| **Matter of Esmailian** |
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| 2014 NY Slip Op 33477(U) |
| December 24, 2014 |
| Surrogate's Court, Nassau County |
| Docket Number: 2012-368709 |
| Judge: Edward W. McCarty III |
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Will of

File No. 2012-368709

FARIDEH ESMAILIAN
a/k/a FARIDEH ISMAILIAN,
FARIDEH ESMAILIAN BEROUKHIM
Deceased.

Dec. No. 30342

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In this contested probate proceeding, the proponent moves for an order pursuant to CPLR 3212 granting summary judgment dismissing objections to the offered will and admitting it to probate.

The decedent Farideh Esmailian died on January 9, 2012, survived by four adult children. Her husband had predeceased her in 2004 and a fifth child, Bahman, committed suicide on May 23, 2008. The will offered for probate is dated July 22, 2008. The will leaves the entire net estate to the decedent's daughter Jaklin, to the exclusion of the other children. Objections to the will were filed by the decedent's daughter Hemda. The decedent's son Rahmat and daughter Houdit, her only other distributees, executed waivers and consents to probate.

## Introduction

It appears that the decedent had at best a rudimentary understanding of written English and was only somewhat more adept at speaking English but was much more comfortable reading and speaking in her native Farsi. Nevertheless, the propounded instrument is written in English. The instrument was purportedly executed on July 22, 2008 at the office of Matin Emouna, the drafting attorney, who is fluent in both English and Farsi. The attesting witnesses were Elizabeth Schaefer, an employee of Mr. Emouna, and Shohreh Marabi, a New York State court interpreter

who translates Farsi to English and English to Farsi. Ms. Marabi is a cousin of Mr. Emouna.

The Objections to the Will

The objections allege that the propounded instrument was not duly executed in accordance with the statutory formalities for a will execution; that the decedent lacked the capacity to execute a will on the date the will was purportedly executed; and the will does not express the intent of the decedent but rather is the result of undue influence having been exercised upon the decedent by the petitioner and her husband.

The Motion

In support of the motion for summary judgment, the proponent submits *inter alia* the deposition testimony of herself, the objectant, the drafting attorney, and the attesting witnesses.

Relevant Deposition Testimony

Mr. Emouna testified that he had known the decedent for several years prior to the execution of the will, having been both a friend of and attorney for her son Bahman. In August of 2006 Mr. Emouna represented Bahman in the purchase of the decedent's residence as she was moving to an apartment. The property was sold for $865,000.00. Mr. Emouna prepared the contract and the deed in English. The closing took place in his office. Mr. Emouna also testified that after Bahman's suicide in May 2008, the decedent retained him to represent her regarding her appointment as administrator of Bahman's estate. She also called him and told him that she wanted a will prepared. He got his instructions for the will over the telephone from the decedent and spoke only to her. Although he did not question her at length regarding her assets, he claimed he had an idea of what her estate consisted of because of his knowledge of the family and of Bahman's estate, the decedent being Bahman's only distributee. He claims he did not question her because he knew she was "well off." Mr. Emouna testified that although he

believes that either Jaklin or her husband or both of them drove the decedent to Mr. Emouna's office for the will execution, they were not present when the will was discussed and executed. He went over the will with her in detail, translating the English words into Farsi so she could understand. Mr. Emouna did not discuss the will or its contents with the petitioner and did not believe that the decedent had either. After the will was executed, she told Mr. Emouna to keep it and that she didn't even want a copy because she did not want its contents disclosed to anyone.

Elizabeth Schaefer, Mr. Emouna's employee testified that she believed she had met the decedent on one occasion prior to the will signing. She answered in the affirmative when the objectant's attorney asked if Mr. Emouna stated when the decedent was signing the instrument that this was her will. In response to the question "And did she say anything when he said that?" she replied "Well, he said it in English and then he was talking to her in Farsi and she was nodding." She also testified that Mr. Emouna appeared to go over the entire will with the decedent page by page. She testified that the decedent executed the will after Mr. Emouna read it to her and then she and Ms. Marabi signed as witnesses. Ms. Schaefer was not sure if she had ever witnessed a will before.

Ms. Marabi testified that Mr. Emouna called her and asked her if she would be a witness to the decedent's will. She testified that he had never asked her to do so before, but that he wanted her to witness the decedent's will since she spoke Farsi and he wanted a witness who spoke Farsi. Ms. Marabi also testified that she was given a copy of the will and she was reading along as Mr. Emouna translated the will from English to Farsi for the decedent. At her deposition, the objectant's attorney said to the witness that there is a provision in the will that leaves everything to Jaklin and asked the witness if the decedent made any comment when that part was read. The witness testified that "I think [Mr. Emouna] specifically said 'This is what

you want?' and she said 'Yes'."

