

**Matter of Rovno**

2014 NY Slip Op 34077(U)

January 10, 2014

Surrogate's Court, New York County

Docket Number: File No. 2011-797

Judge: Rita Mella

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

New York County Surrogate's Court  
DATA ENTRY DEPT.  
JAN 10 2014

\_\_\_\_\_  
Probate Proceeding, Estate of

**DECISION**

File No. 2011-797

LILLIE ROVNO,

Deceased.

\_\_\_\_\_  
M E L L A, S.

The following papers were considered in determining this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Proponent's Notice of Motion for Summary Judgment, Affidavit in Support with Exhibits, and Memorandum of Law.....	1, 2, 3
Respondents' Affidavit in Opposition to Proponent's Motion with Exhibits.....	4
Proponent's Reply Affidavit with Exhibits and Memorandum of Law.....	5, 6

In this contested probate proceeding in the estate of Lillie Rovno, petitioner, Roberta Gordon, has propounded for probate an instrument dated April 21, 2008. The instrument nominates her as executor and her live-in companion and the attorney draftsman, Richard M. Greenberg, Esq., as successor. Under the propounded instrument, decedent's entire estate, valued at \$200,000, is bequeathed to Ms. Gordon, who is decedent's niece. If Ms. Gordon had predeceased the decedent, then, under the propounded instrument, the entire estate would have passed to decedent's distributees.

Before the court is a motion for summary judgment in which Ms. Gordon seeks an order dismissing the objections to probate filed by decedent's other niece and nephews, Hazel Rovno, Harold Reed, Lawrence Reed, Barry Reed, and Irving Reed (children of Lou and Harry Reed, decedent's pre-deceased brothers). The objections allege that decedent lacked testamentary capacity and that the propounded instrument is the product of fraud and undue influence

exercised by Ms. Gordon.<sup>1</sup> For the reasons set forth below, Ms. Gordon's motion is granted in part and denied in part.

## BACKGROUND

The following facts are, for the most part, undisputed. Lillie Rovno was a retired legal secretary. She passed away at the age of 89 on January 23, 2011, survived by her sister, Ida Gordon (Ms. Gordon's mother) and objectants. Hospital records from St. Luke's Medical Center indicate that on February 12, 2008, Ms. Rovno traveled alone to the Emergency Room complaining of dizziness and some difficulty looking for words and "keeping her bank account." Ms. Rovno claimed that her symptoms began five days earlier after she fell in her apartment. After a physical, neurological and mental status exam, it was determined that Ms. Rovno had suffered a stroke.

On February 13, 2008, Ms. Rovno was admitted to the hospital. The same day she signed a Durable Power of Attorney, Health Care Proxy, and Living Will naming Ms. Gordon as her agent. Upon discharge from the hospital on February 19, 2008, Ms. Rovno was transferred to the Jewish Home & Hospital where she convalesced until March 20, 2008, when she returned home. Upon the return to her apartment, Ms. Rovno was assisted by home care aides who helped her with grocery shopping and other activities of daily living.

The record also reflects that the subject of preparing a will came up shortly after Ms. Rovno's stroke. At his SCPA § 1404 examination, Mr. Greenberg, who not only drafted the propounded instrument but also supervised its execution, testified that he met with Ms. Rovno

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<sup>1</sup> Objectants do not allege lack of due execution.

twice at her apartment prior to the day the instrument was executed. During the first meeting, Ms. Rovno informed him that she wanted to have a will prepared and that she wanted to leave her property to her niece, Ms. Gordon. Mr. Greenberg testified that he then drafted the propounded instrument in accordance with decedent's wishes. At the second meeting, Mr. Greenberg read the draft will out loud to Ms. Rovno. She confirmed that the draft reflected her wishes. Ms. Rovno then asked Mr. Greenberg to arrange for its execution. Mr. Greenberg testified that he left the draft will with Ms. Rovno. Once she approved it, he arranged for three witnesses to be present for its execution.

Susan Magazine, Ms. Rovno's neighbor, Richard Boltax and Jane Caswell, Mr. Greenberg's friends whom Ms. Rovno had met previously, served as witnesses. On April 21, 2008, the witnesses gathered in Ms. Rovno's apartment. Mr. Greenberg testified that he first allowed the witnesses a few minutes to speak with Ms. Rovno. Ms. Rovno signed the instrument which she acknowledged to be her will, followed by each of the attesting witnesses. Mr. Greenberg served as notary. Approximately two and a half years later, Ms. Rovno passed away.

