from several of decedent's disinterested friends and from his dentist, all of whom are in accord that by 2006 or 2007 or 2008 or 2009 – when they last had their respective contacts with decedent – he had exhibited signs of mental decline, including memory lapses, confusion, and instances of spatial disorientation.

Objectants have also submitted the affidavits of two physicians – an internist and a urologist – who had treated decedent in February and March of 2010, just short of a year after the will's execution. According to them, as confirmed by medical records annexed to their respective affidavits, decedent was by then suffering from serious cognitive impairment and was "alert as to person and place," but not as to time. In addition, objectants have submitted the

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[1]A self-proving affidavit would have added weight to the case for capacity, but the instrument prepared by the lawyer for that purpose is in effect a nullity for such purpose, since the affiants failed to subscribe their names to it in the presence of the notary who took their oaths as to its contents (see SCPA 1406[1]). Nor could the testimony of proponent, her boyfriend, and her mother be used for purposes of making a case for capacity, since testimony barred under the Dead Man's Statute (CPLR 4519) cannot be used in support of summary judgment (*see Friedman v Sills*, 112 AD2d 343 [2d Dept 1985]).

affidavit of a psychiatrist with expertise in "psychiatric issues facing the elderly." The psychiatrist, however, had never met decedent and his opinion rests solely upon his review of the depositions and affidavits of individuals who did know decedent personally and of medical records from 2010. On the basis of mere paper review, he opines that decedent lacked testamentary capacity on April 24, 2009.

Precedents have clearly established that,

> "A testator needs only a lucid interval of capacity to execute a valid will, and this interval can occur contemporaneously with an ongoing diagnosis of mental illness ... (Matter of Esberg, 215 AD2d 655), progressive dementia, or even incompetency (see Matter of Walther, 6 NY2d 49; Matter of Friedman, 26 AD3d 723)."

Matter of Demaio, Sur Ct., Queens County, May 16, 2014, Kelly, J., index No. 2012-1485/B. Moreover, advanced age or dementia does not per se create a question of fact as to [a] decedent's capacity at the time of a will's execution (*see McGown v Underhill*, 115 AD 638, 640 [2d Dept, 1906 ["[I]ncapacity cannot 'be inferred [merely] from an enfeebled condition of mind or body ....'"]).

Objectants' evidence on lack of capacity includes the testimony of a friend of decedent, who characterized decedent as "irrational" as early as 2004, in the sense that decedent chose to deploy his funds in what the friend viewed as a non-cost-ineffective way; the testimony of decedent's dentist that decedent was frail and unkempt during his visits for treatment between 2004 and 2006, and that his memory then appeared to be failing; and the testimony of decedent's accountant, who in 2009 "worked with [decedent]" on his 2008 tax filings and now reports that "Joe was slipping in terms of his mental health. His memory was failing, he seemed befuddled, and he did not have his old zest and desire to talk." Additional evidence is offered by a long-

time commercial tenant in the Park Avenue building, testifying that, when she encountered decedent at some unspecified point between 2007 and the time of decedent's death in 2011, decedent appeared to be "extremely confused and forgetful, and did not know what was going on." Nonetheless, in light of the standard set by precedents, objectants' proofs fail to create a genuine question of fact as to capacity, either because they are too vague and conclusory, or inadequately connected to the relevant time, or both. Objectants' request for further discovery has no bearing on this issue, since the proposed discovery does not relate to decedent's capacity at or near the time he executed the will. Nor is the expert's affidavit proffered by objectants sufficient to create a genuine question of fact. It is not just that the opinion of a non-treating physician constitutes "the weakest form of proof" as to capacity or its absence (*Matter of Slade*, 106 AD2d 914, 915 [4th Dept 1984]). Rather, it is also that the expert's opinion here is in part baseless, resting as it does upon the very affidavits and medical records that the court has already determined are not sufficiently probative to put into question proponent's prima facie case for capacity, and in part speculative, purporting to draw a conclusion as to decedent's capacity on April 24, 2009, from medical records compiled almost a year later (*see Matter of Langbein*, 25 AD2d 681, 681-82 [2d Dept. 1966]).

The court is not unmindful that objectants ascribe their inability to produce evidence of decedent's incapacity proximate to the will's execution to a campaign allegedly waged by Sztuka to isolate decedent from third persons. However, to give objectants a dispensation from the requirement that they lay bare their proof as to capacity would implicitly – and improperly – suggest that they could rebut proponent's prima facie case at trial by a combination of inadequate evidence and conjecture. Accordingly, proponent's motion to dismiss the objection alleging

incapacity is granted.