The Opposition

In opposition, the contestants submitted portions of the deposition testimony of Ms. Schaefer, Ms. Marabi, Mr. Emouna, the petitioner and the objectant.

The opposition points out that the deposition testimony of the two attesting witnesses was to the effect that there were two original wills executed on July 22, 2008 but that only one original had been filed with the court. That has since been remedied and both original wills have been produced and are on file in the court. In her affidavit in opposition to the petitioner's motion for summary judgment, the objectant asserts "I disagree very strongly with Petitioner's motion because I can show the facts that support my objections." The objectant avers that her mother was in a very bad mental state when the will was executed because her son had committed suicide only two months before. She annexes to her motion a photocopy of what she purports is a true and accurate copy of a record from the decedent's pharmacy which she says reflects that the decedent was taking a strong psychiatric prescription to help her deal with the loss of her son. Also, a letter from a physician notes that the decedent "has also been listless. As we discussed, it could well be that the patient is suffering from significant depression, possibly related to the death of her son several years ago. She also avers that in 2010 her mother told her to go to the decedent's apartment and she would find a handwritten list under her mattress detailing the personal property and sums of money the decedent evidently gave to the petitioner over the years. A photocopy of the paper, in Farsi and purportedly in the decedent's handwriting, is annexed to the opposition papers as well as what purports to be an English translation of the document.

The objectant posits that the will was not duly executed in that the decedent never

declared the instrument to be her will and did not ask Ms. Schaefer and Ms. Marabi to act as witnesses. She also emphasizes that the instrument is written in English but avers that her mother was unable to read, write or even speak English. She also avers that the facts show that the decedent did not have the mental capacity to execute a will on July 22, 2008, only two months after the death of her son, when she was behaving erratically, was angry and confused and taking a strong psychiatric medication. She also asserts that the facts show that her sister and her sister's husband exerted undue influence over the decedent, and her mother would never have disinherited her other children but for the exertion of that influence.

Analysis

Summary Judgment

The proponent of a summary judgment motion 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]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment in contested probate proceedings is appropriate where a contestant 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,* [2d Dept 2002]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]).

Due Execution and Testamentary Capacity

The proponent of a will offered for probate has the burden of proving, by a fair preponderance of the credible evidence, that the instrument was properly executed and that the testatrix was mentally competent. All testators enjoy a presumption of competence and the mental capacity required for wills is less than that required for any other legal instrument (*Matter of Coddington*, 281 App Div 143 [3d Dept 1952], *affd* 307 NY 181 [1954]). The supervision of a will's execution by an attorney will give rise to an inference of due execution (*see, e.g., Matter of Finocchio*, 270 AD2d 418 [2d Dept 2000]; *Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]).

The elements of due execution are that the testator's signature should be at the end of the will, the attesting witnesses must know that the signature is the testator's, the attesting witnesses must know that it is the testator's will and the attesting witnesses must sign within a thirty-day period (EPTL 3-2.1). In this case, the execution of the will was supervised by Matin Emouna, an attorney, thus giving rise to the presumption that all statutory formalities were complied with. Furthermore, the deposition testimony of Mr. Emouna, Ms. Schaefer, and Ms. Marabi establish that the will was, in fact, duly executed. The testator need not tell the witnesses herself that the document being signed is her will. “The testator must merely communicate to the witnesses that [she] knows that the instrument is [her] will. Neither does the testator have to expressly request that the witnesses witness [her] signature on the will; such a request may be inferred from the conduct of the testator and the circumstances extant at the time” (Warren’s Heaton on Surrogate’s Court Practice, §42.05[2] [c], citing *Matter of Hedges,* 100 AD2d 586 (2d Dept 1984], and *Matter of Frank,* 249 AD2d 893 [4th Dept 1998]).