#### SUMMARY JUDGMENT STANDARD

On a motion for summary judgment the court's task is not to resolve issues of fact, but to determine if such issues exist (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once the movant makes a prima facie case, it is incumbent upon the party opposing summary judgment to assemble, lay bare and reveal her proofs to establish the existence of a genuine issue of fact for trial (*id.* at 598). Summary judgment is available in a probate contest where the party opposing summary judgment fails to offer proof sufficient to raise a triable issue of fact (*see, e.g., Matter of Goldberg*, 180 AD2d 528 [1st Dept 1992]).

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## TESTAMENTARY CAPACITY

With respect to testamentary capacity, proponent has the burden of establishing that decedent was competent to make a will, i.e., that she understood the nature and extent of her property, the natural objects of her bounty and the provisions of the instrument (*Matter of Kumstar*, 66 NY2d 691 [1985], *rearg denied* 67 NY2d 647 [1986]; *Matter of Bush*, 85 AD2d 887 [4th Dept 1981]).

In support of her motion for summary judgment, Ms. Gordon submits the transcript from the attesting witnesses' SCPA § 1404 examinations wherein each testified that at the time of the execution ceremony on April 21, 2008, decedent was alert, conversant and in good mental health. Each signed the attestation clause and self-proving affidavit stating that decedent was of sound mind, providing further proof of testamentary capacity (*see Matter of Megna*, NYLJ, Jan. 7, 2002 at 31, col 3 [Sur Ct, Suffolk County 2002]; *Matter of Wilson*, NYLJ, Aug. 18, 1998 at 22, col 5 [Sur Ct, New York County 1998]).

Ms. Gordon also relies on business records from the Visiting Nurse Services (VNS) of New York, the agency that provided Ms. Rovno with post-rehabilitation services. The records which cover the period from March 21, 2008 to May 13, 2008, indicate, among other things, that a neurological assessment revealed that decedent was able to “express complex ideas, feelings, and needs clearly, completely and easily in all situations with no observable impairment.” With respect to cognitive functioning, decedent was described as requiring prompting only under stressful or unfamiliar conditions. On May 13, 2008, when all services provided by the VNS (e.g., speech therapy, physical therapy, occupational therapy, as well as skilled nursing services),

were concluded, it was determined that decedent had achieved her full potential and accomplished all her goals.

In further support of summary relief, Ms. Gordon also relies on affidavits from several individuals: decedent's neighbors; Dr. Martin J. Frankel, decedent's doctor for over twelve years;<sup>2</sup> Jacqueline House, Dr. Frankel's office manager/receptionist; Ah Loi Wong, decedent's housekeeper; and Jannell Racero, her home-care companion, each attesting to decedent's mental acuity before, during, and after she executed her will.

While Ms. Gordon admits that after the stroke, she helped decedent pay her bills, she maintains that decedent controlled her own finances and acted independently and free from constraint. As proof, Ms. Gordon annexes to her papers copies of handwritten notes allegedly made by decedent in which decedent calculated how much she paid to the home care companions and her cleaning woman. The records also suggest that decedent was aware and knowledgeable of her checking account balances and amounts withdrawn from her IRA.<sup>3</sup>

As noted above, once, as here, a prima facie showing of testamentary capacity has been made by the movant, it is incumbent upon objectants to bring forth admissible evidence to demonstrate the presence of triable issues (*Sheppard Oil Co v Ryan*, 62 AD2d 1074 [3d Dept

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<sup>2</sup> According to Dr. Frankel, when he met with decedent on April 2, 2008, decedent told him that she had moments of forgetfulness. However, Dr. Frankel noted: "Had she not told me that she was intermittently forgetful, I would never have suspected it. In my mind, there was no question at that time as to her judgment, mental capacity or her ability to communicate or understand. Nothing in my records indicate that Ms. Rovno suffered any problems of judgment, alertness, or ability to communicate or understand."

<sup>3</sup> In her affidavit, Ms. Racero states that decedent routinely prepared her own grocery list and would give her money with which to buy groceries, and that decedent always counted her change.

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1978]).

In response, objectants also submit decedent's medical records which they contend show that the stroke she suffered in February 2008, resulted in permanent damage to the part of her brain responsible for planning, organizing, problem solving, and decision making. As a result, they argue that decedent was unaware of the nature and extent of her assets or the objects of her bounty (*Matter of Kumstar*, 66 NY2d at 692). The records on which objectants rely are, for the most part, for the period of time immediately after Ms. Rovno suffered a stroke, and contain some references to "vascular dementia." However, subsequent records closer in time to the execution of the propounded instrument, namely a progress note from a March 14, 2008 meeting, indicate that decedent was doing well cognitively. Moreover, according to the Occupational Therapy Discharge Summary dated March 20, 2008, the same day decedent was discharged from the Jewish Home & Hospital, decedent was noted to have "made good gains in cognition."