Objection Alleging Lack of Due Execution

A prima facie case for due execution can be made by evidence that the decedent signed the propounded instrument at its end (EPTL 3-2.1[a][1]) and in the presence of (or acknowledged his signature to) at least two attesting witnesses (EPTL 3-2.1[a][1](C][2], [4]); that the decedent declared to each witness that the instrument was his will (EPTL 3-2.1[a][1][C][3]) and asked each to sign it as a witness (EPTL 3-2.[a][1][C][4]); and that each witness did so within thirty days of the other witness's or witnesses' doing so (*id.*). If an attorney-drafter supervised the will execution ceremony, there is a rebuttable presumption of "regularity" in the execution *(Matter of Moskoff*, 41 AD3d 481, 482 [2d Dept 2007]), which presumption is in turn reinforced if there is an attestation clause *(Matter of Collins*, 60 NY2d 466 [1983]).

In this connection, proponent offers the deposition testimony of the surviving attesting witness to the will that the lawyer who acted as the other attesting witness also supervised its execution. Moreover, the will contains an attestation clause. Finally, the testimony of a partner of the lawyer's practice confirms that the formalities needed for a valid will execution were known to and as a rule complied with by the partners. Thus, proponent has made a prima facie showing that the propounded instrument was executed in accordance with statutory requirements..

The court finds unavailing objectants' argument that the witness's failure to sign his deposition transcript nullifies the probative value of his testimony therein, including his assertion that the execution ceremony was attorney supervised. Under CPLR 3116(a), an unsigned transcript may be relied on where, as here, it is certified and there is no claim that it is inaccurate

in some respect (*Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443 [1st Dept 2012]).

In their final effort to resist summary judgment as to due execution, objectants argue that a genuine question of fact is created by the surviving witness's inability to remember the details of an execution ceremony more than two years earlier – one of 40 or 50 other such ceremonies in which he had participated over the years. But this contention is also unavailing (*see* SCPA 1405[3]); *Matter of Finochhio*, 270 AD2d 418 [2d Dept 2000]). Thus, in the absence of evidence establishing the existence of a due-execution issue requiring trial, the motion to dismiss the objection as to due execution is granted.

Objections Claiming Undue Influence, Fraud, and Mistake

The remaining objections share a common premise that survives even if decedent was possessed of testamentary capacity in the limited respects demanded under *Kumstar*. According to each of those objections, the propounded instrument was not an expression of decedent's knowing and voluntary choice, but instead was the product of one or more of three invalidating factors: undue influence or fraud or a misunderstanding on the part of decedent.

As the Fourth Department noted decades ago,

> "While the rule as to what constitutes undue influence has been variously stated, the substance of the various statements is that, to be sufficient to avoid a will, the influence exerted must be of a kind that so overpowers and subjugates the mind of the testator as to destroy his free agency and make him express the will of another rather than his own .... " *Matter of Beneway*, 272 AD 463, 468 (citations omitted).

Undue influence has been called "a species of fraud" (*id.*). However, if a challenge based on fraud is to be viable as a distinct ground for invalidating a will, the elements of fraud – a knowing misrepresentation inducing a testator to act in reasonable reliance upon it (see *Eurycleia*

Partners LP v Seward & Kissel, LLP, 12 NY3d 553, 559) by executing a will that he would not have executed if he had known the real facts -- must at least have been pled and pled with particularity (*see* CPLR 3016[b]). If mistake is to be viable as a separate ground for invalidating a will, testator's understanding as to the facts must have been inaccurate and that misunderstanding must have contributed substantially to a portion or all of the propounded instrument (*see Matter of Swartz*, 79 Misc 388 [NY County 1913]).

Proponent, as the movant for summary dismissal of such objections, has the burden of making a prima facie case that the propounded instrument was a natural will under decedent's circumstances. In view of certain facts that are undisputed, there is support for such a case here. There were no close blood relatives to whom decedent's bounty would normally have been directed. The instrument made some provision for two of the individuals with whom he had some continuing connection through the years, whereas others to whom he had a like relation were not so close to decedent that a natural will would unquestionably have given them benefits. Moreover, even the affidavits and depositions offered by objectants themselves disclose that, for at least two years before the propounded instrument was executed, Sztuka had been a substantial figure in decedent's life, whether as a health aide or housekeeper, as some thought, or as a companion, as others thought (or, indeed, as lovers and fiancés, as Sztuka averred at her own deposition). This is not to ignore that the other two recipients of substantial benefits under the will, proponent (Sztuka's daughter) and proponent's boyfriend, although they had lived briefly in an apartment in the Park Avenue building where decedent also resided, had only very limited contacts with him. However, they were individuals to whom Sztuka herself was close, and it is not necessarily unnatural for a testator, acting in accordance with his own volition, to choose to

please or to compensate one individual by benefiting her loved ones.