A will drawn in accordance with the intentions of a testator and executed in due form is valid, even though written in a language not understood by the testator, when it is shown she had

a full and accurate knowledge of its contents (*Camperi v Chiechi*, 134 Cal App 2d 485, 500 [District Court of Appeal, 1955]). The proponent of a will bears the burden of proof of due execution and where the testator is not fluent in English, the proponent has a greater burden in proving that the mind of the testator accompanied the act, and the instrument executed speaks her intent (*Watson* v Watson, 37 AD2d 897, 898 [3d Dept 1971]), because if the decedent had difficulty with the English language, there is the possibility that she did not understand the significance of what she was doing (*Matter of Henig*, NYLJ, Dec. 24, 2001, at 29, col. 2 [Sur Ct, Kings County 2001]). There must be evidence showing that it was explained to her in a manner she could understand (*Matter of Henig*, NYLJ, Dec. 24, 2001, at 29, col 2 [Sur Ct, Kings County]; *see also Matter of Liqouri*, 1955 NY Misc LEXIS 2783 [Sur Ct, Kings County 1955]). The Surrogate, in determining whether or not the will has been duly executed will look to the surrounding circumstances and the substance of the transaction. (*Matter of Dybalski*, 199 App Div 677, 680 [4th Dept 1922]). In addition, realistic consideration is given to the manner in which persons living in this country, who are not conversant in English, would be expected to transact business of this nature (*Camperi v Chiechi*, 134 Cal App 2d 485, 500 [District Court of Appeal 1955]). A showing that the testator understood what she was doing when she executed the will, and the witnesses understood that a will was being executed by her is sufficient to prove due execution (*Matter of Dybalski*, 199 App Div 677, 681 [4th Dept 1922]). Thus, where the attorney draftsman read the will to the decedent paragraph by paragraph, first in English and then in her native Yiddish, there was sufficient proof that the testator understood the contents of the will (*Matter of Rosenwasser*, NYLJ, Sept. 29, 2006, at 30, col 3 [Sur Ct, Kings County 2006]). The court is satisfied that the proponent has made out a prima facie case on the issue of due execution and the objectant has failed to raise a material question of fact. That branch of the

motion seeking to dismiss the objection regarding due execution is therefore granted.

The proponent also has the burden of proving testamentary capacity. It is essential that a testatrix 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]). A testatrix must 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 do not preclude a finding thereof (*see Matter of Fiumara*, 47 NY2d 845, 847 [1979]; *Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]) 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]). "When there is conflicting evidence or the possibility of drawing inferences from undisputed evidence, the issue of capacity is one for the jury" (*Matter of Kumstar*, 66 NY2d 691, 692 [1985]).

Here, there is no direct evidence that the decedent was not competent to make a will on July 22, 2008 or at any other date. Objectant relies on a hospital record dated October 23, 2008 on which date the decedent was scheduled to appear for a cystoscopy but refused to appear for it. The record indicates that in a telephone call to the hospital the petitioner said “Mom is crazy and will not do test.” First, uncertified medical and hospital records are inadmissible and therefore may not be considered on a motion for summary judgment (*Matter of Delgatto,* 82 AD3d 1230 [2d Dept 2011]). Even if they were admissible, however, the hospital record is clearly insufficient to raise an issue of fact regarding testamentary capacity if for no other reason than the

record is dated two months after the will was executed. There is also no evidence remotely establishing that the decedent was "crazy" at any time. It is clear from the evidence that the decedent was aware of the consequences of executing a will, that she had a sufficient understanding of the nature and extent of her assets, and that she knew who the persons were who were the natural objects of her bounty. Thus, the petitioner has made out a prima facie case on the issue of testamentary capacity and the objectant has failed to raise a triable issue of fact. The branch of the motion seeking to dismiss the objection regarding testamentary capacity is also granted.

Undue Influence

The objectant bears the burden of proof on the issue of undue influence (*see Matter of Walther,* 6 NY2d 49, 53 [1959]). In order to prove undue influence, the contestants must show (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testatrix 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 (*cf., Matter of Walther*, 6 NY2d 49). Undue influence can be shown by all the facts and circumstances surrounding the testatrix, 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 maker fostered by the exploitation of a relationship of trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). Without a 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 order to

justify a submission of undue influence to the jury, objectant must make a showing of motive and opportunity to exert undue influence as well as that such influence was actually utilized" (*Maisannes v Ryan,* 34 AD3d 212, 213 [1st Dept 2006]). Without evidence of such influence having actually been exercised, the objectant's evidence of undue influence is insufficient as a matter of law (*Matter of Fiumara,* 47 NY2d 845, 846 [1979]).

In this case, there is absolutely no evidence of undue influence having been exerted upon the testator by the petitioner or anyone else other than the fact of the will itself which, as just discussed, is insufficient as a matter of law. That branch of the petitioner's motion which seeks to dismiss the objection of undue influence is also granted.

Conclusion

Accordingly, the proponent's motion for summary judgment is granted. The objections are dismissed and the propounded instrument dated July 22, 2008 shall be admitted to probate.

Settle decree.

Dated: December 24, 2014

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