Matter of Chayka
2014 NY Slip Op 33067(U)
September 30, 2014
Sur Ct, Nassau County
Docket Number: 30096
Judge: Edward W. McCarty III
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

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

---x

Probate Proceeding, Will of File No. 2010-360984

ANITA G. CHAYKA,
a/k/a ANITA CHAYKA, Dec. No. 30096

Deceased.

--x

In this contested probate proceeding, the petitioner, Robert Bonich, moves for an order granting summary judgment pursuant to CPLR 3212 dismissing the remaining objection of undue influence of the objectant, Frances Nieman, 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, Frances Nieman, the objectant, and Lorraine Bonich. 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. Objections to probate were filed by Lorraine and Frances. Lorraine has settled her interest in the estate by stipulation of settlement dated November 18, 2013 and has withdrawn her objections.

The objections to probate allege 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) 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) the propounded instrument was not duly executed as required by law.

By decision and order of this court dated February 27, 2012 (Dec. No. 27807), summary judgment was granted in favor of the petitioner as to the objections based on lack of due execution, lack of testamentary capacity and fraud.

Petitioner now moves for summary judgment on the remaining objection of undue influence based upon new evidence consisting of the affidavit of Lorraine Bonich, dated November 18, 2013, and the Response to Notice to Admit by Frances Nieman, dated January 15, 2014.

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]).

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]).

In the prior decision, this court held as follows with respect to the objection of undue influence:

> "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."

Petitioner argues that summary judgment should be granted based upon Lorraine's affidavit. According to Lorraine, her mother did not like the fact that Frances had so much control over her money and her mother was "crazed" about money. Lorraine also states that in April 2010, Frances moved approximately $191,000.00 from their mother's account to her personal account. She admits that she did not witness any conversations between her brother, her mother or her sister in relation to this transfer, but she expects that the transfer made her mother very angry. Lorraine also claims that Frances stated to her, "It's all my fault." Lorraine states as follows:

> "I have no personal knowledge regarding the execution of the May 7, 2010 Will. I joined Fran in objecting to the Will because at first, were [sic] weren't sure if Bob did something to force Mom to make a new Will. Now that all of the depositions are complete, I do not believe there was any undue influence in relation to this Will and therefore look to settle my interest in this case."

Objectant's counsel argues that the statements made by Lorraine in her affidavit are suspect and are simply a product of Lorraine switching sides for monetary consideration. In addition, counsel asserts that Lorraine's "evidence" on the issue of undue influence is "mere speculation" and "[h]er credibility (or lack thereof) should in and of itself raise a question of fact as to the assertions made in her affidavit."

Counsel annexes the following selections from Lorraine's prior deposition to point out inconsistencies from her current position:

I. Transcript, page 12, Lines 14 - 21, regarding the April 12, 2010, meeting with decedent, her three children, and the attorney, Ms. Eble.

> A:. . . - this was not the case, this was not the case, my mother really knew what she wanted, and didn't want - because as I said at least four or five times, she was asked by the lawyer during that period, and again at the end she reiterated for I guess the fifth or sixth time, Mrs. Chayka, do you want a codicil on the will, is there anything you want to change she said no, a third, a third, a third.

II. Transcript, page 73 et seq.,
Lines 11-16, regarding Petitioner's control over his dying mother:
A. > > > it wasn't until the last week of my mother's life - I'm talking to my mother on a Monday evening - now, this supposed will that my mother signed was on a Friday, and she died exactly one week later . . .

Page 74, Lines 16 - 25, Page 75, Lines 2-5, 21 - 25, Page 76, Lines 2-4:
A: Monday, so the 7, 8, 9, - - 10th, my mother died that Friday the 14th, and I don't know that he told her about not coming, but we know, I was told I could not come, my sister went, Lorraine, again to the best interests of the patient telling her daughter she can't see her mother according to whom? Bob, who is not even the health proxy.
Q: Did Lorraine [the nurse] tell you that Bob [Petitioner] said you can't see your mother?
A: yes.
Q: Monday the 10th, how was your mother?
A: She was trying to talk to me. She was ill she was trying to talk to me . . .
A: Last time I saw my mother, and I was told Bob said you can't come in. He had no right doing that. I'm a health proxy, my sister is health proxy, she went and was told by Lorraine Molloy [sic] she couldn't even come into the house, Bob (P. 76) said so. I can't say. You can ask Fran, but . . .
Q: When did Fran tell you that she wasn't allowed in the house?
A: It must have been Tuesday, . . . , because I was there Monday, and when I went to go again, by then he already - was told we weren't allowed then, and talk about pain and suffering, you know, your mother is dying, you are not allowed to see her?