On the basis of the foregoing, the court concludes that proponent has made a prima facie case on the objections of fraud, mistake, and undue influence.

Before addressing objectants' proofs on the question of undue influence, the court notes that summary dismissal of the objections of fraud and mistake is warranted here. As to fraud, objectants have not pled the requisite elements, much less pled them with particularity or supported them with proofs. As to mistake, objectants' theory is that Sztuka was at all relevant times married to and living with an individual of whom decedent was unaware and that decedent would not have made testamentary gifts for Sztuka is he had been aware of her domestic arrangements. There is indeed considerable documentary and testimonial evidence supporting objectants' allegations as to Sztuka's marital and domestic relationship to the third party. However, objectants fail to offer anything more than conjecture as to whether decedent knew the facts in this regard, whatever they may have been. Nor do they submit evidence that he would not have made the dispositions for Sztuka and proponent and proponent's boyfriend if he had understood the facts to be as objectants now allege them. Accordingly, the motion for dismissal of the objections sounding in fraud and mistake as separate grounds for denial of probate is granted.

By contrast, the objection alleging undue influence cannot be summarily dismissed.

The court would so rule even if Sztuka undisputedly had been (as she claimed at her deposition) decedent's fiancée since 2006, when he was in his mid-'80's, and even if the two

undisputedly had planned (as she further claimed) to be wed four years later.[2] Even in such case, the affidavits of several of objectants' disinterested witnesses would raise genuine questions of fact as to undue influence. Among the disinterested witnesses are the tenant who rented commercial space in the Park Avenue building for some 25 years; her husband, who had for years been a frequent dinner companion of decedent's; a former nun, who worked at the church that decedent regularly attended for decades; and decedent's accountant. Their affidavits largely relate to contacts with decedent predating 2008, that is, prior to what the witnesses uniformly characterize as maneuvers by Sztuka to cut decedent off from his friends and from the activities that he had enjoyed up to that point. According to these witnesses, after Sztuka came into decedent's life (in 2004, according to Sztuka, or in 2006, according to the witnesses) decedent became less and less accessible by telephone, their calls to him thereafter either going unanswered or most often being deflected by Sztuka. Also according to the witnesses, from that time forward decedent was no longer the gregarious individual whom they had previously known him to be. From their recitals of the facts, decedent had until then been closely involved with the church that he had faithfully attended for some 50 years and had been something of a fixture in his neighborhood, sitting on a bench outside his building and interacting with the passersby. From the testimony of other witnesses, it is clear that for years decedent had dined several times a week with two friends and that such contacts stopped entirely shortly after decedent met Sztuka.

Furthermore, according to several of the witnesses, prior to 2006 decedent had lived debt-

[2]By contrast, two doctors who treated decedent in 2010 affirm that they had either been told by Sztuka, or inferred from appearances, that she was decedent's home health aide. Proponent herself denied at her deposition that decedent and her mother had any intimate involvement.

free and was in all other respects exceedingly careful with his money, perhaps to the point of stinginess. His financial records from that year onward, however, reflect a very different spending pattern, including as they did, for example, on-going withdrawals of sizeable amounts of cash, considerable credit card indebtedness, a multitude of checks drawn (by unspecified persons) variously to the order of Sztuka or to proponent or to third parties such as retail establishments, and an unprecedented mortgage on the Park Avenue building.

The affidavits of several of the witnesses express their shared view that Sztuka was an increasingly domineering force as well as dominant figure in decedent's life from the time the two met and that decedent was cowed by her. According to the decades-long tenant, decedent had confided that within two weeks of meeting decedent Sztuka had suggested that he give her the Park Avenue building. The affidavit of a second witness, decedent's accountant, describes another occasion, in the spring of 2008, on which decedent called him to confide that he thought he "had done something wrong" by giving Sztuka a power of attorney (executed in August 2007). According to the accountant, decedent told him that he hadn't understood the instrument's function when he signed it and did not want Sztuka to be in control of his finances. The accountant further avers that, after decedent revoked the instrument under the guidance of a lawyer to whom the accountant had referred decedent, Sztuka became furious and thereafter took pains to make sure that he and decedent would never be alone together. Also according to the accountant, during his discussion of estate planning with decedent and counsel, decedent had expressed an interest in leaving his property to a variety of persons, including some to his church and some for the benefit of his tenants (with whom he allegedly had developed a personal relationship over the years).