Despite Ms. Gordon's having laid out a solid case for testamentary capacity, objectants also call this court's attention to Mr. Greenberg's SCPA § 1404 examination in which he purportedly testified that the information concerning decedent's assets came from conversations with Ms. Gordon and not decedent. However, a complete review of the entire transcript, not just selected portions, clarifies Mr. Greenberg's testimony in this regard. On cross-examination, when asked whether decedent had identified what her assets consisted of at any time prior to the execution of the will, Mr. Greenberg testified that he went over this information with decedent before the execution of the will and that she was "very on top of it." Further, when asked by objectants' counsel if he ever asked decedent whether she had any other family members to whom she wanted to leave her property, Mr. Greenberg testified that he asked the question, and

decedent indicated that she wanted to leave everything to Ms. Gordon.

“Mere proof that the decedent suffered from old age, physical infirmity and chronic, progressive senile dementia when the will was executed is not necessarily inconsistent with testamentary capacity and does not alone preclude a finding thereof, as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made” (*see Matter of Williams*, 13 AD3d 954, 957 [3d Dep 2004], *lv denied* 5 NY3d 705 [2005]). More importantly, evidence concerning a testator’s condition is relevant only to the extent that it bears on her mental capacity at the time the instrument was executed (*see, e.g., Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]; *Matter of Bush*, 85 AD2d 887; *Matter of Lindsay*, 136 Misc 555 [Sur Ct, NY County 1930], *affd* 234 AD 841[1st Dept 1931]).

Objectants’ proof of an impairment on Ms. Rovno’s part falls short, and thus they fail to meet their burden of rebutting proponent’s prima facie case and creating a triable issue of fact on capacity.<sup>4</sup> The motion for summary judgment dismissing the objection based on lack of testamentary capacity is granted.

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<sup>4</sup> Objectants Barry, Hazel and Lawrence also rely on their own Affidavits in which they individually attest to their respective backgrounds as medical professionals in support of their contention that decedent lacked testamentary capacity. However, there is no indication that any of them ever examined or treated decedent at or near the time she executed the propounded instrument on April 21, 2008. Consequently, objectants’ conclusions, as non-treating physicians, which are based solely on their review of decedent’s medical records, must be considered the “weakest and most unreliable of evidence” (*Matter of Buchanan*, 245 AD2d 642, 646 [3d Dept 1997]), to be rejected by this court as speculative (*see generally Matter of Vukich*, 53 AD2d 1029, 1030 [4th Dept 1976]; *see also Matter of Brownstone*, 289 AD2d 97 [1st Dept 2001]). Such evidence is inadequate to create a question of fact.

The Affidavit of Harold Reed is equally unavailing. Mr. Reed states that his conclusion of decedent’s mental incapacity is based on “many conversations with my brother Barry, who had first hand knowledge as well as his comprehensive review of the medical records.”

## UNDUE INFLUENCE

On a proponent's motion for summary judgment, if movant establishes a prima facie case that the propounded instrument was the natural product of the decedent's wishes, the motion's opponent must submit proof to show the contrary. (*Matter of Milchin*, NYLJ, Oct. 31, 2013, at 25, col.6 [Sur Ct, NY County]. To be successful on the claim for undue influence, objectants must establish that there was moral coercion restraining independent action and constraining decedent to do what was against her free will. In such a case, objectants must show not only opportunity and motive, but that undue influence was actually exercised (*Matter of Walther*, 6 NY2d 49 [1959]; *Matter of Evanchuk*, 145 AD2d 559 [2d Dept 1988]; *Matter of Spangenberg*, 248 AD2d 543 [2d Dept 1998]).

Where a beneficiary under a will was in a confidential or fiduciary relationship with the testator, and was involved in the drafting of the will, an inference of undue influence arises. Although the inference does not shift the burden of proof on the issue of undue influence, it places the burden on the beneficiary to explain the circumstances of the bequest. However, the adequacy of the explanation is a question of fact for the jury (*Matter of Bartel*, 161 Misc 2d 455, 457 [Sur Ct, New York County 1994], *affd* 214 AD2d 476 [1st Dept 1995]; *see Matter of Hirschorn*, 21 Misc 3d 1113 [A] [Sur Ct, Westchester County 2008]).