III. Transcript, Page 117, Lines 13-23, regarding Fran's transfer of the funds:
A: Only after several days and constant haranguing and everything else that was going on in that household, that we had nothing to do with. It wasn't us, she did

nothing wrong, absolutely nothing wrong. I'm saying. Robert did wrong, he was constantly at her, my mother, constantly at my mother. My mother, as I said it before this morning, . . . , verbatim, he is loser, and I guess I just have to accept it, and that's the way she felt about Bob.
IV. Transcript, Page 118, Lines 15 - 23, regarding Fran's protective transfer of decedent's funds:
A: She was told the transfer was to make her look good to her co-op board. She was told the transfer was my sister stealing money from her. No, sir, these are not the facts.
Q: While the money was in Fran's sole possession, did she spend any of it?
A: Of course not, absolutely not. She would sooner go without meals than steal from my mother's funds.

Counsel states that Lorraine's affidavit merely adds to the disputed facts and raises more questions.

In addition, petitioner's counsel argues that the court should grant summary judgment on the remaining objection based upon Frances's Notice to Admit, along with her deposition testimony.

According to petitioner's counsel, Frances has admitted the following. She was managing all of the decedent's finances at the beginning of 2010, had been doing so since 2007, and continued handling the finances until the decedent's death. Frances was the decedent's attorney-in-fact and maintained possession of the decedent' s checkbook. At the meeting at the decedent's home on April 12, 2010 with the decedent, the attorney who drafted her prior will, Robert, Frances and Lorraine present, the decedent stated that her estate should be divided equally among her three children.

On April 20, 2010 and April 21, 2010, Frances transferred a total of $191,000.00 out of the decedent's Chase bank account to France's personal account. Frances discussed her intention to move the money with Lorraine who agreed that the money should be moved. On May 8, 2010,

Frances discussed the transfer with the decedent. On May 9, 2010, Frances became aware that approximately $40,000.00 which had been previously left in the Chase account had been transferred to a new account. On May 11, 2010, Frances asked the decedent if she wanted the money returned and the decedent nodded affirmatively. On May 12, 2010, Frances transferred the money back into the decedent's Chase account.

According to petitioner, the transfer, not undue influence, caused the decedent to execute the purported instrument.

Counsel for Frances argues that there is nothing said in the responses that constitute admissions against interest. In fact, Frances denies that she ever admitted to Lorraine that something was "her fault." Counsel argues since nothing new of a significant nature has transpired since the court's prior decision, the court should deny the current motion.

In support of her position, Frances submits an affidavit from Wendy Rogers, the decedent's niece. According to Ms. Rogers, the decedent told her that she had given Robert "quite a bit of money to try to help him hold onto his house but that she would not give any more because he ultimately lost it anyway." She repeated to Wendy her intention to split everything equally. The last conversation they had to this effect was a few weeks before her aunt's death.

Frances has also submitted her own affidavit. According to Frances, she moved the monies because Robert was writing unauthorized checks from the pre-signed checks that were to pay the registered nurses. In addition, Frances states that she never said "It's all my fault." She always said "It's not my fault."

Petitioner's counsel has submitted a reply arguing that Lorraine's affidavit is critical and requires reconsideration of the motion. Petitioner contends that objectant is not in possession of

any direct evidence of undue influence practiced by petitioner.

The motion for summary judgment is denied. The court finds that neither Lorraine Bonich's affidavit, which is suspect given its execution simultaneously with a stipulation of settlement settling her interest in the estate, nor Frances's responses to the notice to admit warrant a different determination. A triable issue of fact still exists as to undue influence for the reasons set forth in the court's prior decision.

This matter will appear on the court's calendar for jury trial on March 2 - 4, 2015, commencing at 9:30 am. A conference will be held on October 22, 2014, at 9:30 a.m., for entry of a pretrial conference order.

This constitutes the decision and order of the court.

Dated: September 30, 2014

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