The power of attorney that decedent revoked in the spring of 2008 had been prepared (along with a health care proxy) by another lawyer, the same one who drafted and witnessed the propounded instrument and the two testamentary instruments executed in 2008. Although it is unclear as to how and when decedent came to retain that particular lawyer – *i.e.*, whether or not Sztuka was the connection between the two -- it is undisputed that Sztuka was present in the lawyer's offices when the propounded instrument was executed, and there is documentary evidence to the effect that the attorney-drafter's notes for the first of the three wills that he prepared memorialized Sztuka's wishes as well as decedent's with respect to the Park Avenue building.

As reflected in medical records compiled in 2004, decedent was then in his early '80's and suffering from cardiovascular issues, poor vision, and osteoporosis. According to an affidavit from his dentist, during decedent's last visit to his office (in 2006) decedent had exhibited confusion and had expressed frustration with his own inability to cope with his on-going dental problems. In early 2010, and thereafter, decedent was treated by an internist and a urologist in connection with the renal failure, incontinence, and other physical ailments that he was by then suffering. According to the doctors, the background information concerning decedent's health was supplied to them not by decedent, but instead by Sztuka, to whom they looked as the person in control of decedent's health care choices.

In sum, objectants have submitted considerable evidence that the classic conditions under which undue influence can be found – a mental infirmity less than required for testamentary incapacity, isolation, and dependency – were all in attendance at the execution of the propounded instrument.

The motive for supplanting a testator's volition with one's own is often clear from the provisions of the will in issue, to the extent that they give benefits to the alleged manipulators that they would not otherwise have received. Such is the case here. Moreover, there is evidence that the alleged malefactor had some direct connection to the genesis of the propounded instrument.

But, as precedents have recognized, opportunity and motive are not enough to prove a case of undue influence. There must in addition be evidence that such influence was actually exerted (*Matter of Zirinsky*, 43 AD3d 946, 947 [2d Dept. 2006]). Precedents also recognize, however, that undue influence typically occurs covertly and therefore may be provable only through circumstantial evidence (particularly where the victim is no longer available to speak for himself). Objectants have submitted various proofs that Sztuka was disposed to wielding an influence over decedent and that she prevented others from having any offsetting influence, all under ambiguous circumstances that do not clearly point to benign explanations for the power that she held in relation to decedent. Objectants have also offered proofs that, once Sztuka was positioned to have an influence over decedent, his assets were deployed and ultimately disposed of by his will in ways that may have suited his purposes (as well as hers) or, by contrast, only hers. Only a trial, not a decision on a summary judgment motion, can determine which of the two alternative scenarios was the case. Thus, there are genuine questions of fact as to whether the will now offered for probate was an extension of a pattern in which Sztuka supplanted decedent's intent with her own by capitalizing on his vulnerabilities. Accordingly, the motion to dismiss the objections sounding in undue influence is denied.

There remains to be considered whether the court should allow objectants leave to take discovery (as to the undue influence issue) beyond the "3/2 rule" established by section 207.27 of

the Uniform Rules of the Surrogate's Court (22 NYCRR § 22.27), under which an examination in a probate proceeding cannot relate to matter predating the propounded instrument by more than three years or postdating it by more than two years. The rule is not inflexible, since it is subject to exception in a case of special circumstances (*see Matter of Kaufmann*, 11 AD2d 759 [1st Dept. 1960]). A basis for such exception exists where, as here, persons substantially benefited under the will were "stranger[s] to the blood" (*id.,*) as to whom there is some evidence of a design upon decedent's property (*Matter of Brady*, 273 AD 968 [2d Dept. 1948]); *Matter of Carpenter*, 252 AD 885 [2d Dept. 1937]). Therefore, objectants are given leave to extend their discovery to matter occurring as early as 2004, when Sztuka avers that she and decedent met.

This decision constitutes the order of the court.

November 7, 2014

Nora S. Anderson

SURROGATE