To prove that the propounded instrument is a natural one which reflects the affection decedent had for her, Ms. Gordon calls this court's attention to the affidavits of Jacqueline House and Janell Racero, two disinterested persons. Ms. House, the receptionist at the office of Ms. Rovno's doctor, avers that decedent referred to Ms. Gordon as the "daughter she never had." Ms. Racero, who worked for decedent as her companion after she had the stroke including during the

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time that decedent executed the propounded instrument in April 2008, states that decedent enjoyed talking about Ms. Gordon and told her that if it was not for Ms. Gordon, she would be alone because she had no children. Ms. Racero also avers that during the time she worked for decedent, the only visitors to decedent's apartment were Ms. Gordon, Ms. Gordon's children, and Mr. Greenberg.

As further proof of their close familial relationship, Ms. Gordon annexes to her motion papers, a copy of decedent's passport which lists her as an emergency contact, pictures of decedent lighting a candle at her son's 2004 Bar Mitzvah, and photographs showing decedent celebrating Thanksgiving and Passover holidays with Ms. Gordon and her family.

Objectants maintain that Ms. Gordon was in a confidential relationship with decedent from the time decedent suffered a stroke in February 2008. As proof, they point out that only one day after decedent's stroke, decedent executed a Power of Attorney, a Health Care Proxy, and Living Will all in Ms. Gordon's favor. They point out that decedent had never executed a will before she executed this propounded instrument which names Ms. Gordon as the sole beneficiary of decedent's estate.

Objectants also point out that Ms. Gordon, who is an attorney, took charge of decedent's finances, arranged for the drafting of the will by her live-in boyfriend, was present when decedent discussed the will's provisions with Mr. Greenberg, and that she and Mr. Greenberg selected the attesting witnesses. Objectants also assert that Ms. Gordon was present when Mr. Greenberg read the draft will out loud to decedent and was present at the execution ceremony. Finally, objectants contend that decedent lacked the benefit of independent counseling from an

attorney.

Viewing these facts in the light most favorable to the objectants, who are opposing summary judgment, there is the possibility that a jury could draw inferences leading it to conclude that the testamentary instrument at issue herein was the product of undue influence (*see Matter of Rifkin*, 12 Misc 3d 1183[A] [Sur Ct, Bronx County 2006]). Moreover, this court recognizes as a threshold issue whether or not decedent and Ms. Gordon had a confidential relationship. In other words, this issue cannot be resolved on this motion, since there is no basis in the record for finding that Ms. Gordon and decedent had a confidential relationship as a matter of law,<sup>5</sup> and the question of whether a confidential relationship, as a matter of fact existed, is not susceptible of summary determination” (*see Matter of Pacifico, supra, citing Cowee v Cornell*, 75 NY 91 [1878], *Matter of Nealon*, 104 AD3d 1088 [3d Dept 2013], *Prievio v Urbaniak*, 64 AD2d 1240 [4th Dept 2009]; *see also Matter of Antoinette*, 238 AD2d 762 [3d Dept 1997]). Further, “where a will has been prepared by an attorney associated with a beneficiary, an explanation is called for and it is a question of fact for the jury as to whether the proffered explanation is adequate” (*see Matter of Elmore*, 42 AD2d 240 [3d Dept 1973]). Accordingly, a triable issue of fact exists as to objectants’ claim of undue influence.

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<sup>5</sup> The durable power-of-attorney, in and of itself, does not establish a confidential relationship as a matter of law (*see Matter of Pacifico*, NYLJ, Jul. 18, 2013 at 26, n 9 [Sur Ct, New York County]; *citing Matter of Petix*, 15 Misc 3d 1140 [A] [Sur Ct, Monroe County 2007]; *see also* 2 NY PJI2d 7:56 at 1516-18 [2013]).

FRAUD

In order to state a claim for fraud against a proponent of a will, an objectant must show that the person accused of such fraud knowingly made a false statement to the testator that caused her to execute a will that disposed of her property in a manner differently than she would have in the absence of the statement (*Matter of Ryan*, 34 AD3d 212 [1st Dept 2006]). Here, objectants failed to allege that Ms. Gordon, or any one on her behalf, made a false statement that resulted in Ms. Rovno's executing the instrument in question. Thus, objectants have failed to state a claim of fraud, much less offer proof in admissible form that Ms. Rovno was subjected to fraud. Accordingly, that branch of proponent's motion to dismiss the objection based on fraud is granted.

CONCLUSION

Based on the foregoing, the motion for summary judgment dismissing the objections as to lack of testamentary capacity and fraud is granted. Ms. Gordon's request for summary relief on objectants' claim of undue influence is denied.

This decision constitutes the order of the court.

Dated: January 10, 2014



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